DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-238
Vote 10-239
Title: Arizona Free Enterprise Club's Freedom Club PAC, et al., Petitioners
v.
Ken Bennett, in His Official Capacity as Arizona Secretary of State, et al.
Docketed: August 19, 2010
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos: (10-15165, 10-15166)
Decision Date: May 21, 2010
Questions Presented

---Date---	--------Proceedings and Orders----------
Aug 17 2010	Petition for a writ of certiorari filed. (Response due September 20, 2010)
Aug 23 2010	Consent to the filing of amicus brief(s) in support of either party or of neither party received from counsel for respondent Clean Elections Institute, Inc. VIDED
Aug 23 2010	Consent to the filing of amicus brief(s) in support of either party or of neither party received from counsel for Freedom Club PAC petitioners. VIDED
Aug 23 2010	Consent to the filing of amicus brief(s) in support of either party or of neither party received from counsel for petitioners John McComish, Nancy McLain and Tony Boure. VIDED
Aug 24 2010	Consent to the filing of amicus brief(s) in support of either party or of neither party received from counsel for Ken Bennett, et al. (State Respondents) VIDED
Aug 24 2010	Waiver of right of respondents John McComish, et al. to respond filed.
Aug 25 2010	Order extending time to file response to petition to and including October 20, 2010.
Sep 16 2010	Brief amicus curiae of Cato Institute filed. VIDED.
Sep 16 2010	Brief amicus curiae of Center for Competitive Politics filed. VIDED.
Oct 19 2010	Brief of respondent Clean Elections Institute, Inc. in opposition filed. VIDED.
Oct 19 2010	Brief of respondents Ken Bennett, in His Official Capacity as Arizona Secretary of State, et al. in opposition filed. VIDED.
Oct 29 2010	Reply of petitioners Arizona Free Enterprise Club, et al. filed. (Distributed)
Nov 1 2010	DISTRIBUTED for Conference of November 23, 2010.
Nov 29 2010	Petition GRANTED. The petition for certiorari in No. 10-239 is GRANTED. The cases are consolidated and a total of one hour is allotted for oral argument.
Dec 13 2010	Consent to the filing of amicus curiae brief(s) in support of either party or of neither party received from counsel for the petitioners Arizona Free Enterprise

Club's Freedom Club. VIDED

Dec 23 2010 SET FOR ARGUMENT ON Monday, March 28, 2011.

Jan 6 2011 Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for respondents Ken Bennett, et al. VIDED

Jan 6 2011 Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for respondent Clean Elections Institute. VIDED

Jan 6 2011 Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for petitioners John McComish, Nancy McLain, and Tony Boure. VIDED

Jan 12 2011 Brief of petitioners in No. 10-239 John McComish, et al. filed. VIDED

Jan 13 2011 Brief of petitioners Arizona Free Enterprise Club's Freedom Club PAC, et al. filed. VIDED

Jan 13 2011 Joint appendix filed (4 volumes). Statement of costs filed. VIDED

Jan 14 2011 Joint motion for divided argument filed by petitioners. VIDED

Jan 18 2011 Brief amicus curiae of Center for Competitive Politics filed. VIDED

Jan 19 2011 Brief amicus curiae of Yankee Institute for Public Policy filed. VIDED

Jan 19 2011 Brief amicus curiae of Justice and Freedom Fund filed. VIDED

Jan 20 2011 Brief amici curiae of Four Former Chairmen and One Former Commissioner of the Federal Election Commission filed. VIDED

Jan 20 2011 Brief amicus curiae of Cato Institute filed. VIDED

Jan 20 2011 Brief amici curiae of Mitch McConnell filed.

Jan 20 2011 Brief amici curiae of Gun Owners of America, Inc., et al. filed. (Distributed)

Jan 25 2011 CIRCULATED

Feb 2 2011 Record received from U.S.C.A. for 9th Circuit. (1 Box)

Feb 2 2011 Record from U.S.D.C. for the District of Arizona is electronic.

Feb 11 2011 Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED

Feb 14 2011 Brief of respondent Clean Elections Institute, Inc. filed. VIDED. (Distributed)

Feb 14 2011 Brief of respondents Ken Bennett, et al. filed. VIDED. (Distributed)

Feb 15 2011 Brief amici curiae of Former Officials of the American Civil Liberties Union filed. VIDED. (Distributed)

Feb 17 2011 Brief amicus curiae of Center for Governmental Studies filed. VIDED. (Distributed)

Feb 18 2011 Brief amicus curiae of Union for Reform Judaism filed. VIDED. (Distributed)

Feb 18 2011 Brief amici curiae of Constitutional Scholars filed. VIDED. (Distributed)

Feb 22 2011 Brief amicus curiae of the United States filed. VIDED. (Distributed)

Feb 22 2011 Brief amicus curiae of Committee for Economic Development filed. VIDED. (Distributed)

Feb 22 2011 Brief amici curiae of Former Elected Officials filed. VIDED. (Distributed)

Feb 22 2011 Brief amici curiae of Anthony Corrado, et al. filed. VIDED. (Distributed)

Feb 22 2011 Brief amici curiae of Self-Financing Candidates Congressman Bill Foster (Ret.) et al. filed. VIDED. (Distributed)

Feb 22 2011 Brief amici curiae of Justice at Stake, et al. filed. (Distributed)

Feb 22 2011 Brief amici curiae of Maine Citizens for Clean Elections, et al. filed. VIDEO (Distributed)

Feb 22 2011 Brief amici curiae of Professors of Constitutional and Election Law filed. VIDEO (Distributed)

Feb 22 2011 Brief amicus curiae of Service Employees International Union filed. VIDEO (Distributed)

Feb 22 2011 Brief amici curiae of Iowa, et al. filed. VIDEO (Distributed)

Feb 22 2011 Brief amici curiae of Costas Panagopoulos, et al. filed. VIDEO (Distributed)

Feb 22 2011 Brief amici curiae of Campaign Legal Center, et al. filed. VIDEO (Distributed)

Feb 22 2011 Brief amici curiae of Municipal Amici New York City, et al. filed. VIDEO (Distributed)

Mar 15 2011 Reply of petitioners John McComish, et al. filed. VIDEO (Distributed)

Mar 16 2011 Reply of petitioners Arizona Free Enterprise Club's Freedom Club PAC, et al. filed. VIDEO (Distributed)

Mar 18 2011 Motion of the Acting Solicitor General for leave to participate in oral argument as amici curiae and for divided argument GRANTED.

Mar 18 2011 Motion for divided argument filed by petitioners DENIED.

Mar 28 2011 Argued. For petitioners: William R. Maurer, Seattle, Wash. For respondents: Bradley S. Phillips, Los Angeles, Cal., and William M. Jay, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

FILED

No. (1) 10-238 AUG 17 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ARIZONA TAXPAYERS ACTION COMMITTEE, DEAN MARTIN, and RICK MURPHY,

Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, LORI S. DANIELS, and LOUIS HOFFFMAN in their official capacities as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

CLEAN ELECTIONS INSTITUTE, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

INSTITUTE FOR JUSTICE
WILLIAM R. MAURER*
101 Yesler Way, Suite 603
Seattle, WA 98104
(206) 341-9300
wmaurer@ij.org

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320

INSTITUTE FOR JUSTICE
TIMOTHY D. KELLER
PAUL V. AVELAR
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
(480) 557-8300

Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In *Davis v. FEC*, 128 S. Ct. 2759 (2008), this Court held that the First Amendment forbids the government from attempting to level the playing field in elections by raising contribution limits for candidates who are outspent by self-financed opponents. Arizona's Citizens Clean Elections Act achieves a similar result by providing extra subsidies in the form of "matching funds" to publicly financed candidates who are outspent by independent expenditure groups and privately financed candidates. The questions presented are:

1. Whether the First Amendment forbids Arizona from providing additional government subsidies to publicly financed candidates that are triggered by independent expenditure groups' speech against such candidates?

2. Whether the First Amendment forbids Arizona from providing additional government subsidies to publicly financed candidates that are triggered by the fundraising or expenditures by these candidates' privately financed opponents?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following individuals were parties in the court of appeals proceeding and separate plaintiffs before the district court: John McComish, Nancy McLain, and Tony Bouie.

CORPORATE DISCLOSURE STATEMENT

The Arizona Free Enterprise Club's Freedom Club PAC has no parent company and there is no publicly held company that has a 10% or greater ownership interest in the Arizona Free Enterprise Club's Freedom Club PAC.

The Arizona Taxpayers Action Committee has no parent company and there is no publicly held company that has a 10% or greater ownership interest in the Arizona Taxpayers Action Committee.

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PETITION FOR A WRIT OF CERTIORARI

Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee, Dean Martin, and Rick Murphy respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The original decision of the court of appeals is reported at 605 F.3d 720. The court's amended decision is unreported and appears in the Appendix ("App.") at App. 1-44. The decision of the U.S. District Court for the District of Arizona is unreported and appears in the Appendix at App. 45-78.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech." Relevant portions of the Arizona Citizens

Clean Elections Act, Ariz. Rev. Stat. §§ 16-940 *et seq.*, are reproduced at App. 134-49.

STATEMENT OF THE CASE

This case asks whether the government may provide funding benefits to candidates in contested elections in order to "level the playing field" among those candidates. In *Davis v. FEC*, 128 S. Ct. 2759 (2008), this Court held the government may not do so. The benefit provided in *Davis* was an increase in contribution limits for federal candidates who ran against so-called "millionaire" candidates who could finance their own campaigns. In this case, the benefit is a subsidy in the form of "matching funds" paid to candidates when their opponents or their supporters engage in political activity in excess of a government-created threshold. The result, however, is the same. The candidates who opt into the system are granted funding advantages designed to equalize their speech with the speech of candidates who elect to fund their own campaigns or raise money from private donors. But *Davis* is clear that the government may not create funding benefits for favored candidates in order to equalize their ability to spend money on campaign speech. Arizona does just that by providing matching funds to one candidate triggered by the spending by or for his opponent.

In upholding Arizona's system of matching funds subsidies, the Ninth Circuit rejected *Davis*' application to Arizona's law and concluded that the government may burden the speech of advocacy groups that speak independently of candidates ("independent expenditure groups") and privately financed candidates as an incentive for candidates to publicly finance their campaigns. The Ninth Circuit's decision simply cannot be squared with *Davis* and both the Second and Eleventh Circuits have therefore subsequently refused to follow the Ninth Circuit's reasoning, creating a significant conflict among the circuits. Because the law burdens the speech of independent groups, the Ninth Circuit's decision also conflicts with *Citizens United v. FEC*, 130 S. Ct. 876 (2010). In light of the inextricable conflict among the circuits, the increasing prevalence of similar laws in the states, and the Ninth Circuit's erroneous reading of *Davis* and *Citizens United*, this Court's authoritative guidance is urgently needed.

I. THE ACT

1. At issue are certain provisions of the Arizona Citizens Clean Elections Act, Ariz. Rev. Stat. §§ 16-940 *et seq.* (the "Act"), and specifically, Ariz. Rev. Stat. § 16-952(A-C) (the "Matching Funds Provision"). App. 138-41. The Act is a system of public funding for campaigns for Arizona state offices. It was adopted in 1998 through a ballot initiative by a margin of 51% to 49%. It took effect in 2000. The Act applies to races for Governor, Secretary of State, Attorney General, Treasurer, Superintendent of Public Instruction,

Corporation Commissioner, Mine Inspector, State Senator, and State Representative. The Citizens Clean Elections Commission, the members of which are named as defendants in their official capacities, is tasked with enforcing the provisions of the Act.

The Act provides government funds to candidates who collect a sufficient number of $5 "qualifying contributions" from the public. These candidates must agree to abide by spending limits set out in the Act. Ariz. Rev. Stat. § 16-946. The government provides a set amount of money, or "initial disbursement," to qualifying candidates. Except for the $5 contributions and other minor exceptions, publicly financed candidates cannot accept any private contributions. Ariz. Rev. Stat. § 16-941(A)(1); App. 135. They also may not make expenditures above the initial disbursement unless they receive funds under the Matching Funds Provision. Ariz. Rev. Stat. § 16-941(A)(3-4); App. 135-36. These matching funds are provided by the government and can amount to up to two times the amount of the initial disbursement for each candidate that receives them. Ariz. Rev. Stat. § 16-952(E); App. 142-43.

2. Two overriding purposes of the Act were to "level the playing field" among candidates and reduce the influence and relative voice of certain business groups with whom the ballot measure's proponents disagreed. [Public Campaign, "Why America's Seniors Should Care about Money in Politics," ECF No. 294-2 at 123-24, Ninth Cir. Excerpts of R. ("ER") 4194-95;

Public Campaign, "Why Working People Should Care About Money in Politics," ECF No. 294-2 at 126-27, ER 4197-98; Public Campaign, "Why Environmentalists Should Care about Money in Politics," ECF No. 294-2 at 129-30, ER 4200-01; *see also* Chart of "Level the Playing Field" and/or "Limit Spending" References (with citations), ECF No. 288-6 at 37-70, ER 3584-3617.] As an internal memorandum to the ballot measure's steering committee from the initiative's campaign manager stated: "Clean Elections is NOT about public funding. Its [*sic*] about spending limits, getting rid of special interests, and leveling the playing field." [Confidential "State of the Campaign" Mem. From Campaign Manager Josh Silver, Apr. 6, 1998, ECF No. 333-2 at 3, ER 5070.] The constitutional problem arises in the Act's attempt to address those situations where the "playing field" is not level and independent groups or privately financed candidates can outspend publicly financed candidates. To achieve this leveling, the Act's drafters added the Matching Funds Provision, Ariz. Rev. Stat. § 16-952. This section is entitled "Equal Funding of Candidates." App. 138.

The matching funds subsidies distributed by the government to each publicly financed candidate equal the amount the privately financed candidate spent or received – or the amount spent by the independent political group – over the initial disbursement, less 6% for fundraising expenses. Ariz.

Rev. Stat. § 16-952(A-C); App. 138-41. Independent expenditure groups trigger matching funds to each publicly financed candidate in a race when (i) they spend money in opposition to a publicly financed candidate or in favor of a privately financed opponent, and (ii) the total amount spent by an independent expenditure group plus the amount spent or received by the privately financed candidate exceeds the amount of the initial disbursement. *Id.* When an independent group's spending triggers matching funds, the government provides those funds directly to the publicly financed candidate or candidates in the race and not to independent groups supporting them. Independent expenditures on behalf of publicly financed candidates or against privately financed candidates do not trigger matching funds to privately financed candidates. *See* Ariz. Rev. Stat. § 16-952(C); App. 139-41. An independent expenditure in support of a publicly financed candidate results in matching funds to other publicly financed candidates in the same race, however. Ariz. Rev. Stat. § 16-952(C)(3); App. 140. Thus, a $10,000 expenditure on behalf of a privately financed candidate results in an almost $10,000 governmental subsidy to each publicly financed candidate in the race. In contrast, a $10,000 independent expenditure on behalf of a publicly financed candidate results in no government money going to any privately financed candidates in that race, but would trigger matching funds to any other publicly financed candidates in the race.

Privately financed candidates trigger matching funds to each publicly financed candidate in a race when they spend (in the primary election) or raise (in the general election) money above the government's initial disbursement amount. Ariz. Rev. Stat. § 16-952(A-B); App. 138-39.

Although commonly referred to as "matching funds," that term does not accurately describe how the Matching Funds Provision actually works. The money distributed by the government to publicly financed candidates often substantially exceeds the amount of contributions or spending that triggered the Matching Funds Provision. That is, the Act does not really "match" expenditures or contributions – it often significantly exceeds them. This is because the Act offers a grant of the total matching funds subsidy to each publicly financed candidate running against a privately financed candidate. Ariz. Rev. Stat. § 16-952(A-B); App. 138-39. For example, assume a race with (i) one privately financed candidate and three publicly financed candidates, and (ii) the privately financed candidate has spent or raised more than the amount of the initial disbursement. If an independent expenditure group makes an expenditure of $10,000 in support of the privately financed candidate in this race, then the government gives $10,000 (less 6%) directly to each publicly financed candidate. In other words, $10,000 worth of expenditures in support of a privately financed candidate (who may not have wanted it) results in $28,200 worth of speech against that candidate.

II. THE ACT'S EFFECT ON SPEECH

1. The Petitioners are two political action committees, the Arizona Free Enterprise Club's Freedom Club PAC (the "Freedom Club PAC") and the Arizona Taxpayers Action Committee ("Arizona Taxpayers"), which make or fund independent expenditures in Arizona state campaigns. The Petitioners also include two elected officials, Arizona State Treasurer Dean Martin and State Representative Rick Murphy, who have in the past, and intend to in the future, run campaigns for Arizona state offices using money raised from private parties.

The Petitioners brought this case because the Act burdens their ability to engage in unfettered political speech in competitive elections for Arizona state offices. As an experienced political consultant testified below, since the advent of the Act, "every spending decision" is made with the Act's matching funds in view. [Querard Dep. 99, Feb. 12, 2009, ECF No. 345-3 at 3, ER 1927.] Independent expenditure groups and candidates testified that their entire campaign strategy takes the Act's matching funds into account. Candidates testified to intentionally lowering their expenditures and fundraising to avoid triggering matching funds. The Act's matching funds therefore affect speech at the very core of elections. As Representative Murphy stated, candidates "do not run two campaigns: one with matching funds and one without matching funds. The availability of matching funds for my opponents dictates my strategy and influences my thinking from the very beginning of the election

cycle right up to the very end." [Pl.-Intervenor Murphy's Resp. to Defs.' & Def.-Intervenor's Interrogs. & Doc. Reqs. at 5, ECF No. 338 at 97, ER 3186.]

In that regard, the record below demonstrates that the Act causes independent expenditure groups to take the Act's matching funds into account when deciding on which races to spend money. Specifically, Arizona Taxpayers has delayed making independent expenditures to avoid triggering matching funds until later in the election cycle. It engaged in self-censorship in 2006 when it chose not to speak in opposition to a publicly financed candidate in a Senate primary race to avoid triggering the Act's matching funds. [Kirkpatrick Dep. 72-75, Jan. 30, 2009, ECF No. 338 at 135-36, ER 3224-25.] The Freedom Club PAC has reluctantly triggered matching funds to candidates it opposes and the Act has affected every spending decision it makes with regard to races involving publicly financed candidates. This forces the Freedom Club to alter the timing of its independent expenditures. App. 163-64.

2. The Matching Funds Provision also burdens the speech of privately financed candidates. Representative Murphy is an Arizona State Representative and a privately financed candidate for the Senate in 2010 facing at least one publicly financed general election candidate. He ran as a privately financed candidate in 2006 and 2008 and a publicly financed candidate in 2004. In his 2006 general election campaign, Murphy stopped raising money to avoid

triggering matching funds to his publicly financed opponent. Murphy did not fundraise during the 2008 general election because doing so would have triggered almost $3 in additional subsidies for every $1 he raised. Nonetheless, in the 2008 general election, when a group made an independent expenditure of $3,627 to support Murphy's candidacy, all three of his publicly financed opponents received a check for nearly $3,627 – meaning that the group's small expenditure triggered $10,881 (minus 6%) in government subsidies to his opponents. [Pl.-Intervenors' Resps. to Defs.' & Def.-Intervenor's First Set of Interrogs. & Doc. Reqs. at 6-8, ECF No. 338 at 71-73, ER 3160-62.]

Treasurer Martin is a former state senator and the current Arizona State Treasurer. He was a candidate for governor in the 2010 election but has since withdrawn.[1] His campaigns for the Senate and Treasurer were all privately financed. In his 2004 Senate campaign, Martin intentionally delayed fundraising to minimize the amount of government

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[1] Although he has ended his race for governor in the 2010 election, Martin has long been active in Arizona state politics and expects to run for state office again in the future. App. 151-53. He has also been pressing his claim that the Matching Funds Provision is unconstitutional for six years. Because his claims could not be resolved before this or any of his previous campaigns for office had concluded, and because he plans to run for state office again, his claim is "capable of repetition, yet evading review." *Davis*, 128 S. Ct. at 2770.

subsidies his opponents received. In his 2006 campaign, Martin avoided fundraising to prevent triggering the Act's matching funds. Martin has also actively discouraged groups from making independent expenditures on his behalf to avoid triggering matching funds to his opponents. [Martin Dep. 21-22, 69-71, Jan. 23, 2009, ECF No. 338 at 20-21, 23-24, Tr. 3109-10, 3112-13; Pl.-Intervenor Dean Martin's Supplemental Resp. to Defs.' Req. for Clarification at 1-2, ECF No. 338 at 37-38, ER 3126-27; Martin Decl. 2, Nov. 26, 2007, ECF No. 288-7 at 113, ER 3753; Martin Fundraising Email, Aug. 31, 2004, ECF No. 338 at 27, ER 3116.] In 2010, the Matching Funds Provision forced Martin to run a publicly financed campaign for governor. Despite being philosophically and politically opposed to the Act, Martin believed this was the only strategy that would preclude his opponents from receiving significant government subsidies based on his exercise of his free speech rights. *See* App. 153. [Martin Decl. 2, Nov. 26, 2007, ECF No. 288-7 at 113, ER 3753.][2]

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[2] Robert Burns, a plaintiff-intervenor below, is an Arizona State Senator and the current President of the Arizona Senate. Senator Burns testified that the Act coerced him to change the timing of his speech in order to avoid triggering the Act's matching funds. App. 155. [Pl.-Intervenor Burns' Resps. to Defs.' & Def.-Intervenor's Interrogs. & Doc. Reqs. at 1-2, ECF No. 338 at 57-58, ER 3146-47; Burns Dep. 104, Sept. 17, 2008, ECF No. 338 at 47, ER 3136.] Senator Burns has announced that he intends to retire from politics when his current Senate term ends. While he no longer has a direct interest in the outcome of

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3. Finally, a systematic analysis of four cycles of Arizona election data shows that it is now commonplace for candidates to delay campaign activities to minimize the Act's matching funds triggered by their own speech. [Primo Decl. in Support of Pl.-Intervenors' Mot. for Summ. J., May 26, 2009, ECF No. 288-7 at 2-39, ER 3642-79.] Indeed, one researcher reports that, of the Arizona candidates who responded to his survey, all reported putting off spending to avoid having their opponents receive these additional subsidies through the Matching Funds Provision. Michael Miller, *Gaming Arizona: Public Money and Shifting Candidate Strategies*, 41 PS: Political Science & Politics 527 (Jul. 2008) [ECF No. 288-7 at 54-59, ER 3694-99.]

III. THE PROCEEDINGS BELOW

1. Treasurer Martin, along with other privately financed candidates and an independent expenditure group, first challenged the constitutionality of the Matching Funds Provision in 2004, when he was a State Senator. The United States District Court for the District of Arizona, the Honorable Earl Carroll, dismissed the case for failure to state a claim. *Ass'n of Am. Physicians & Surgeons v. Brewer*, 363 F. Supp. 2d 1197 (D. Ariz. 2005).

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this proceeding, his experience is relevant to illustrate how the Matching Funds Provision burdens free expression.

Martin and his co-plaintiffs appealed to the Ninth Circuit. The Ninth Circuit initially dismissed the entire appeal as moot, but then reversed itself solely as to Martin. The court held that Martin's claim was not moot, concluded that he had stated a cause of action, and remanded to the district court. *Ass'n of Am. Physicians & Surgeons v. Brewer*, 486 F.3d 586, *reh'g granted, rev'd in part*, 494 F.3d 1145, *amended by*, 497 F.3d 1056 (9th Cir. 2007). Martin then amended his complaint to include two independent expenditure groups, Petitioners Arizona Taxpayers and the Freedom Club PAC, as plaintiffs. The amended complaint was entitled *Martin, et al. v. Brewer, et al.*, No. 04-cv-0200 (D. Ariz. May 1, 2008).

Separate from Treasurer Martin's case, on August 21, 2008, privately financed candidates John McComish, Nancy McLain, Tony Bouie and others filed suit in the United States District Court for the District of Arizona, the Honorable Roslyn Silver. This complaint was styled *McComish v. Brewer*, No. 08-cv-1550 (D. Ariz. Aug. 21, 2008). These candidates asserted that the Matching Funds Provision violated the First Amendment and ran afoul of this Court's then-very recent decision in *Davis*. Because the *McComish* and *Martin* actions were against the same defendants and raised similar issues, the state defendants moved to consolidate the cases before Judge Carroll. The *Martin* plaintiffs did not object. Nonetheless, Judge Carroll denied the motion. To avoid duplicative proceedings, the *Martin* plaintiffs intervened in the *McComish* case and voluntarily dismissed the

Martin case.[3] Murphy then joined Martin and the independent expenditure groups as plaintiff-intervenors in the *McComish* proceeding. The Clean Elections Institute, Inc. (CEI), a non-profit group promoting the Act, also intervened as a defendant.

In the end, there were four groups of parties to the case before Judge Silver, each represented by separate counsel: (i) the state defendants (the Arizona Secretary of State and the members of the Citizens Clean Elections Commission), (ii) defendant-intervenor CEI, (iii) the *McComish* plaintiffs (privately financed candidates McComish, McLain, and Bouie), and (iv) the *Martin* plaintiff-intervenors (independent expenditure groups Arizona Taxpayers and the Freedom Club PAC and privately financed candidates Martin and Murphy), which are the Petitioners here.[4]

Before the *Martin* plaintiffs intervened in the case, the *McComish* plaintiffs moved for a temporary restraining order prohibiting the members of the

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[3] As discussed more thoroughly *infra*, the *McComish* plaintiffs are also filing a separate petition for certiorari with this Court regarding the Ninth Circuit's decision. Petitioners here fully support the *McComish* plaintiffs' petition and urge this Court to grant it. Petitioners also respectfully request that this Court consolidate its review of both petitions into one proceeding so that this Court can consider the full range of the Act's harm to the free speech of both independent expenditure groups and privately financed candidates.

[4] As noted above in footnote 2, the *Martin* plaintiff-intervenors also included Senator Burns at this time.

Clean Elections Commission from applying the Matching Funds Provision during the 2008 elections. On August 29, 2008, Judge Silver found that the Matching Funds Provision "violates the First Amendment of the U.S. Constitution," but refused to grant the motion because of ongoing elections. App. 128. Both the *McComish* plaintiffs and the *Martin* intervenors then moved to preliminarily enjoin the members of the Clean Elections Commission from applying the Matching Funds Provision during the 2008 elections. On October 17, 2008, Judge Silver found that the challengers had "shown a high likelihood of success on the merits," but refused to temporarily enjoin the system because, again, the court did not wish to interfere with ongoing elections. App. 112.

After significant discovery, all parties filed cross motions for summary judgment. On January 20, 2010, Judge Silver found that the Matching Funds Provision was unconstitutional, granted the challengers' motions, and entered an injunction. App. 45-78. Judge Silver stayed the effect of the injunction for ten days to permit defendants and defendant-intervenor time to appeal, which they did. App. 77.

2. The *McComish* plaintiffs then moved the Ninth Circuit to vacate the stay. On January 29, 2010, the Ninth Circuit refused to vacate the stay of the injunction and consolidated both state defendants' and defendant-intervenor's appeals. App. 87-88. Judge Carlos Bea dissented from the court's refusal to vacate the stay. App. 89. On February 1, 2010, the Ninth Circuit extended the stay of the injunction and

expedited the appeals. App. 80-81. Judge Bea again dissented, concluding that this case was "determined by *Davis* . . . because state intervention in the funding of campaign contributions in a manner to benefit candidates when their opponents spend their own money on speech imposes a substantial burden on the exercise of the free speech of the candidate who spends his money." App. 81.

3. On May 21, 2010, the Ninth Circuit issued its opinion on the merits, reversing the district court as to its First Amendment determination and remanding for further proceedings on the challengers' Equal Protection claims. App. 1-38. Judge Kleinfeld concurred separately, noting that, while he agreed with the majority, *Davis* was the closest decision on point and that the circuits were divided. App. 38-44.

On June 8, 2010, at the request of both the *Martin* and *McComish* plaintiffs, this Court vacated the Ninth Circuit's stay of the district court's injunction and stayed the mandate of the Ninth Circuit "pending the timely filing and disposition of a petition for a writ of certiorari." App. 79. On June 23, 2010, the Ninth Circuit issued an amended opinion, but did not withdraw its judgment or issue a new judgment. App. 3-4. This timely Petition by the *Martin* plaintiffs followed.

REASONS FOR GRANTING THE WRIT

This Court should grant this Petition for three reasons.

First, the Ninth Circuit's decision directly conflicts with the Second Circuit's decision in *Green Party of Conn. v. Garfield*, ___ F.3d ___, 2010 U.S. App. LEXIS 14286 (2d Cir. July 13, 2010), and the Eleventh Circuit's decision in *Scott v. Roberts*, ___ F.3d ___, 2010 U.S. App. LEXIS 15897 (11th Cir. July 30, 2010). The reason for this split is simple: the Second and Eleventh Circuits both correctly applied *Davis* to the matching funds systems they considered, while the Ninth Circuit did not. The Second and Eleventh Circuits' rejection of the Ninth Circuit's conclusion thus creates a clear circuit split. Resolution of this split is imperative because there is currently significant uncertainty regarding the constitutionality of public financing laws employing matching funds subsidies across the nation. For independent groups, countless candidates running in states and municipalities across the country with such systems, and lawmakers who may attempt to implement similar laws in the future, timely clarification of this area of the law is imperative.

Second, this split flows from the conflict between the Ninth Circuit's decision and *Davis* itself. The Ninth Circuit upheld a law that attempts to coerce speakers into limiting their political activities by turning the exercise of their First Amendment rights into the catalyst by which their political and ideological opponents gain funding advantages. As the

Second and Eleventh Circuits correctly concluded, *Davis* controls in such a situation and requires that the reviewing court strike such a law down. The Ninth Circuit's conclusion otherwise means its decision clearly conflicts with *Davis*, in which this Court struck down a federal law that employed a similar mechanism that provided funding advantages to a candidate's opponent triggered by the candidate's exercise of his First Amendment rights.

Third, with regard to independent expenditure groups, the Ninth Circuit's decision conflicts with *Citizens United* and decades of decisions from this Court striking down laws seeking to limit the amount of expenditures such groups may make in elections. A mere four months after *Citizens United* was decided, the Ninth Circuit has given the government a powerful tool to indirectly achieve what this Court has made clear it cannot do directly: burden political expenditures by independent groups. Under Arizona's law, if an independent expenditure group spends above a certain level, the government then directly subsidizes candidates the independent expenditure group opposes. And the more an independent expenditure group speaks, the more the candidates it wishes to defeat benefit. Because Petitioners include independent expenditure groups directly affected by the Matching Funds Provision, granting this Petition will provide this Court with the opportunity to directly address whether the government may make such an end-run around *Citizens United*.

I. EVEN AFTER THIS COURT'S DECISION IN *DAVIS*, CIRCUITS ARE DIVIDED ON WHETHER SYSTEMS OF PUBLIC FINANCING OF CAMPAIGNS EMPLOYING MATCHING FUNDS MECHANISMS ARE CONSTITUTIONAL.

In *Davis*, this Court struck down the "Millionaire's Amendment," which allowed opponents of self-financed candidates in federal elections to accept funds at three times the maximum contribution limit from individuals if their self-financed opponents spent more than a certain amount. 128 S. Ct. at 2771. This Court concluded that such a system "impermissibly burden[ed] [the self-financing candidate's] First Amendment right to spend his own money for campaign speech" by creating an "unprecedented penalty" on any self-financing candidate who robustly exercised her First Amendment rights: if she "engage[s] in unfettered political speech," she will be subject "to discriminatory fundraising limitations." *Id.* Self-financing candidates could still spend their own money, "but they must shoulder a special and potentially significant burden if they make that choice." *Id.* at 2772. This Court applied strict scrutiny to the law and struck it down. *Id.*

The Second and Eleventh Circuits both specifically followed *Davis* when they considered matching funds systems and, consistent with the reasoning of *Davis*, each court struck down the system before it. *Scott*, 2010 U.S. App. LEXIS 15897, at *30; *Green Party*, 2010 U.S. App. LEXIS 14286, at *77. The

Ninth Circuit, in contrast, did not apply *Davis* and upheld Arizona's matching funds system. App. 24, 37. The Ninth Circuit's failure to follow this Court's decision in *Davis* has thus created a clear split among the circuits regarding the constitutionality of public financing systems employing matching funds mechanisms and whether, or to what extent, such systems burden core political speech.

A. THE NINTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH DECISIONS OF THE SECOND AND ELEVENTH CIRCUITS.

The Ninth Circuit's decision below directly conflicts with the decision of the Second Circuit in *Green Party* and the decision of the Eleventh Circuit in *Scott*. It also directly conflicts with the pre-*Davis* decision of the Eighth Circuit in *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994). Moreover, the Second, Eighth, and Eleventh Circuit decisions not only conflict with the Ninth Circuit's decision, but they also conflict with pre-*Davis* decisions from the First and Fourth Circuits, *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008), *cert. denied*, *Duke v. Leake*, 129 S. Ct. 490 (2008), and *Daggett v. Comm'n on Gov'tal Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000).[5] The depth and scope of the split among the

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[5] The Sixth Circuit, in *Gable v. Patton*, 142 F.3d 940, 947-49 (6th Cir. 1998), upheld a Kentucky campaign finance law that

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circuits strongly militate in favor of review under Sup. Ct. R. 10(a).

In *Green Party*, the Second Circuit considered Connecticut's version of the Matching Funds Provision – there called the "Excess Expenditure Provision" – in its system of public financing for state elections. The Second Circuit correctly concluded that while the burden imposed by the Excess Expenditure Provision was slightly different than the burden at issue in *Davis*, matching funds provisions are actually "more constitutionally objectionable" than the law in *Davis*. *Green Party*, 2010 U.S. App. LEXIS 14286, at *81 (internal quotation marks and citation omitted). The Second Circuit applied strict scrutiny to the Excess Expenditure Provision and concluded that the "state's asserted interest in promot[ing] participation in" Connecticut's system was not enough to justify the burden placed on speech. *Id.* at *85-86 (internal quotation marks omitted). Significantly, the Second Circuit expressly stated that it was "not persuaded by the Ninth Circuit's opinion" below. *Id.* at *83 n.19.

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triggered a benefit to a candidate participating in a public financing system when his non-participating opponent collected more than $1.8 million in campaign funds in a primary or general election. That benefit was not the direct provision of additional funds, but rather gave the participating candidate the right to raise additional funds, which the state would match on a 2-to-1 basis. *Id.* at 947. Although Kentucky's system was not a pure matching funds system, the fact that the court upheld a system that triggered funding advantages to a candidate's opponent based on that candidate's exercise of his First Amendment rights means that *Gable* also conflicts with *Davis*, *Green Party*, and *Scott*.

This split became even more pronounced with the Eleventh Circuit's decision in *Scott*. There, a self-financing candidate sought to preliminarily enjoin Florida's system of matching subsidies for gubernatorial candidates.* The district court refused to enter the injunction (albeit while noting that the "Ninth Circuit is just wrong" on whether such matching subsidies imposed a burden on speech). Prelim. Inj. Tr. at 91, *Scott v. Roberts*, No. 10-cv-0283 (N.D. Fla. July 14, 2010). The Eleventh Circuit reversed, finding it "obvious that the subsidy imposes a burden on nonparticipating candidates ... who spend large sums of money in support of their candidacies." *Scott*, 2010 U.S. App. LEXIS 15897, at *30. Moreover, it concluded that this burden was "substantial," and that it "is harsher than the penalty in *Davis*, as it leaves no doubt that the nonparticipants' opponents will receive additional money." *Id.* at *33 (internal quotation marks and citations omitted). The court held that the system did not satisfy strict scrutiny because the supporters of the system had not "sufficiently explained how the Florida public financing system furthers the anticorruption interest." *Id.* at *35. Finally, the court concluded that "the system levels the electoral playing field, and that purpose is constitutionally problematic." *Id.* at *37.

The Second and Eleventh Circuits did not tread new ground. In *Day*, the Eighth Circuit considered a

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* Like Florida's system, Arizona's law uses a candidate's contributions of their own funds to their campaign in calculating matching funds.

challenge to a Minnesota statute that provided additional funds to a publicly financed candidate in response to independent expenditures either against the publicly financed candidate or for his privately financed opponent. If groups made such independent expenditures, publicly financed candidates had their own expenditure limits increased by the amount of the independent expenditure and received an additional public subsidy equal to one-half of the independent expenditure's value. *Day*, 34 F.3d at 1358. The Eighth Circuit concluded that this law burdened speech "because of the chilling effect the statute has on the political speech of the person or group making the independent expenditure." *Id.* at 1360. It found that the law was not narrowly tailored to support a compelling government interest and struck it down. *Id.* at 1361-62.

This Court specifically referenced *Day* in *Davis* when it concluded that "[m]any candidates who can afford to make large personal expenditures to support their campaigns may choose to do so despite [the Millionaire's Amendment], but they must shoulder a special and potentially significant burden if they make that choice." *Davis*, 128 S. Ct. at 2772 (citing *Day*, 34 F.3d at 1359-60). Nonetheless, the Ninth Circuit explicitly refused to rely on *Day*. The court stated, "[o]ur decision is not controlled by *Day*, nor are we persuaded by it." App. 28 n.9. It also minimized this Court's reference to *Day* in *Davis* by claiming that this Court cited *Day* "only once for a single, limited proposition," and that this Court did not "affirm or adopt the Eighth Circuit's approach."

App. 28 n.9. Instead, the Ninth Circuit followed two pre-*Davis* decisions that approved similar systems and specifically rejected *Day*. App. 27 n.9 (citing *Leake*, 524 F.3d at 437-49, and *Daggett*, 205 F.3d at 464-65). As Judge Kleinfeld noted in concurrence below, "[o]ther circuits have divided on whether schemes like Arizona's violate the First Amendment. The Supreme Court cited with apparent approval the Eighth Circuit decision [in *Day*], which may be contrary to the view we take today." App. 39 (Kleinfeld, J., concurring) (internal citations omitted). *See also Leake*, 524 F.3d at 437 ("There is some conflict in the circuits as to whether the provision of matching funds burdens or chills speech in a way that implicates the First Amendment.").

In sum, at best, there exists a fundamental disagreement between the Second, Eighth, and Eleventh Circuits, on one hand, and the First, Fourth and Ninth Circuits, on the other, regarding the constitutionality of public financing systems employing a matching funds subsidy. At worst, the Ninth Circuit's decision is an outlier reflecting a now-extinct trend in pre-*Davis* First Amendment jurisprudence. This is particularly troubling given that, as explained below, a number of other jurisdictions employing such systems (Hawaii, Portland, Oregon, and Tucson, Arizona) are located in the Ninth Circuit. This level of uncertainty and patchwork of constitutional protections for independent expenditure groups and privately financed candidates across the circuits confirm the urgent need for this Court's intervention.

B. THE SPLIT AMONG THE CIRCUITS CREATES CONSIDERABLE CONFUSION REGARDING THE CONSTITUTIONALITY OF SIMILAR SYSTEMS ACROSS THE COUNTRY.

At the time of the Ninth Circuit's decision, three states – Maine,[7] Arizona[8] and Connecticut[9] – had statutes that create public financing systems with matching funds in all of their statewide and legislative political campaigns. At least six other states have public financing systems with matching fund mechanisms for certain offices: Florida (governor),[10] Hawaii (pilot program for county of Hawaii Council

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[7] An Act to Reform Campaign Finance, 1996 Me. Legis. Serv. Initiated Bill Ch. 5 (West) (codified at scattered sections of Me. Rev. Stat. Ann. tit. 21-A, §§ 1121-28 (Supp. 2006)). This law has now been challenged in federal court as well. Compl., *Cushing v. McKee*, No. 10-cv-0330 (D. Me. Aug. 8, 2010).

[8] Arizona Citizens Clean Elections Act, 1998 Ariz. Legis. Serv. Prop. 200 (West) (codified at Ariz. Rev. Stat. Ann., §§ 16-901.01, -940 to -961 (2006)).

[9] An Act Concerning Comprehensive Campaign Finance Reform for State-Wide Constitutional and General Assembly Offices, 2005 Conn. Pub. Acts 5 (Spec. Sess.) (codified as amended at Conn. Gen. Stat. §§ 9-600 to -674, 9-700 to -751 (Supp. 2007)). As noted above, the Second Circuit has struck down Connecticut's Excess Expenditure Provision. The Connecticut Legislature has now revised the law to conform to the court's decision.

[10] Florida Election Campaign Financing Act, Fla. Laws 86-276, (codified at Fla. Stat. §§ 106.30-.36). As noted above, the Eleventh Circuit has preliminarily enjoined enforcement of this law.

elections),[11] New Mexico (Public Regulation Commission and statewide judicial elections),[12] North Carolina (judicial elections),[13] West Virginia (judicial elections)[14] and Wisconsin (judicial elections).[15] Nebraska provides government subsidies to candidates for statewide and legislative offices who agree to abide by a spending limit to match the expenditures by those candidates' opponents that the government deems excessive.[16] Still more states have considered enacting such systems, including New York, Illinois, Maryland, Washington and Wyoming.[17] In addition,

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[11] Pilot Comprehensive Public Funding for Elections to the Hawaii County Council, 2008 Haw. Act 244.

[12] Voter Action Act, 2007 N.M. Laws 1st Spec. Sess. Ch. 2 (H.B. 6) (West) (Public Regulation Commission provisions are codified at N.M. Stat. § 1-19A-10 (2003)). The judicial elections provisions took effect in 2008.

[13] North Carolina Judicial Campaign Reform Act, 2002 N.C. Sess. Laws 158 (codified as amended in scattered sections of N.C. Gen. Stat. ch. 163 (2005)).

[14] West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, 2010 W. Va. Acts 72 (codified at W. Va. Code §§ 3-12-1 to 3-12-17) (pilot program for 2012).

[15] Wisconsin Impartial Justice Act, 2009 Wis. Sess. Laws 89 (codified in scattered sections of Wis. Stat. Ch. 8, 11, 20, 25, 71 (2010)).

[16] Nebraska Campaign Finance Limitation Act, 1992 Neb. Laws 556 §§ 1-10 (codified as amended at Neb. Rev. Stat. §§ 32-1601 to -1613).

[17] Press Release, Public Campaign: While Congress Fiddles and Washington Burns, States Take Action to Clean Up Politics (May 22, 2006), http://www.publicampaign.org/pressroom/2006/05/22/while-congress-fiddles-and-washington-burns-states-take-action-to-clean-up-politics.

the cities of Tucson, Ariz.,[18] Portland, Or.[19] and Albuquerque, N.M.,[20] have some form of matching funds systems. For a number of years, U.S. Senators Richard Durbin and Arlen Specter introduced a taxpayer-funding system for federal elections called the "Fair Elections Now Act," although the senators removed the matching funds provision from later versions of this bill after this Court's decision in *Davis*.[21] Moreover, the push to enact similar public financing systems with matching funds subsidies in states across the country is a top priority for well-funded, politically influential special interests groups, who view such systems as "a bold solution to the problem of money in politics." Brennan Center for Justice et al., *Breaking Free with Fair Elections: A New Declaration of Independence for Congress* 1 (March 2007), *available at* http://www.cleanupwashington.org/documents/breaking_free.pdf. Put simply, such systems are becoming more common across the country and their proponents seek to make them the norm for all U.S. campaigns.

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[18] Tucson, Ariz., Charter ch. XVI, Subchapter (B) § 5 (2003).

[19] Portland, Or., Municipal Code ch. 2.10 (2005).

[20] Albuquerque, N.M., Charter art. XVI (2004).

[21] *Compare* S. 1285, 110th Cong. (2007) (2007 version of Fair Elections Now Act containing a matching funds provision similar to Arizona's), *with* S. 752, 111th Cong. (2009) (2009 version of Fair Elections Now Act omitting the previous matching funds provision). *See also* H.R. 1826, 111th Cong. (2009) (House version of 2009 Senate version of Fair Elections Now Act).

There is now no clear answer as to whether these laws are constitutional, however. The existence of a three-to-three deadlock in the federal appellate courts is clear evidence that there is so much confusion here that this Court should intervene. Independent expenditure groups and privately financed candidates should know whether they have judicial recourse for the harm caused to their free speech rights by such schemes. Publicly financed candidates and the enforcement agencies administering such systems should have some degree of certainty as to whether the systems in which they participate or administer are constitutional. As a federal judge recently noted while struggling with whether to preliminarily enjoin Florida's system for the 2010 primary election, "[t]he law on the merits is unsettled. . . . I cannot end the uncertainty." Prelim. Inj. Tr. at 108, *Scott v. Roberts*, No. 10-cv-0283 (N.D. Fla. July 14, 2010). While this district court judge could not end the uncertainty in each of the jurisdictions in which such schemes operate, this Court can. This Court's immediate intervention – before yet another election season occurs with such systems in place – is therefore necessary.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S HOLDING IN *DAVIS* THAT, IN THE CONTEXT OF A COMPETITIVE ELECTION, LAWS THAT PROVIDE FUNDING ADVANTAGES TO A SPEAKER'S POLITICAL OPPONENTS BASED ON THE EXERCISE OF THE SPEAKER'S FIRST AMENDMENT RIGHTS ARE UNCONSTITUTIONAL.

The split among the circuits reflects the fact that the Ninth Circuit's decision directly conflicts with *Davis*. Like the law at issue in *Davis*, the Matching Funds Provision attempts to "level electoral opportunities" in the context of competitive elections by providing funding advantages to a candidate based on the exercise of free speech rights by that candidate's political and ideological opponents. *See Davis*, 128 S. Ct. at 2773. As Judge Bea correctly concluded in his dissent from the panel decision extending the stay of the district court's injunction, "this case is determined by *Davis* . . . because state intervention in the funding of campaign contributions in a manner to benefit candidates when their opponents spend their own money on speech imposes a substantial burden on the exercise of the free speech by the candidate who spends his own money." App. 81.

Despite the existence of a similar trigger mechanism in the Matching Funds Provision, the Ninth Circuit rejected *Davis*'s application here. The court

held that *Davis* did not apply because this Court had described the Millionaire's Amendment as asymmetrical and discriminatory. The Ninth Circuit averred that, "the law constituted a burden on Davis's speech *only* because it treated candidates running against each other under the same regulatory framework differently based on a candidate's decision to self-finance his or her campaign. . . ." App. 25 (emphasis added). Because candidates under the Arizona system were burdened based on their status as publicly or privately financed, the court held that the Matching Funds Provision was not asymmetrical and discriminatory and was therefore unlike the Millionaire's Amendment. App. 25-26. The court concluded that what distinguished the Matching Funds Provision in a constitutional sense was that the Arizona law "makes no such identity-based distinctions." App. 26-27. The Court thus suggested that publicly and privately financed candidates are not similarly situated and that the government may distribute different benefits and burdens to each. In that regard, the court placed considerable emphasis on the fact that publicly financed candidates "voluntarily choose to participate in a public financing system" and accept expenditure limits, while privately financed candidates choose to run without a spending cap. App. 25. These benefits and burdens, the court suggested, balance each other out.

The Ninth Circuit badly misinterpreted *Davis*. As the Eleventh Circuit subsequently noted, "what

triggered strict scrutiny was the grant of a competitive advantage – an increase in the ability of Davis's opponent to speak," *Scott*, 2010 U.S. App. LEXIS 15897, at *33, not the fact that the law was asymmetrical. Neither *Davis* nor any of the cases cited by the Ninth Circuit require that a speaker be similarly situated with another speaker in order to claim a burden on free speech. In *Davis*, this Court was clear that the burden on the self-financed candidate – not the attributes of his opponent – ultimately decided the First Amendment question. 128 S. Ct. at 2771-72.

The Ninth Circuit's "voluntary choice" theory also fails because it is irrelevant to independent expenditure groups. Under the Act, independent expenditure groups cannot qualify for public funding and cannot "voluntarily choose" to accept or reject public funds. The government's imposition of burdens on such groups cannot be balanced by the benefit of public funds because these groups cannot receive public funds. Independent groups supporting privately financed candidates or opposing publicly financed candidates have only two choices available to them: they can either remain silent or they can speak and have the government "level" their speech by directly funding candidates they oppose. As in *Davis*, the Act does not "provide any way" an independent expenditure group "can exercise" the unfettered right to make unlimited expenditures without abridgment. *See Davis*, 128 S. Ct. at 2772.

Because of this misreading of the law, the Ninth Circuit applied only intermediate scrutiny to the Act.

The court did so despite the fact that it found that the Matching Funds Provision burdens "fully protected speech." App. 22. It classified the Act's effect on speech as "indirect or minimal" and the harm to Petitioners as "mere metaphysical threats to political speech." App. 27. Again, the Ninth Circuit badly misread *Davis*. *Davis* held that the "fundamental nature of the right to spend personal funds for campaign speech" was burdened by the Millionaire's Amendment because it "impose[d] some consequences" on a candidate's choice to self-finance beyond certain amounts. *Davis*, 128 S. Ct. at 2772 (internal quotation marks and citation omitted). Because these consequences affected core political speech, this Court applied strict scrutiny. As discussed above, however, the Act does more than simply "impose some consequences" on speech. It creates distinct and measurable harm to the nature, timing, and amount of expenditures.

Aside from the Ninth Circuit, every court considering "clean elections" systems after *Davis* has concluded that matching funds subsidies burden speech more heavily than the Millionaire's Amendment. *See Scott*, 2010 U.S. App. LEXIS 15897, at *33 ("Like both the district court and the Second Circuit, we conclude that the burden that an excess spending subsidy imposes on nonparticipating candidates is harsher than the penalty in Davis, as it leaves no doubt that the nonparticipants' opponents will receive additional money." (internal quotation marks omitted)); *Green Party*, 2010 U.S. App. LEXIS 14286, at

*82 ("The penalty imposed by the excess expenditure provision, therefore, is harsher than the penalty in *Davis*, as it leaves no doubt that Candidate B, the opponent of the self-financed candidate, will receive additional money."); Prelim. Inj. Tr. at 91, *Scott v. Roberts*, No. 10-cv-0283 (N.D. Fla. July 14, 2010) ("Indeed, in the *Davis* case, it was only a potential dollar. . . . Here, it's not just a potential dollar. It's a certain dollar."); App. 65-66 ("In *Davis*, the negative consequence was having one's opponent subject to higher contribution limits. Here, the negative consequence is having one's opponent receive additional funds."); *Green Party of Conn. v. Garfield*, 648 F. Supp. 2d 298, 373 (D. Conn. 2009) ("Arguably the benefit conferred by the CEP trigger provisions is more constitutionally objectionable than increasing an opponent's individual contribution limits."). Under the Millionaire's Amendment, the non-self-financing candidate still had to raise funds from private parties – that is, the candidate had to develop a message contributors wished to support, identify potential contributors, and persuade them to contribute. In contrast, a group or candidate triggering the Matching Funds Provision results in the government directly giving extra financing to all publicly financed candidates in a race. It beggars logic to hold, as the Ninth Circuit did, that a law that imposes harsher penalties on speech than the Millionaire's Amendment should receive less searching scrutiny because the law burdens speech in a purportedly nondiscriminatory fashion.

The Ninth Circuit's failure to apply strict scrutiny was also erroneous because the Act is clearly content-based. In races between privately financed candidates and publicly financed candidates, independent expenditures in favor of privately financed candidates are "matched" by the government, while independent expenditures against privately financed candidates are not. *See United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (laws that distinguish between message, ideas, subject matter, or content are content-based); *Day*, 34 F.3d at 1360-61 (Minnesota's excess subsidy provision was content-based because it "singles out particular political speech – that which advocates the defeat of a candidate and/or supports the election of her opponents – for negative treatment that the state applies to no other variety of speech"). As such, not only is the Matching Funds Provision subject to strict scrutiny, it is "presumptively invalid" as well. *Stevens*, 130 S. Ct. at 1584.

The Ninth Circuit's attempt to distinguish *Davis* is little more than a rejection of that case. Lower federal courts, however, cannot overturn, alter, or narrow Supreme Court precedent. Moreover, the Ninth Circuit's application of intermediate scrutiny means that Arizona's Matching Funds Provision has so far escaped appellate application of the appropriate level of scrutiny. The Ninth Circuit's decision thus creates uncertainty regarding the scope of *Davis* and its application to similar public financing systems.

III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *CITIZENS UNITED* BY ALLOWING GOVERNMENTS TO INDIRECTLY RESTRAIN THE SPENDING OF INDEPENDENT EXPENDITURE GROUPS.

Section C of the Matching Funds Provision explicitly treats the expenditures of groups acting independently of candidates as "expenditures of . . . nonparticipating candidates." Ariz. Rev. Stat. § 16-952(C)(2); App. 140. It empowers the government to match the expenditures of independent groups supporting a privately financed candidate or opposing a publicly financed candidate. The purported rationale behind this burden is enticement – that is, the government must burden the speech of independent expenditure groups in order to encourage candidates who might otherwise be subject to purportedly corrupting influences to accept public funds. App. 35-37.

It is beyond dispute that the government may not burden independent expenditures under an anti-corruption rationale. In *Citizens United*, this Court stated explicitly what many understood the law to be since *Buckley v. Valeo*, 424 U.S. 1 (1976) – that independent expenditures cannot be regulated under an anti-corruption rationale. *Citizens United*, 130 S. Ct. at 909 ("[I]ndependent expenditures . . . do not give rise to corruption or the appearance of corruption."). Because of the absence of pre-arrangement and coordination between an independent expenditure committee and a candidate, the value of the expenditure to the candidate is undermined and the danger

that expenditures will be given as a *quid pro quo* for improper commitments from the candidate is alleviated. *Id.* at 908; *see also FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985) ("But here, as in *Buckley*, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.").

Nonetheless, the Ninth Circuit determined that the Matching Funds Provision could be applied against independent expenditure groups because the relevant inquiry is not whether independent expenditure groups cause corruption, but "whether matching funds bear a substantial relation to reducing corruption among participating candidates." App. 35. According to the court, unless the state matches "independent expenditures or expenditures from a nonparticipating candidate's own funds, the Act's public funding plan would not attract participants." App. 36. Thus, while independent expenditure groups cannot be directly regulated to reduce the possibility of corruption, the government may indirectly burden their speech to encourage candidates into the public financing system to reduce the possibility of corruption by these candidates. In other words, publicly financed candidates need matching funds available so they know they can match spending by independent groups that oppose them if they enter the system.

This rationale is simply a dressed-up version of the "level the playing field" justification for campaign finance restrictions that this Court has repeatedly and correctly rejected. *See Davis*, 128 S. Ct. at 2771, 2773 (rejecting the "leveling the electoral opportunities" justification for the Millionaire's Amendment).

In sum, the Ninth Circuit's decision stands for the proposition that while the government cannot burden speech to "level the playing field" and it cannot directly burden independent expenditures, it can indirectly burden independent expenditures in order to level the playing field. It is difficult to conceive of a conclusion more at odds with the holdings of both *Davis* and *Citizens United*.

The Ninth Circuit's holding stands *Citizens United* on its head. Because independent expenditures are core political speech and pose no threat of corruption, the government simply may not burden them in order to fight corruption, even if doing so might have an ancillary benefit of increasing participation by others in a public financing program. "Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 265 (1986).

While matching funds do not directly restrict independent expenditures, they work as an indirect

and substantial restriction on the ability of independent expenditure groups to exercise "the unfettered right to make unlimited . . . expenditures." *Davis*, 128 S. Ct. at 2772. By allowing the government to create real, if indirect, restrictions on the right of independent groups to make unlimited expenditures, the Ninth Circuit has provided the state with the ability to achieve indirectly what it is constitutionally forbidden from doing directly and has set an example for other courts and legislators to follow to undermine *Citizens United*. This disruptive jurisprudential development in a circuit covering much of the western United States threatens to restrict the speech of independent expenditure groups mere months after this Court held, in the strongest possible terms, that such restrictions are constitutionally impermissible.

As *Citizens United* made clear, the Constitution protects the political speech of groups as well as individual candidates. 130 S. Ct. at 899-903. The *Martin* plaintiffs (the Petitioners here) include independent groups and raise issues regarding the application of *Citizens United* that are in addition to the harm the Act causes to candidate speech. Petitioners note that contemporaneously with this Petition, the *McComish* plaintiffs – each a privately financed candidate – are seeking this Court's review of the Ninth Circuit's decision. Petitioners here fully support the *McComish* plaintiffs' petition and urge this Court to accept it. This Court should grant both petitions, though, in order to directly consider the affect the Act has on both candidates and independent groups in one proceeding. In particular, this Court

should grant review of this Petition in order to provide much-needed guidance (if not outright correction) to the Ninth Circuit and other courts on the scope of *Citizens United*.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that this Court grant both their petition for a writ of certiorari and that of the *McComish* plaintiffs and that this Court consolidate both petitions for consideration.

Respectfully submitted,

INSTITUTE FOR JUSTICE
WILLIAM R. MAURER*
101 Yesler Way, Suite 603
Seattle, WA 98104
(206) 341-9300

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320

INSTITUTE FOR JUSTICE
TIMOTHY D. KELLER
PAUL V. AVELAR
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
(480) 557-8300

Counsel for Petitioners

**Counsel of Record*

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MCCOMISH; NANCY MCLAIN; TONY BOUIE,

Plaintiffs-Appellees,

ROBERT BURNS,

Plaintiff-Intervenor-Appellee,

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC; ARIZONA TAXPAYERS ACTION COMMITTEE, agent of Taxpayers Action Committee; DEAN MARTIN; RICK MURPHY,

Plaintiffs-Intervenors-Appellees,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; GARY SCARAMAZZO; ROYANN J. PARKER; JEFFREY L. FAIRMAN; DONALD LINDHOLM; LORI S. DANIELS, in their official capacities as members of the Arizona Citizens Clean Elections Commission,

Defendants-Appellants,

and

Clean Elections Institute, Inc.,

Defendant-Intervenor.

No. 10-15165

D.C. No.
CV-08-1550-ROS

JOHN MCCOMISH; NANCY MCLAIN; TONY BOUIE,

Plaintiffs-Appellees,

DEAN MARTIN; ROBERT BURNS; RICK MURPHY; ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC; ARIZONA TAXPAYERS ACTION COMMITTEE, agent of Taxpayers Action Committee,

Plaintiffs-Intervenors-Appellees,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; GARY SCARAMAZZO; ROYANN J. PARKER; JEFFREY L. FAIRMAN; DONALD LINDHOLM; LORI S. DANIELS, in their official capacities as members of the Arizona Citizens Clean Elections Commission,

Defendants,

and

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant-Intervenor-Appellant.

No. 10-15166
DC No.
CV 08-1550-ROS
ORDER AND AMENDED OPINION

Appeals from the United States District Court
for the District of Arizona
Roslyn O. Silver, District Judge, Presiding

Argued and Submitted
April 12, 2010 – San Francisco, California

Filed May 21, 2010
Amended June 23, 2010

Before: Andrew J. Kleinfeld, A. Wallace Tashima, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Tashima;
Concurrence by Judge Kleinfeld

COUNSEL

Nicholas C. Dranias, Goldwater Institute, Phoeniz, Arizona, for the plaintiffs-appellees.

William R. Maurer, Institute for Justice, Seattle, Washington, for the plaintiffs-intervenors-appellees.

Mary R. O'Gracy, Solicitor General of Arizona, Phoenix, Arizona, for the defendants-appellants.

Bradley S. Phillips, Munger, Tolles, & Olson, Los Angeles, California, for the defendant-intervenor-appellant.

Stephen M. Hoersting, Center for Competitive Politics, Alexandria, Virginia, for *amicus curiae* Center for Competitive Politics.

ORDER

The opinion filed May 21, 2010, slip op. 7319, is amended by deleting footnote 1, slip op. at 7326, and substituting the following footnote in its place:

> 1 Governor Symington was sentenced to a 30-month term of imprisonment, but his conviction was reversed and the case remanded

for a new trial. *See United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999). He was then granted a presidential pardon just as his retrial was set to commence.

OPINION

TASHIMA, Circuit Judge:

This is a challenge to the constitutionality of the "matching funds" provision of Arizona's Citizens Clean Elections Act, Ariz. Rev. Stat. § 16-952. The Act establishes a legal framework within which the State of Arizona may provide public financing to candidates for state political offices. A candidate who chooses to participate in the Act's voluntary public financing scheme relinquishes her or his right to raise private campaign contributions. Instead, she or he receives an initial grant of funds from the state to spend on her or his campaign. The challenged provision ensures that if the participating candidate has an opponent who is not participating in the public financing system and whose campaign expenditures or contributions exceed a threshold set by the Act, she or he receives additional matching funds from the State.

Six past and future candidates for Arizona political office who have, or plan to, run privately-financed campaigns, as well as two political action committees who fund such candidates, brought suit to enjoin the Act's matching funds provision, alleging that it violates their rights under the First Amendment and the

Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. These Plaintiffs claim that the matching funds provision severely burdens their exercise of protected political speech by punishing them for making, receiving, or spending campaign contributions. As nonparticipating candidates, if they exceed the Act's matching funds threshold, they will trigger the disbursement of matching funds to their opponents. They allege that their fear of triggering matching funds to their opponent causes them to curb their campaign fundraising or spending, thereby chilling their speech. They also claim that because the Act treats candidates differently based on whether or not they participate in the public financing scheme, it denies them the equal protection of the law.

The district court held that the matching funds provision of the Act violated the First Amendment. It did not reach Plaintiffs' equal protection claim. After determining that the matching funds provision of the Act could not be severed from the Act as a whole, the district court granted Plaintiffs' motion for summary judgment, issued a declaratory judgment that the Act violates the First Amendment, and enjoined its enforcement.

Applying Supreme Court precedent analyzing campaign finance laws under the First Amendment, *see Citizens United v. FEC*, 130 S.Ct. 876 (2010); *Davis v. FEC*, 128 S.Ct. 2759 (2008); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), we conclude that the matching funds provision of the Act imposes only a minimal burden on First Amendment rights. It

survives intermediate scrutiny because it bears a substantial relation to the State's important interest in reducing *quid pro quo* political corruption. Because the Act conforms to the requirements of the First Amendment and must be upheld, we reverse. We decline to address Plaintiffs' equal protection claim in the first instance; instead, we remand to the district court so that it may consider the issue.

I. Statutory Background

Prior to the passage of the Citizens Clean Elections Act (the "Act"), Arizona had already adopted campaign contribution limits. Ariz. Rev. Stat. § 16-905 (historical and statutory note). In 1986, the State's voters passed an initiative measure establishing individual contribution limits of $200 for legislative candidates and $500 for statewide candidates, per election. *See id.* Even with these campaign contribution limits in place, Arizona experienced a series of massive political corruption scandals.

In 1988, Governor Evan Mecham was indicted on multiple criminal charges, including perjury and fraud for allegedly hiding a campaign loan. He was later impeached on charges of misuse of public funds and obstruction of justice, and ousted from office. Next, the "Savings and Loan Scandal" led to a United States Senate Ethics Committee investigation of certain activities of both U.S. Senators from Arizona,

who had received contributions and favors from Arizona savings and loan tycoon Charles Keating.

Then, in 1991, AzScam erupted. A sting operation caught state legislators on videotape accepting campaign contributions and bribes in exchange for agreeing to support gambling legislation. The video footage was generally seen as outrageous. For example, Representative Don Kenny was seen stuffing a $55,000 cash bribe into a gym bag after joking, "are you sure there are no hidden cameras up there?" AzScam resulted in the indictment of twenty-one individuals, including lobbyists, political activists, and seven state legislators. Two additional state legislators were named in a civil racketeering suit. In total, nearly ten percent of the Arizona Legislature at the time faced civil or criminal charges related to AzScam. Former Arizona Governor J. Fife Symington testified that the scandal was highly publicized around the state.

In the late nineties, Governor Symington himself was embroiled in scandal and indicted on twenty-three counts, including using the power of his office to extort concessions from a pension fund to which he owed $10 million. He became Arizona's second governor in a row to leave his office in disgrace when he resigned in 1997, after being convicted on seven counts of filing false financial statements.[1]

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[1] Governor Symington was sentenced to a 30-month term of imprisonment, but his conviction was reversed and the case

(Continued on following page)

In the wake of these scandals, the voters of Arizona passed the Citizens Clean Elections Act, Ariz. Rev. Stat. §§ 16-940-16-961, an initiative measure, in the 1998 statewide election. Ariz. Rev. Stat. § 16-940 (historical and statutory note). There is no evidence that the Act was intended solely to remedy Arizona's apparent susceptibility to political corruption. Plaintiffs, however, introduced ample evidence indicating that when the Act was adopted, voters were aware of, and concerned about, continuing and repeated political corruption in Arizona.

The voter information pamphlet for the 1998 election argued that the Act should be approved because it would free politicians "to represent the best interests of all the citizens, not just the large financial contributors who can trade their cash for political support." Ballot Propositions Publicity Pamphlet for the 1998 Arizona General Election, at *87, *available at* http://www.azsos.gov/election/1998/info/pubpamphlet/prop200.pdf. One justification for the Act was that it would change Arizona's "reputation [as] a state rife with corruption and the abuse of money in politics. . . . [and] restore confidence in our political system." *Id.* at *88. The pamphlet further noted that under the existing election law regime,

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remanded for a new trial. *See United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999). He was then granted a presidential pardon just as his retrial was set to commence.

"[o]ur elected officials are going to jail and this cycle of abuse seems endless."[2] *Id.*

The Act's findings state that the State's previous election financing system, "[u]ndermine[d] public confidence in the integrity of public officials," because it "[a]llow[ed] Arizona elected officials to accept large campaign contributions from private interests over which they have governmental jurisdiction." Ariz. Rev. Stat. § 16-940. The Act's stated purpose is to "create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech." *Id.*

Plaintiffs argue that the Act was not aimed at reducing corruption, and that legislative reforms designed to prevent another AzScam had already been adopted at the time the Act was passed. Instead, Plaintiffs contend that the Act's true purposes were to level the political playing field and reduce campaign spending.[3] Voters are motivated by varied and

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[2] One of the Act's original supporters testified that another one of its goals was to "promote freedom of speech because . . . [under the Act,] more candidates would have more opportunity to speak."

[3] We recently recognized in *Long Beach Area Chamber of Commerce v. City of Long Beach*, that in light of Supreme Court precedent, "'preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.'" *Long Beach*, No. 07-55691, ___ F.3d ___, 2010 WL 1729710 at *7

(Continued on following page)

conflicting motivations. Generally, a diverse electorate cannot be said to share one true intent in adopting an initiative measure. More specifically, the extent to which Arizona's various corruption scandals led to the passage of the Act cannot be precisely determined. Based on the record before us, however,

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(9th Cir. April 30, 2010) (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985)). In particular, we observed that the so-called "anti-distortion rationale," under which the government claims an "interest in combating 'the corrosive and distorting effects of immense aggregations of wealth,'" is not a legitimate basis for campaign finance restrictions after the Supreme Court partially overruled *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), in its *Citizens United* decision. *Id.* at *6 (quoting *Austin*, 494 U.S. at 660 and discussing *Citizens United*, 130 S. Ct. at 904, 912-13). Likewise, the "time protection rationale," under which the government claims an interest in "'protect[ing] candidates from spending too much time raising money rather than devoting that time to campaigning among ordinary voters'" may not serve as the basis for restricting campaign finance activity. *Id.* at *7 (quoting *Randall v. Sorrell*, 548 U.S. 230, 243-45 (2006)).

We need not, however, address the potential legitimacy of arguments that the State has not raised before us in defense of the Act. Further, even if the State had raised these arguments, "[i]t is unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification" for the matching funds provision. *Buckley*, 424 U.S. at 26. Because the Act is justified by the State's legitimate and non-illusory interest in reducing *quid pro quo* corruption, we need not consider the constitutional legitimacy of other potential rationales that might support it. *See id.* at 24-27.

we conclude that one of the principal purposes of the Act was to reduce *quid pro quo* corruption.

The Act created a system of public financing for political campaigns. A candidate who chooses not to participate in this system may raise unlimited funds from private donations, subject to contribution limits and disclosure requirements, which existed before the Act. If a candidate opts to participate in the public financing system, she or he agrees to forfeit her or his right to fund her or his campaign with private contributions. Instead, she or he must collect a required number of five-dollar "qualifying contributions" during a specified time period to demonstrate that she or he has the voter support to be a viable candidate. Ariz. Rev. Stat. § 16-946. The number of required qualifying contributions varies between two hundred and four thousand, depending on the office that the candidate is seeking. Ariz. Rev. Stat. § 16-950(D).

If the candidate qualifies for public financing, she or he will then receive a lump-sum grant for her or his primary campaign, which varies depending on whether she or he is running opposed or unopposed in a party primary, or whether she or he is an independent candidate. Ariz. Rev. Stat. § 16-951. If the participating candidate has a nonparticipating opponent in the primary who spends more than her or his initial grant, or whose expenditures, combined with the value of independent expenditures in opposition to her or his candidacy or in support of her or his

nonparticipating opponent,[4] exceed the amount of her or his initial grant, the participating candidate will receive "matching funds" in the amount of the combined spending of her or his nonparticipating opponent, plus the value of independent expenditures against her or him or in support of her or his nonparticipating opponent, reduced by six percent and reduced by the amount of "early contributions" raised by the nonparticipating opponent during the preprimary fundraising period.[5] Ariz. Rev. Stat. §§ 16-952, 16-945.

If the participating candidate wins her or his primary and continues on to the general election, she or he receives a second initial lump-sum grant. Ariz. Rev. Stat. § 16-952. If she or he has a

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[4] An independent expenditure is a campaign expenditure made by a third party that "expressly advocates the election or defeat of a clearly identified candidate, that is made without cooperation or consultation with any candidate or committee or agent of the candidate and that is not made in concert with or at the request or suggestion of a candidate, or any committee or agent of the candidate." Ariz. Rev. Stat. § 16-901(14).

[5] The matching funds that the participating candidate receives are reduced by six percent to take into account the fact that nonparticipating candidates incur expenses in order to raise money. The assumption underlying this provision is that a nonparticipating candidate must spend six dollars (on postage, event costs, etc.) in order to raise one hundred dollars, while a participating candidate has no fundraising costs. Therefore, in order for both candidates to have the same net amount available to spend on non-fundraising campaign expenses, the matching funds that the participating candidate receives are reduced by six percent.

nonparticipating opponent in the primary whose contributions received, combined with the value of independent expenditures in supporting him or her and opposing the participating candidate, less his or her expenditures during the primary campaign, exceed the amount of the participating candidate's second initial grant, the participating candidate will receive matching funds, calculated in the same manner as in the primary campaign. Ariz. Rev. Stat. § 16-952(B). During both elections, matching funds, combined with the initial grant, may not exceed three times the amount of the initial grant. Ariz. Rev. Stat. § 16-952(E). This means that a nonparticipating candidate who is able to raise funds in excess of three times the amount of his or her participating candidate's initial grant gains a potentially unlimited financial advantage in the campaign.

II. Factual Background

Plaintiffs are John McComish and Nancy McLain, current members of the Arizona House of Representatives who are seeking reelection in 2010, Tony Bouie, a non-incumbent candidate for the Arizona House of Representatives, and Robert Burns, an Arizona State Senator seeking reelection in 2010. Joining them in this challenge to the Act are plaintiffs-intervenors, Dean Martin, a former Arizona State Senator, current State Treasurer, and candidate for Governor in 2010, Rick Murphy a member of the Arizona House of Representatives seeking reelection in 2010, the Arizona Free Enterprise Club's Freedom

Club PAC ("Freedom Club PAC"), a political action committee ("PAC") which makes contributions to Arizonans for a Sound Economy, an independent expenditure committee that funds independent expenditures in races subject to the Act, and the Arizona Taxpayers Action Committee ("Arizona Taxpayers"), an independent expenditure committee that makes independent expenditures in races subject to the Act. All candidate-plaintiffs have declined to participate in the Act's public funding program and will be running in the 2010 election as privately-financed candidates.

Plaintiffs sued Jan Brewer, in her official capacity as Arizona Secretary of State,[6] and Gary Scaramazzo, Royann Parker, Jeffrey Fairman, Donald Lindholm, and Lori Daniels, in their official capacities as members of the Arizona Citizens Clean Elections Commission (collectively, the "State"). The Clean Elections Institute, Inc., a nonprofit organization formed to continue the work of Arizonans for Clean Elections, the campaign committee that sponsored the initiative that created the Act, intervened as a defendant.

Since 2002, between fifty-two percent and sixty-seven percent of candidates for state office during general elections have chosen to participate in the Act's public funding program. Plaintiffs contend that

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[6] Ken Bennett has succeeded Jan Brewer as Secretary of State since the commencement of this action.

matching funds have dampened overall campaign spending in Arizona. It is undisputed, however, that overall campaign spending in Arizona has increased since the Act's passage.

Plaintiffs also allege that matching funds have specifically deterred them from engaging in political expression through monetary expenditures. They argue that the fear of triggering matching funds causes privately-funded candidates to refrain from or delay raising and spending money in support of their campaigns. They contend that matching funds burden the speech of independent expenditure committees by causing them to delay making independent expenditures in order to avoid triggering matching funds until later in the campaign, when the publicly-financed candidate will have less time to use them, in an attempt to minimize the competitive benefit of the matching funds to the publicly-financed candidate.

We agree with the district court's observation that "Plaintiffs' testimony is somewhat scattered and shows only a vague interpretation of the burden of the Act." John McComish testified that in his 2008 campaign for the House of Representatives, he triggered matching funds to his opponents. In order to avoid triggering additional matching funds to his opponents until later in the campaign, he "deci[ded] to wait and not make any substantial expenditures until September 2, 2008." McComish describes this as an act of "self-censorship" in order to avoid the consequence of "disseminat[ing] viewpoints hostile to my campaign."

Nancy McLain testified that during her 2008 campaign for House of Representatives she "made a conscious decision to not raise or spend a significant amount because it could not be spent without resulting in 'equalizing funds.'" Although she avoided triggering matching funds in the general election, she triggered matching funds in the primary. She claims that her "reluctance to fundraise and spend money during the primary election meant that [she] was not able to broadcast [her] message either on air or in newspapers as often as [she] thought necessary to win the election," although she was victorious. She describes matching funds as imposing a "competitive disadvantage" on her campaign, which her fundraising and spending choices "seek to minimize."

Tony Bouie also triggered matching funds during his 2008 campaign for House of Representatives. He testified that because he had "no control over independent expenditures that the Commission deems [to] benefit him" he "fe[lt] compelled to conserve money for damage-control in anticipation of poorly-conceived independent expenditures backfiring after they trigger matching funds" to his opponents. As a result he "change[d his] campaign strategy" by "holding [his] campaign speech until [his] expenditures could be timed to minimize the impact of the matching funds." He believes that matching funds thereby "placed [him] at a continuous tactical disadvantage."

Robert Burns "believe[s] that the existence of matching funds coerces traditionally funded candidates into changing their message and the timing of

getting out their message, even if ultimately the amount of messaging a traditional candidate chooses to engage in does not change." His deposition testimony indicated that matching funds had not actually chilled his speech during his most recent 2008 election for State Senate. He admitted that he was willing to trigger matching funds. Further, he also indicated that despite the matching funds provision, he simply communicated his message to the extent he felt was necessary to win, stating "[i]f I had to spend X number of dollars to get out a – a mailer, and I had that amount of money, I would go ahead and do the mailer."

Dean Martin stated that "the matching funds provision of the Act forced [him] to self-censor" in his most recent race for State Treasurer in 2006. He reasoned that the "only way [he] could avoid being massively outspent by [his] opponent was to prevent the triggering of additional matching funds to her campaign" and "was thus coerced into accepting the same limits as [his] government-funded opponent . . . [without] receiv[ing] any of the benefits of being a government-funded candidate, such as the receipt of matching funds for independent expenditures that opposed [his] candidacy and the label 'participating' or 'clean' candidate." Despite Martin's testimony that he felt matching funds severely burdened his speech, he curiously could not even recall whether he had ever triggered matching funds to an opponent. The record indicates that Martin is fundamentally opposed to the policy of publicly financing political

campaigns, regardless of whether a given public financing scheme includes a provision for matching funds.

Rick Murphy ran successfully for House of Representatives as a participating candidate in 2004. He later ran for reelection in 2006 and 2008 as a nonparticipating candidate. He testified that he attempted to not trigger matching funds during his 2006 campaign because, since his opponent would receive additional matching funds once he surpassed the threshold amount, "[i]t didn't seem like it made a lot of sense for me to do that, so I curtailed my speech and curtailed my fundraising in order to prevent it." Still, Murphy testified that matching funds have never prevented him from accepting a political contribution. Murphy's testimony that he curtailed his fundraising for fear of triggering matching funds was directly contradicted by his own campaign consultant, who testified that he advised Murphy to "raise as much money" as he could from "everywhere," that he never advised Murphy to stop raising money, and that Murphy never curtailed or stopped his fundraising efforts.

The treasurer of the Freedom Club PAC testified that the PAC has never been prevented from making an independent expenditure for fear of triggering matching funds. He further stated that he takes into account various campaign finance "reporting requirements, notifications and filings" upon which matching funds disbursement determinations by the Citizens

Clean Elections Commission are based, in determining when to spend money.

Arizona Taxpayers stated that it "decided not to speak in opposition to [a] participating candidate . . . in the 2006 primary election because such speech would have triggered matching funds." However, the groups's founder admitted that it had never decided against making an expenditure because it would trigger matching funds. Further, the evidence demonstrates that Arizona Taxpayers could not afford to make expenditures during the 2006 primary election, because it had only $52.72 in cash on hand.

III. Standard and Scope of Review

We review the district court's grant of summary judgment to Plaintiffs and denial of summary judgment to the State de novo.[7] *See Block v. City of L.A.*, 253 F.3d 410, 416 (9th Cir. 2001). This means that we will look at the case "anew, the same as if it had not been heard before, and as if no decision previously had been rendered," and "giving no deference to the district judge's determinations." *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006); *Ditto v.*

[7] "Ordinarily a denial of a motion for summary judgment is not a final order and thus not appealable. 28 U.S.C. § 1291. However, the district court's grant of summary judgment was a final decision giving us jurisdiction to review its denial of [the State's] motion for summary judgment." *Abend v. MCA, Inc.*, 863 F.2d 1465, 1482 n.20 (9th Cir. 1988).

McCurdy, 510 F.3d 1070, 1075 (9th Cir. 2007).[*] We apply the same legal standard that the district court did, "[v]iewing the evidence in the light most favorable to the nonmoving party," and granting summary judgment "only if no genuine issues of material fact remain for trial and the moving party is entitled to judgment as a matter of law." *Block*, 253 F.3d at 416. We "may affirm on any ground supported by the record." *N. Mariana Islands v. United States*, 399 F.3d 1057, 1060 (9th Cir. 2005). Because the district court did not rule on the parties' evidentiary objections and did not strike any evidence from the record, all of the evidence adduced below remains a part of the record before us on appeal. *See Vinson v. Thomas*, 288 F.3d 1145, 1152 & n.8 (9th Cir. 2002).

IV. Analysis

First, we must determine what level of constitutional scrutiny applies to the Act's matching funds

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[*] We reject Plaintiffs' argument that *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1221 (9th Cir. 2003), requires us to review the district court's findings of fact for clear error because its opinion was one which struck down a restriction on speech. *Brown*, and the line of cases that it follows, apply to this Court's review of cases in which the district court made findings of fact in the process of issuing a preliminary injunction or holding a bench trial, or when questions of fact were submitted to a jury. *See Planned Parenthood v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1066-1070 (9th Cir. 2002) (en banc). This case, arising from a grant of summary judgment, is in an entirely different procedural posture to which these cases do not apply.

provision. The level of scrutiny that applies to a law which implicates First Amendment concerns is "dictated by both the intrinsic strength of, and the magnitude of the burden placed on, the speech and associational freedoms at issue." *Lincoln Club v. City of Irvine*, 292 F.3d 934, 938 (9th Cir. 2002). We must, therefore, engage in a two-step inquiry. First, we determine whether the type of speech the law affects is fully protected by the First Amendment. Next, we determine the type of burden, if any, that the law places on that speech. Laws that place severe burdens on fully protected speech are subject to strict scrutiny. Laws that "place[ ] only a minimal burden on fully protected . . . freedoms" or that apply to "speech and associational freedoms [that] are not fully protected by the First Amendment" receive intermediate scrutiny. *Id.*

[1] *Buckley*, the Supreme Court's landmark case on the constitutionality of campaign finance laws under the First Amendment, provides guidance in determining whether the Act affects fully protected speech. *Buckley* held that campaign contributions are not fully protected political speech. 424 U.S. at 21-22; *see also Lincoln Club*, 292 F.3d at 938-39. The Supreme Court reasoned that a "contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. . . . [T]he transformation of contributions into political debate involves speech by someone other than the contributor." *Buckley*, 424 U.S. at 21. By contrast, campaign expenditures are

fully protected speech because a "restriction on the amount of money a person can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19.

[2] Following *Buckley*, a law that has a hybrid effect on both contributions and expenditures is interpreted as though it affects fully protected speech. *See Lincoln Club*, 292 F.3d at 939. The matching funds provision of the Act affects both contributions and expenditures. During primary elections, the Act explicitly ties participating candidate's matching fund disbursements to nonparticipating candidates' expenditures. Ariz. Rev. Stat. § 16-952. During a general election, the Act bases matching fund calculations on contributions received by nonparticipating candidates. *Id.* This includes contributions that come from a nonparticipating candidate's personal funds, which, under *Buckley's* framework, are considered expenditures, and fully protected speech. *See* 424 U.S. at 51-55. Because the Act affects both contributions and expenditures, we analyze it as though it affects fully protected speech.

Next, we determine what level of burden, if any, the Act imposes on that speech. Plaintiffs argue that the Supreme Court's recent decision in *Davis*, 128 S. Ct. 2759, controls this case, and compels the conclusion that the Act places a severe burden on their speech triggering the application of strict scrutiny. The State and Defendant-Intervenor counter that the

Act places only a minimal or indirect burden on Plaintiffs' speech and that the Supreme Court's latest campaign finance decision, *Citizens United*, 130 S. Ct. 876, reaffirmed that intermediate scrutiny applies to such laws.

[3] In *Buckley*, the Supreme Court evaluated the constitutionality of provisions of the Federal Election Campaign Act of 1971, and related provisions of the Internal Revenue Code of 1954, as amended, which allowed for the public financing of presidential elections. *See* 424 U.S. at 6, 85-109. The Court found that the public financing scheme in that case was "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus [it] furthers, not abridges, pertinent First Amendment values." *Id.* at 92-93 (footnote omitted). Therefore, the public financing of elections itself does not create any burden on speech.

In *Davis*, the Court struck down the Millionaire's Amendment to the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 2 U.S.C. § 441a-1(a). The Millionaire's Amendment applied to campaigns for the United States House of Representatives, in which all candidates are privately financed and there is no public funding. But if one candidate financed his campaign with personal funds in excess of a threshold amount, "a new, asymmetrical regulatory scheme c[ame] into play." 128 S. Ct. at 2766. While the self-financing candidate continued to be subject to the

normal contribution limits, his opponent, the 'non-self-financing' candidate became eligible to "receive individual contributions at treble the normal limit . . . even from individuals who may have reached the normal aggregate contributions cap, and [could] accept coordinated party expenditures without limit." *Id.* The *Davis* Court held that this "scheme of discriminatory contribution limits," "imposes a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech." *Id.* at 2772. Having found the Millionaire's Amendment to be a substantial burden on fully protected speech, the Court applied strict scrutiny. *Id.*

Plaintiffs urge us to adopt the rationale of the district court and conclude that, under the logic of *Davis*, they have "established a cognizable burden" under the First Amendment. The district court reasoned that "[i]f the mere *potential* for your opponent to raise additional funds is a substantial burden, the granting of additional funds to your opponent must also be a burden." We disagree. As discussed below, we conclude that *Davis* is easily and properly distinguished from the case at bench.

The regulatory framework the Supreme Court examined in *Davis* is different from the one we confront under the Act. *Davis* says nothing about public "funding schemes and therefore says nothing about their constitutionality." Comment, 122 Harv. L. Rev. 375, 383 (Nov. 2008). All of the candidates in *Davis* were subject to the same scheme regulating privately financed candidates. "Under the usual circumstances,

the same restrictions apply to all the competitors for a seat and their authorized committees." *Davis*, 128 S.Ct. at 2765. But if one candidate heavily self-funded his campaign, it triggered an entirely new "asymmetrical regulatory scheme" that required him to file three additional types of campaign finance disclosures not required of his opponents. *Id.* at 2766-67. "Failure to comply with the reporting requirements may [have] result[ed] in civil and criminal penalties." *Id.* at 2767. It also triggered new, more generous campaign contribution limits, but only for the self-financing candidate's opponents. *Id.* at 2771.

In striking down the Millionaire's Amendment, the Supreme Court noted that had the law "simply raised the contribution limits for all candidates, Davis' argument would plainly fail." *Id.* at 2770; *see also id.* at 2771 ("Consequently, if § 319(a)'s elevated contribution limits applied across the board, Davis would not have any basis for challenging those limits."). Instead, the law constituted a burden on Davis' speech only because it treated candidates running against each other under the same regulatory framework differently based on a candidate's decision to self-finance his or her campaign, which is a manner of engaging in fully protected speech. *Id.* at 2771.

In contrast, the Supreme Court has held that it is constitutional to subject candidates running against each other for the same office to entirely different regulatory schemes when some candidates voluntarily choose to participate in a public financing system. *Buckley*, 424 U.S. at 97. "[T]he Constitution does not

require Congress to treat all declared candidates the same for public financing purposes." *Id.* "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Id.* at 97-98.

In *Davis*, the Millionaire's Amendment was an attempt to "level electoral opportunities for candidates of different personal wealth." 128 S. Ct. at 2773. This was problematic because *Buckley* had held that "the First Amendment simply cannot tolerate [a] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." 424 U.S. at 54. In *Citizens United*, the Supreme Court elaborated on its decision in *Davis*, indicating that the Millionaire's Amendment was unconstitutional because it specifically sought to disadvantage the rich. "The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity." *Citizens United*, 130 S. Ct. at 905. Under the Act, while matching funds are calculated based on the total contributions received and expenditures made by a nonparticipating opponent, they are not distributed specifically to the opponents of wealthy candidates. Matching funds do not distinguish between different sources of nonparticipating candidates' financing at all. The law in *Davis* was problematic because it singled out the speakers to whom it applied based on their identity. The Act's matching

funds provision makes no such identity-based distinctions.

[4] Plaintiffs, perhaps recognizing that they have not demonstrated any actual chilling of their speech by the Act, argue that under *Davis*, we could strike down the matching funds provision without any proof that their speech has been deterred or punished. But *Davis* does not require this Court to recognize mere metaphysical threats to political speech as severe burdens. We will only conclude that the Act burdens speech to the extent that Plaintiffs have proven that the specter of matching funds has actually chilled or deterred them from accepting campaign contributions or making expenditures.

[5] Based on the record before us, we conclude that any burden the Act imposes on Plaintiffs' speech is indirect or minimal.[9] Since the Act's adoption,

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[9] Prior to, and without the benefit of, the Supreme Court's recent decisions in *Citizens United* and *Davis*, three of our sister circuits considered the constitutionality of state public financing schemes with matching funds provisions similar to the one we now confront. *See N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008); *Daggett v. Comm'n on Gov'tal Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000); *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994). The Fourth and First Circuits concluded that the respective statutes imposed no First Amendment burden at all. *See N.C. Right to Life*, 524 F.3d at 437-49; *Daggett*, 205 F.3d at 464-65. The Eighth Circuit, however, concluded that the Minnesota law at issue imposed a substantial burden on fully protected political speech and, because it could not survive strict scrutiny, struck it down. *See Day*, 34 F.3d at 1360, 1363.

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Plaintiffs argue that because the Supreme Court's decision in *Davis* cites *Day*, *Davis* somehow transformed the decision of one of our sister circuits into controlling precedent. *Davis* cites *Day* only once for a single, limited proposition. *See Davis*, 128 S. Ct. at 2772 ("Many candidates who can afford to make large personal expenditures to support their campaigns may choose to do so despite [the Millionaire's Amendment], but they must shoulder a special and potentially significant burden if they make that choice. *See Day v. Holahan*, 34 F.3d 1536, 1359-60 (C.A.8 1994) (concluding that a Minnesota law that increased a candidate's expenditure limits and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures)"). In so citing *Day*, *Davis* did not affirm or adopt the Eighth Circuit's approach, nor did it overturn *sub silento* the decisions of the First and Fourth Circuits. It merely cited *Day* for what it is – a decision in which our sister circuit found that a law chilled protected speech and held that such a burden could not survive strict scrutiny. Our decision is not controlled by *Day*, nor are we persuaded by it.

In *Day*, plaintiffs demonstrated that the Minnesota statute they were challenging had a "chilling effect" on political speech and that its "mere enactment . . . ha[d] prevented many if not most potential political expenditures from ever being made." 34 F.3d at 1360. As discussed *infra*, Plaintiffs have not established the existence of such a chilling effect in the instant case. Having found that the Minnesota law imposed a substantial burden on fully protected political speech, the Eighth Circuit proceeded to apply strict scrutiny. *Id.* at 1361. The court concluded that the law could not survive that test because it found that the state's professed interest supporting the law, that of encouraging participation in the public financing program, was "not legitimate," "no matter how compelling in the abstract," because it was not based in fact, but was rather "contrived for purposes of [] litigation." *Id.* The record there demonstrated that the challenged provision was "not necessary to encourage candidates' involvement in public campaign financing, as participation was

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campaign spending in Arizona has increased. Several Plaintiffs testified that they would have made increased expenditures or undertaken increased fundraising but for the matching funds provision. No Plaintiff, however, has pointed to any specific instance in which she or he has declined a contribution or failed to make an expenditure for fear of triggering matching funds. The record as a whole contradicts many of Plaintiffs' unsupported assertions that their speech has been chilled. Robert Burns admitted he was willing to trigger matching funds and spent as much money as he needed to in order to communicate his message. Dean Martin claimed his speech was chilled by matching funds, but could not even recall whether he had triggered them in the past. Rick Murphy admitted he had never turned a contribution away, and his political consultant testified that he never slowed his fundraising. The Freedom Club PAC's treasurer testified that he has

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approaching 100% before the new campaign finance laws were passed." *Id.*

Two years after it decided *Day*, the Eighth Circuit, recognizing the unusual factual background of that case, declined to extend its reasoning and upheld other provisions of Minnesota's campaign finance law under strict scrutiny. *See Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1555 (8th Cir. 1996). In the case at bench, because the interest Arizona asserts in support of the Act is not "contrived for purposes of this litigation," *Day*, 34 F.3d at 1361, even under current Eighth Circuit law "the circumstances surrounding the enactment of the [Act] make *Day* inapposite." *Rosenstiel*, 101 F.3d at 1555. We decline to follow the Eighth Circuit down a road that even it refused to follow.

never been dissuaded from making an independent expenditure by the possibility of triggering matching funds. Arizona Taxpayers's claim that it declined to speak in the 2006 primary for fear of triggering matching funds seems disingenuous in light of the fact that it only had $52.72 cash on hand. Plaintiffs have not demonstrated that any chilling effect exists. Their own experiences campaigning under the Act highlight that it "in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures." *Daggett*, 205 F.3d at 464.

Plaintiffs bemoan that matching funds deny them a competitive advantage in elections. The essence of this claim is not that they have been silenced, but that the speech of their opponents has been enabled. We agree with the First Circuit that the First Amendment includes "no right to speak free from response – the purpose of the First Amendment is to secure the widest possible dissemination of information from diverse and antagonistic sources." *Id.* (internal quotations omitted).

Plaintiffs' assertions that they have delayed making certain expenditures in order to avoid triggering matching funds to their opponents until later in the campaign cycle is evidence that they continue to seek strategic advantages under the Act, but does not support the argument that their speech has been chilled. Many campaign finance regulations, particularly disclosure requirements, lead candidates to

engage in such strategic behavior, but this does not make them unconstitutional. As the Court has observed, "the public begins to concentrate on elections only in the weeks immediately before they are held." *Citizens United*, 130 S. Ct. at 895. Consequently, waiting until that time to make campaign expenditures would not necessarily be evidence of coerced behavior. Rather, such decisions likely reflect a rational strategy of maximizing the impact of one's campaign funds.

[6] Although Plaintiffs cannot point to any specific instances in which their speech has been chilled because of the Act, we recognize that under the Supreme Court's jurisprudence, even laws that create only potential chilling effects impose some First Amendment burden. For example, the Supreme Court has held that campaign contribution disclosure requirements and campaign advertisement funding disclosure and disclaimer requirements impose a minimal burden on speech and are therefore subject to intermediate scrutiny. *See Buckley*, 424 U.S. at 64 (disclosure requirements); *Citizens United*, 130 S. Ct. at 914 (disclosure and disclaimer requirements). In *Buckley*, the law at issue required candidates and PACs, as well as some other individuals or groups making political contributions or expenditures, to file disclosure reports with the FEC. 424 U.S. at 63. The Court recognized that these reporting requirements "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id.* at 64. The Court also realized that the public disclosure of

political contributions "will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation." *Id.* at 68. Even though these were "not insignificant burdens on individual rights," the Court analyzed them under intermediate scrutiny rather than strict scrutiny because the disclosure laws "impose no ceiling on campaign-related activities." *Id.* at 64, 68.

Recently, in *Citizens United*, the Court applied the same type of analysis to the BCRA's requirement that political advertisements must state who "is responsible for the content of [certain] advertising." 130 S. Ct. at 913-14. The Court reaffirmed *Buckley's* reasoning that such requirements may impose a cognizable burden under the First Amendment even though they "do not prevent anyone from speaking." *Id.* at 914.

The Court rejected the plaintiffs' arguments that the requirement "decreases both the quantity and effectiveness of the group's speech by forcing it to devote four seconds of each advertisement to the spoken disclaimer." *Id.* at 915. Notably, in the absence of any evidence "of harassment or retaliation," the Court also dismissed the plaintiffs' arguments that the disclosure requirements would "chill donations to an organization." *Id.* at 916.

[7] In this case, as in *Buckley* and *Citizens United*, the burden that Plaintiffs allege is merely a theoretical chilling effect on donors who might dislike

the statutory result of making a contribution or candidates who may seek a tactical advantage related to the release or timing of matching funds. The matching funds provision does not actually prevent anyone from speaking in the first place or cap campaign expenditures. Also, as in *Buckley* and *Citizens United*, there is no evidence that any Plaintiff has actually suffered the consequence they allege the Act imposes. We conclude that the burden created by the Act is most analogous to the burden of disclosure and disclaimer requirements in *Buckley* and *Citizens United*. Following the Supreme Court's precedents in those cases, because the Act imposes only a minimal burden on fully protected speech, intermediate scrutiny applies.

[8] Examining the matching funds provision under intermediate scrutiny, because there is a "'substantial relation'" between the Act's matching funds provision and a "'sufficiently important' governmental interest," we conclude that it does not violate the First Amendment. *See Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*). The State has a sufficiently important interest in preventing corruption and the appearance of corruption. *See Citizens United*, 130 S. Ct. at 909. The record demonstrates that Arizona has a long history of *quid pro quo* corruption. AzScam, in which legislators literally sold their votes for cash bribes, was just one of many substantial, wide-spread, and highly-publicized political scandals that Arizona experienced in the late 1980s and 1990s. These incidents occurred despite the contributions

limits in place prior to the Act. Regardless of whether *quid pro quo* corruption continued to be a problem at the time of the Act's passage, the appearance of *quid pro quo* corruption to the electorate was undeniable. Arizona voters were justified in concluding that contribution limits alone were not sufficient to combat corruption and its appearance. As the Supreme Court has recognized, the State's interest in eradicating the appearance of *quid pro quo* corruption to restore the electorate's confidence in its system of government is not "illusory," it is substantial and compelling. *See Buckley*, 424 U.S. at 26-27.

Furthermore, the State has an interest in providing matching funds to encourage participation in its public funding scheme. Because *Buckley* held that public financing of elections furthers First Amendment values, federal courts have found that states may structure them in a manner which will encourage candidate participation in them. *See, e.g., Rosenstiel*, 101 F.3d at 1553 ("the State has a compelling interest in stimulating candidate participation in its public financing scheme"). The Eighth and First Circuits have found this interest to be so compelling as to withstand even the strictest scrutiny.[10] *See id.*; *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39-40 (1st Cir. 1993) (finding that the state has a "compelling"

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[10] Because we hold that the Act is subject only to intermediate scrutiny, we need not decide whether the Act would survive strict scrutiny, as the First and Fourth Circuits have held with respect to public financing schemes similar to the Act.

interest in "having candidates accept public financing").

The district court misapprehended how the Act functions to reduce corruption. It assumed that the Act works by reducing nonparticipating candidates' incentive to fundraise private contributions, thereby reducing the appearance of corruption among nonparticipating candidates. Thus, it concluded that the Act did not further an anticorrpution interest by providing matching funds to participating candidates triggered by non-participating candidates making contributions to their own campaigns from their own private funds. In doing so, it relied on the Court's holding that "discouraging use of personal funds[ ] disserves the anticorruption interest." *Davis*, 128 S. Ct. at 2773.

The fact is, however, that the Act is aimed at reducing corruption among participating candidates. The relevant inquiry thus is whether matching funds bear a substantial relation to reducing corruption among participating candidates. In exchange for public funding, participating candidates relinquish their right to raise campaign contributions from private donors. They therefore have both reduced opportunities and reduced incentives to trade legislative favors for financial favors. The Supreme Court has held "[i]t cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest." *Buckley*, 424 U.S. at 96.

Viewing the Act from this perspective, it is clear that the Act's anticorruption interest is further promoted by high participation in the program. The more candidates that run with public funding, the smaller the appearance among Arizona elected officials of being susceptible to *quid pro quo* corruption, because fewer of those elected officials will have accepted a private campaign contribution and thus be viewed as beholden to their campaign contributors or as susceptible to such influence.

It is not relevant under this analysis what the source of a nonparticipating candidate's campaign contributions is when he or she triggers matching funds. In order to promote participation in the program, and reduce the appearance of *quid pro quo* corruption, the State must be able to ensure that participating candidates will be able to mount competitive campaigns, *no matter what the source of their opponent's funding*. If matching funds were not triggered by independent expenditures or expenditures from a nonparticipating candidate's own funds, the Act's public funding plan would not attract participants. It would be an enormous political risk to participate in such a system.

In this way, matching funds bear a substantial relation to the State's anticorruption interest. A public financing system with no participants does nothing to reduce the existence or appearance of *quid pro quo* corruption. If participants were not given matching funds, they would not join the program because they would not be viable candidates in their elections.

If the State were to adopt the district court's recommendation of structuring matching funds by tying them "solely to contributions made by third parties to a candidate," it would have the effect of deterring the participation of any candidate who feared she or he might have an opponent who was able to self-finance or would be the beneficiary of large independent expenditures. This would substantially diminish the Act's ability to attract participants, thereby undermining its ability to prevent corruption.

[9] In contrast, if the Act were to raise the amount of its lump-sum grants and do away with matching funds altogether, it would make the Act prohibitively expensive and spell its doom. By linking the amount of public funding in individual races to the amount of money being spent in these races, the State is able to allocate its funding among races of varying levels of competitiveness without having to make qualitative evaluations of which candidates are more "deserving" of funding beyond the base amounts provided to all publically-funded candidates. The State must walk a fine line between providing too much and too little funding to participating candidates, and we cannot conclude that the Act's matching funds provision has failed in this effort.

V. Conclusion

[10] For the reasons set forth above, we conclude that the matching funds provision of the Act does not violate the First Amendment. We decline to

reach the equal protection claim, and reverse and remand to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

KLEINFELD, Circuit Judge, concurring:

I concur. My reasoning is slightly different. In my view, the historical and policy considerations do not matter to the outcome. Although the complaint asserts both a facial and an as-applied challenge, the district court injunction and the arguments amount to a facial rejection of the statute.

The fact that matters is that the Arizona public financing scheme imposes no limitations whatsoever on a candidate's speech. *Davis v. Federal Election Commission*[1] is easily distinguished because there the scheme did indeed impose a limit on the candidate's speech, at least indirectly. If the candidate spent too much of his own money promoting his political position, then his opponent would benefit from a tripled contribution limit per donor.[2] The Arizona scheme does not manipulate the limits on private donors' contributions according to whether a competing candidate is participating in the government funding

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[1] 128 S.Ct. 2759 (2008).

[2] *Id.* at 2766.

scheme. Had it done so, *Davis* would apply by analogy.

Other circuits have divided on whether schemes like Arizona's violate the First Amendment.[3] The Supreme Court cited with apparent approval the Eighth Circuit decision,[4] which may be contrary to the view we take today. But as the majority correctly says, it is not clear that the Supreme Court meant to adopt the Eighth Circuit view, and *Davis* did not require the Court to address a scheme like the one addressed by the Eighth Circuit.

I doubt that the level of scrutiny or risk of corruption matter in this case. The Arizona public financing scheme's matching funds provision imposes no limit at all on contributions or expenditures for one's own campaign. The limits are separate from the public financing scheme and not challenged. The

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[3] *Compare N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008) (holding that matching funds to publicly funded candidates that trigger based on contributions and expenditures for privately funded candidates do not impose any burden on First Amendment rights) *and Daggett v. Comm'n on Gov'tal Ethics and Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000) (same) *with Day v. Holahan*, 34 F.3d 1356, 1360-62 (8th Cir. 1994) (holding that providing additional public funds in response to independent expenditures advocating for a privately financed candidate burdens the speech of the independent advocacy groups, subjecting the law to strict scrutiny, and striking it down).

[4] *Davis*, 128 S.Ct. at 2772.

plaintiffs do not challenge the contribution limits.[5] Contribution limits are what invoke corruption and level of scrutiny considerations.

Plaintiffs challenge not contribution limits, but the benefits that the public financing scheme gives to participating candidates running against privately financed candidates and the strategic concerns the scheme creates for privately financed candidates. Because the challenged scheme imposes no contribution or spending limits, it does not restrict speech at all, so I cannot see why heightened scrutiny would apply.[6] All that the evidence shows is that candidates who forego public funding make strategic decisions in response to the public funding scheme.[7] That is not a restriction on speech. Intelligent, ambitious people seeking political office, or any other goal, are likely to study the rules and develop strategies taking maximum advantage of the rules. The kinds of strategic

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[5] Contribution limits are imposed by Arizona Revised Statutes § 16-905. Part of the referendum that created Arizona's public funding scheme alters the contribution limits by providing new rules for participating candidates, § 16-941(A), and uniformly decreasing the contribution limits for nonparticipating candidates, § 16-941(B). The complaint does not allege that either § 16-905 or § 16-941 is unconstitutional. It alleges that § 16-952, the matching funds provision of the referendum, is unconstitutional. Section 16-952 does not impose contribution limits.

[6] *Accord N.C. Right to Life*, 524 F.3d at 437; *Daggett*, 205 F.3d at 464.

[7] *N.C. Right to Life*, 524 F.3d at 438; *Daggett*, 205 F.3d at 464.

choices generated by the Arizona rules do not differ in kind from the choices presented to candidates by other election laws. For example, candidates will run their campaigns differently according to whether there is a fixed election day or an extended period for mail-in ballots, at large elections of multiple candidates in one district or single winner elections in multiple smaller districts, or partisan or nonpartisan elections. That different laws generate different strategies does not make them restrictions on speech.

The only speech-related concern I can see to the Arizona scheme is that a privately funded candidate has to raise a lot more money to swamp a publicly funded candidate. Someone not serious about politics, but serious about traveling, eating meals, and seeing his picture on billboards and in the newspapers for months, all at taxpayer expense, might pose a genuine challenge to a privately funded candidate, unless that candidate could raise funds well beyond the ceiling in the public funding scheme. If the notion is that campaign contributions amount to disguised bribery, I suppose this might mean the Arizona scheme would promote rather than inhibit corruption. But it is hard to see the materiality of that because contribution limits have not been challenged, and all the corruption theory has been used to justify in First Amendment law is contribution limits. As for the privately funded candidate, his or her speech is not limited by this increased burden of fundraising. Rather, his chances of winning are inhibited if he makes an incorrect judgment about whether he is

going to be able to raise enough money to swamp the publicly funded candidate. But the First Amendment does not protect the candidate's interest in winning, just his interest in being heard. There is no First Amendment right to make one's opponent speak less,[8] nor is there a First Amendment right to prohibit the government from subsidizing one's opponent,[9] especially when the same subsidy is available to the challenger if the challenger accepts the same terms as his opponent.[10]

As for the practical effects of the Arizona scheme, I have no idea whether they are good or bad, and nothing in the record throws any light on whether the good outweighs the bad or vice versa. Intent and motivation do not show effect, because the unintended effects of reform frequently outweigh the intended effects. Nor does it matter whether the scheme is a good or bad one, for First Amendment purposes. Arizona is entitled to make good or bad laws so long as they do not violate the Constitution.

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[8] *See Daggett*, 205 F.3d at 464.

[9] *Cf. Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998) (holding that the National Endowment for the Arts may decide who to subsidize based on aesthetic value of artworks because a subsidy is not a regulation on who can speak).

[10] *Cf. Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829-30 (1995) (holding that a public university must make its printing facilities available to all qualifying student publications regardless of viewpoint).

Since this law does not limit speech, it does not violate the First Amendment.

Perhaps public funding is good because it helps candidates run for office without relying on contributions from people who will want something in return. Perhaps it is bad because in a state with a large electorate and mass media, large contributors are the only people involved who know a candidate, and their money gives the public the benefit of what amounts to quality screening by people who actually know the candidate. As for the notion that contributions amount to bribery, at least when they are large, that may be so, or it may be that large contributions amount to protection money that those especially vulnerable to government power pay to those they fear will wield it. Perhaps both, or neither, is true. Doubtless many contributions result from contributors' beliefs about who will provide good government, and gratitude to those willing to accept elected office and competent to discharge it well. None of this matters to this case. The only significance of the corruption concern to First Amendment law is that in *Buckley v. Valeo*, the concern was used to justify a limit on contributions to campaigns.[11] Since the case before us does not involve a contribution limit or any other burden on speech, the concern is immaterial.

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[11] 424 U.S. 1, 25-26 (1976) (per curiam); *see also Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 901 (2010).

In sum, the Arizona public financing scheme does not limit speech directly or indirectly. The only Supreme Court case touching at all closely upon the issues is *Davis*, and *Davis* has to be distinguished because the scheme in that case affected contribution limits and this scheme does not. No Ninth Circuit case speaks to the constitutionality of the Arizona scheme or anything like it. Our sister circuits are divided. Accordingly, I conclude that Arizona is not constitutionally barred from using the scheme before us.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

John McComish, et al.,	)	No. CV-08-1550-PHX-ROS
Plaintiffs,	)	**ORDER**
vs.	)	
Jan Brewer, et al.,	)	
Defendants.	)	

This case involves claims by Plaintiffs that the campaign finance regime adopted by the State of Arizona violates their free speech and equal protection rights. In short, Plaintiffs believe the campaign finance regime violates their rights because the state provides additional funds to publicly-funded candidates in the event non-publicly-funded candidates exceed certain campaign expenditure and fundraising limits. As set forth below, the regime burdens Plaintiffs' First Amendment rights, is not supported by a compelling state interest, is not narrowly tailored, and is not the least restrictive alternative.

The four cross motions for summary judgment were filed in June 2009. The parties filed responses and replies in July 2009. Beginning in late July, and continuing through September 2009, the parties made various filings regarding supplementing the record and submission of supplemental authority. In October the Court directed additional briefing on crucial issues not addressed in the parties' original submissions. The additional briefing was not complete

until mid-November. In December 2009 the parties continued to submit additional filings, and in January 2010 Plaintiffs filed a second motion for preliminary injunction. The Court ordered expedited briefing on that motion as well as supplemental briefing on the appropriate scope of available remedies.

The record in this case is unusually large and complicated. The summary judgment briefing consists of more than one hundred separate docket entries, many of which consist of multiple documents and hundreds of pages. Given the complicated nature of this case, the Court deemed it prudent to review in great detail the parties' submissions before issuing its ruling. This ruling is issued less than two months after the parties submitted the supplemental briefing.[1]

BACKGROUND

1. Passage of Clean Elections Act

The November 1998 election contained the initiative measure known as the Citizens Clean Elections Act ("Act").[2] According to the findings and declarations

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[1] The District Court hearing the *Davis* matter took approximately ten months to issue its opinion, and it took the Supreme Court just under one year to issue its opinion.

[2] Defendants' briefing recounts various episodes of corruption in Arizona's state government allegedly leading up to passage of the Act. Plaintiffs concede the episodes occurred, but disagree that they were the driving force for passage of the Act. From the record presented in the context of what constitutes

(Continued on following page)

contained in that initiative, the intent of the Act was "to create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech." The proponents of the Act believed the election-financing system in effect at that time suffered from the eight flaws that follow:

> 1. Allowed "elected officials to accept large campaign contributions from private interests over which they have governmental jurisdiction";
>
> 2. Gave "incumbents an unhealthy advantage over challengers";
>
> 3. Hindered "communication to voters by many qualified candidates";
>
> 4. Suppressed "the voices and influence of the vast majority of Arizona citizens in favor of a small number of wealthy special interests";
>
> 5. Undermined "public confidence in the integrity of public officials";
>
> 6. Cost "average taxpayers millions of dollars in the form of subsidies and special privileges for campaign contributors";

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admissible evidence, it is impossible to determine the extent to which the various corruption scandals led to passage of the Act.

> 7. Drove "up the cost of running for state office, discouraging otherwise qualified candidates who lack personal wealth or access to special-interest funding"; and
>
> 8. Required "elected officials spend too much of their time raising funds rather than representing the public."[3]

The voter information pamphlet contained various arguments "for" and "against" passage of the Act. According to the arguments in favor of the Act, "it's money that talks in political campaigns and it threatens the principles of our democracy." Also, "[a] thriving system depends upon solid governance and policies that benefit all of Arizonans, not just a few who can afford to 'pay to play.'" And "[p]olls reveal that a lack of confidence in government is a major factor" why individuals choose not to vote. Voting in favor of the Act would "end the money chase, halt corruption, limit campaign spending and reduce special interest influence." Voting in favor of the Act would also "make sure that no lobbyist or special interest can again 'buy' a candidate as they are doing now."

The arguments against the Act in the voter information pamphlet claimed it would levy "a host of new taxes, create[ ] a new level of bureaucracy,

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[3] This information is taken from the Ballot Propositions Publicity Pamphlet for the 1998 General Election. Available at http://www.azsos.gov/election/1998/Info/PubPamphlet/Cover.htm]

provide[ ] taxpayer funds for fringe candidates, punish[ ] candidates who don't want to use taxpayer funds, and limit[ ] free speech." The opponents believed tax dollars should be saved "for education and the safety of [their] children" instead of wasted on "wacky candidates." The Act passed with approximately 51% of the vote.

2. Operation of Act

The Act, as currently constituted, provides a voluntary system of campaign financing in which all candidates for public office must decide whether to be a "participating candidate" or a "non-participating candidate." Participating candidates must collect a certain number of five-dollar "qualifying contributions." Once a participating candidate collects the minimum number of "qualifying contributions," he or she receives an initial grant for the primary. During the primary campaign, the participating candidate will receive additional funds in the form of "matching funds" if the participating candidate has a non-participating opponent that spends more than the initial grant.[4] The participating candidate will also receive matching contributions if there are "independent

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[4] "Matching funds" are a dollar for dollar match minus 6% meant to compensate for the fundraising expenses incurred by traditional candidates. A.R.S. § 16-952(A). The parties use the terms "matching contributions" and "matching funds" interchangeably. This opinion will use matching funds.

expenditures"[5] against the participating candidate or in favor of the non-participating opponent. Participating candidates cannot raise or spend money in addition to the grant.

In the general election, a participating candidate receives a second initial grant. Matching funds are awarded if the non-participating candidate's receipts (i.e. contributions), less expenditures made during the primary campaign, exceed the second initial grant. Independent expenditures trigger matching funds in the general campaign the same way they triggered matching funds in the primary campaign. Matching funds cap out at three times the applicable spending limit. Independent expenditures by Political Action Committees[6] ("PACs") made on behalf of a candidate – non-participating or participating – or in opposition to the participating opponent also count towards the spending limit.

Based on this structure, a candidate is faced with the initial choice of whether to participate in public funding. If the candidate decides not to participate in

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[5] "Independent expenditures" are defined as "expenditures by a person or political committee, other than a candidate's campaign committee, that expressly advocates the election or defeat of a clearly identified candidate, that is made without cooperation or consultation with any candidate or committee or agent of the candidate and that is not made in concert with or at the request or suggestion of a candidate, or any committee or agent of the candidate." A.R.S. § 16-901(14).

[6] Political Action Committees are groups organized "for the purpose of influencing the result of any election." A.R.S. 16-901.

public funding, he or she must determine how much money to spend on the race and how much time to engaged in seeking fundraising. Assuming the candidate has a publicly funded opponent, the candidate's expenditures and fundraising may result in additional funds granted to that opponent. Those additional funds, however, are limited. Once a non-participating candidate has raised or spent more than three times the initial grant, no additional matching funds will be given to the participating opponent. Simply, there are no consequences once a non-participating candidate has raised or spent more than three times the initial grant.

3. Participation in and Consequences of Act

The Act has been in place for the past five elections.[1] Since 2002, candidate participation has varied between 52% and 67%. (Doc. 293 at 3). The parties disagree on whether the Act has had an impact on total campaign spending. It is undisputed that campaign spending has increased since the Act's passage, but it is unclear whether that increase can be traced to the Act. The parties also disagree on whether candidates' spending patterns show the Act has any effect on candidate behavior. Defendants assert the spending patterns of candidates prove the Act has no chilling effect. According to Defendants, if the Act truly is chilling speech, one would expect to find

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[1] The Act applies to elections for statewide offices.

candidates spend just up to but no more than the spending limit. In other words, candidates would attempt to spend the maximum amount they are able to spend without triggering matching funds. Aggregate statistics show candidates do not do so. But this evidence does not dispose of Plaintiffs' claims that their speech was chilled and will be chilled. For example, some of the Plaintiffs triggered matching funds. Those individuals now claim they would have spent more or spent at a different time if matching funds were not a possibility.[5] Accordingly, the evidence regarding candidate spending does not definitively establish a chilling effect, or lack thereof.

4. Plaintiffs' Statements Regarding Burden of Act

Plaintiffs and Plaintiff-Intervenors are incumbents, past or future candidates for office, and Political Action Committees ("PACs"). Plaintiffs were asked during discovery to explain how the Act burdens their rights. Plaintiffs' testimony is somewhat scattered and shows only a vague interpretation of the burden of the Act. Evidence regarding each Plaintiff is recounted below.

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[5] Other Plaintiffs did not spend enough to trigger matching funds, and it does not appear that they stopped spending just short of the point where matching funds would be awarded.

a. John McComish

Plaintiff John McComish is a member of the Arizona State House of Representatives who plans on running for reelection in 2010. In 2008, Mr. McComish ran as a non-participating candidate. (Doc. 316). In the 2008 election, Mr. McComish had at least three participating opponents. Those opponents received matching funds based on Mr. McComish's expenditures as well as expenditures by third parties. Mr. McComish claims the Act requires him to take steps to minimize the impact of matching funds. Mr. McComish does this "by refraining from making campaign expenditures that [he] would otherwise make . . . or by adopting a tactic of delaying [his] expenditures in such a manner as to minimize the benefit any participating candidate may receive from matching funds." This, according to Mr. McComish, "amounts to self-censorship because [he] will refrain from engaging in communication at times and in manners that [he] would otherwise choose in order to avoid disseminating viewpoints that are hostile to [his] candidacy." (*Id.* at 5).

Mr. McComish also believes matching funds "discriminate against traditional candidates." (Doc. 316 at 5). This "discrimination" allegedly occurs when a non-participating candidate triggers matching funds to his opponents. The Court is unable to conceive of how an award of matching funds "discriminates" against McComish. Discrimination in a general sense requires that two individuals or groups be treated differently by the government. Mr. McComish and the

other Plaintiffs mentioned below have not explained how they have been legally disfavored by the government in comparison to participating candidates.

b. Nancy McLain

Plaintiff Nancy McLain is a member of the Arizona House of Representatives and plans on running for reelection in 2010. During the 2008 primary election, Ms. McLain triggered the award of matching funds to an opponent. (Doc. 317 at 4). Independent expenditures, allegedly aiding Ms. McLain, triggered additional matching funds. During the most recent general election, Ms. McLain had two participating opponents. The presence of these opponents made her "reluctant to fundraise . . . or personally contribute or loan money to [her] campaign." Ms. McLain did not trigger matching funds for the general election. In the future, Ms. McLain plans on minimizing her fundraising and spending, or altering the mode of her fundraising and spending, to lessen the impact of any matching funds. Thus, matching funds allegedly require that Ms. McLain engage in "self-censorship."

Like Mr. McComish, Ms. McLain claims matching funds constitute a "discriminatory legal framework." Again, it is unclear what type of discrimination Ms. McLain believes is at issue.

c. Tony Bouie

Tony Bouie is a non-participating candidate for the Arizona House of Representatives. During the 2008 primary campaign, Mr. Bouie had participating and non-participating opponents. Mr. Bouie and his non-participating opponent both exceeded the spending limit during the primary campaign. Thus, the participating opponent received matching funds. Mr. Bouie claims his "speech was chilled from the moment [he] understood the general idea of matching funds." (Doc. 318). Mr. Bouie ceased "the promotion of [his] campaign and [held his] campaign speech until [his] expenditures could be timed[9] to minimize the impact of matching funds provisions." The Act caused Mr. Bouie to "self-censor until the last days of the election rather than sending out mailers, making auto calls, and passing out information door-to-door."

d. Dean Martin

Dean Martin is the current Arizona State Treasurer and was elected to the State Senate in 2000, 2002, and 2004. (Doc. 288-2 at 4). In each of his campaigns, Mr. Martin ran as a non-participating candidate. Mr. Martin claims during his most recent campaign he "was forced to limit [his] speech and abide by the Act's expenditure limits or risk being

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[9] Delaying expenditures as much as possible minimizes the impact of matching funds because the participating opponent will not have time to spend the matching funds.

further outspent by [his] government-funded opponent because of the operation of the Act." (Doc. 288-6 at 113). Mr. Martin states "[t]he only way [he] could avoid being massively outspent by [his] opponent was to prevent the triggering of additional matching funds to [his opponent's] campaign." (*Id.* at 114). Thus, Mr. Martin "stopped accepting contributions to [his] campaign." (*Id.*). Mr. Martin triggered a relatively small amount of matching funds in the 2006 State Treasurer race. (Doc. 362-1 at 22).

Despite Mr. Martin's statement that matching funds forced him to limit his speech, and the fact that Mr. Martin triggered matching funds in 2006, Mr. Martin was unable during his deposition to recall whether he had ever triggered matching funds. (Doc. 309-8 at 3). It follows that if matching funds were a serious concern, Mr. Martin would know whether he had triggered such funds. Mr. Martin also testified he has supported legislation to repeal the Act, and his opposition to matching funds is based, at least in part, on the provision that if you accept government funding "you're not allowed . . . to support your own campaign over a certain amount." (*Id.* at 9). Thus, it appears that Mr. Martin's real focus has been on public funding of elections in general, and not matching funds in particular.

e. Robert Burns

Robert Burns is an Arizona State Senator. Mr. Burns was first elected in 2002, was reelected in

2008, and plans on running in the 2010 election. (Doc. 288-6 at 91). During the 2008 campaign, Mr. Burns, a non-participating candidate, exceeded the matching funds threshold. (Doc. 354 at 7). He claims "the existence of matching funds coerces traditionally funded candidates into changing their message and the timing of getting out their message, even if ultimately the amount of messaging a traditional candidate chooses to engage in does not change."

But Mr. Burns' deposition seems to indicate that matching funds have had little to no impact on his campaign activities. For example, Mr. Burns was unable to state whether he had reduced his campaign communications because of the possibility of triggering matching funds. (Doc. 309-11). In fact, some of his testimony seems to indicate Mr. Burns simply communicated his message to the extent he felt necessary to win. (Doc. 309-11 at 5 "If I had to spend X number of dollars to get out a – a mailer, and I had that amount of money, I would go ahead and do the mailer.").

f. Rick Murphy

Rick Murphy is an Arizona State Representative. Mr. Murphy was elected to the Arizona House in 2004 and was reelected in 2006 and 2008. Mr. Murphy accepted public funds in 2004 but ran as a non-participating candidate in the 2006 and 2008 campaigns. Mr. Murphy now claims he was coerced into accepting public funding for the 2004 campaign, but

the record does not provide an explanation of this coercion.[10] During the 2006 campaign, Mr. Murphy claims he "curtailed [his] speech and curtailed [his] fundraising in order to prevent [matching funds]." (Doc. 362-1 at 79).

g. Arizona Free Enterprise Club's Freedom Club PAC

The Arizona Free Enterprise Club's Freedom Club PAC ("Freedom Club PAC") "is a Candidate Support or Opposition Committee." (Doc. 288-2 at 6). The Act allegedly harms the Freedom Club PAC because matching funds are triggered when it speaks out in favor of certain candidates. (Doc. 288-2 at 21). But the Freedom Club PAC does not make independent expenditures. (Doc. 362-1 at 83). The Freedom Club PAC contributes to Arizonans for a Sound Economy, another PAC, and it is this entity which actually expends funds. The Freedom Club PAC's treasurer stated matching funds have never prevented it from spending money, but matching funds allegedly have altered the timing of certain expenditures. (Doc. 362-1 at 85).

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[10] According to one of Mr. Murphy's campaign consultants, Mr. Murphy was not coerced into accepted public funding. In fact, the consultant believes Mr. Murphy "would not have been elected [in 2004] if Clean Elections did not exist." The consultant reached this opinion because Mr. Murphy was not an incumbent and did not having the contacts necessary to independently raise funds. (Doc. 309-9 at 8).

h. Arizona Taxpayers Action Committee

The Arizona Taxpayers Action Committee ("ATAC") is an Independent Expenditures Committee that was organized in 2006. It claims it "did not speak in opposition to a publicly funded candidate in the District 1 Senate primary race to avoid triggering matching funds to that candidate." (Doc. 288-2 at 7). Defendants counter that the evidence shows no such abstention occurred. Instead, the decision not to spend money was based on the fact ATAC had no money to spend. (Doc. 354 at 9). Based on the unreliable and conflicting evidence, the Court cannot determine which side is presenting the more accurate picture.

ANALYSIS

I. Procedural History

The Court previously denied Plaintiffs' applications for a temporary restraining order and a preliminary injunction. (Doc. 30, 185). In the ruling denying the preliminary injunction, the Court found that the Clean Elections Act "imposes a substantial burden on the First Amendment right to use personal funds for campaign speech."[11] (Doc. 185 at 10). The Court also found Defendants had not established a compelling state interest justifying that burden. (Doc.

[11] The prior rulings did not address the precise nature of the burden allegedly imposed upon Plaintiffs. As explored below, identifying the burden is more difficult than that alluded to by the prior rulings.

185 at 14). The preliminary injunction was denied, however, because of the "extraordinary balance of the harms required in the context of an ongoing election." (Doc. 185 at 18). The parties have now completed discovery and have filed motions for summary judgment.

II. Standard For Summary Judgment

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

III. Proper Standard of Review

The first disagreement between the parties is the proper standard of review. According to the Ninth Circuit, if the Act "places a severe burden on fully protected speech and associational freedoms," the court must apply strict scrutiny. *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934, 938 (9th Cir. 2002). But if the Act "places only a minimal burden on fully protected speech and associational freedoms, or if the speech and associational freedoms are not fully protected under the First Amendment,

[courts] apply a lower level of constitutional scrutiny." *Id.* Thus, the proper standard of review depends upon two inquiries. First, what type of speech is at issue? And second, is that speech being burdened?

A. Type of Speech

Based on longstanding Supreme Court precedent, there is an important distinction between contributions and expenditures. Contributions are not considered "to be fully protected political speech." *Lincoln Club of Orange County*, 292 F.3d at 938. Instead, "contributions are merely speech by proxy," and do not merit full protection. *Id.* Expenditures, however, are recognized as fully protected speech. Candidates have a "First Amendment right to engage in unfettered political speech," such as the expenditure of their personal funds. *Davis v. Federal Election Comm'n*, 128 S. Ct. 2759, 2771 (2008). Thus, if the Act is seen as burdening contributions, it will be subject to a lower level of scrutiny; if the Act is seen as burdening expenditures, it will be subject to a higher level of scrutiny; and if the Act is seen as a burden on both expenditures and contributions, the higher level of scrutiny is appropriate. *Lincoln Club of Orange County*, 292 F.3d at 938 (applying strict scrutiny to provision regulating both contributions and expenditures).

Defendants argue the Act "is fundamentally a restriction on contributions." (Doc. 382 at 6). This is an oversimplification. For a primary campaign,

matching contributions are explicitly tied to a candidate's "expenditures." While those expenditures might consist of a candidate spending contributions from third parties, it is possible for a candidate to trigger matching funds during the primary based on his or her expenditure of personal funds. For the general campaign, matching funds are dependent on "contributions," but the expenditure of personal funds is also defined as a "contribution." Accordingly, the Act has the ability, if not always the effect, of regulating expenditures in both the primary and general campaigns. The Act's burden must be evaluated in terms of potentially affecting "fully protected speech." *Lincoln Club of Orange County*, 292 F.3d at 938.

B. Level of Burden

According to Plaintiffs, matching funds place a "drag on campaign speech." (Doc. 297 at 15). That drag is present because "Matching Funds cause the vigorous exercise of First Amendment rights by Plaintiffs, political action committees and their supporters to produce fundraising advantages for their opposing government-subsidized candidates." (*Id.*) In other words, Plaintiffs allege they will refrain from raising funds or spending their personal monies to prevent participating candidates from receiving matching funds. This, according to Plaintiffs, is a severe burden on their free speech rights. Plaintiffs' argument relies in large part on the Supreme Court's recent decision in *Davis v. Federal Election Commission*, 128 S. Ct.

2759 (2008). While *Davis* is instructive, it does not answer the precise question now before the Court.

In *Davis*, the Supreme Court addressed the so-called "Millionaire's Amendment" contained in the federal Bipartisan Campaign Reform Act of 2002. According to that amendment, when a candidate's expenditure of personal funds exceeded $350,000, the candidate's opponent became eligible to accept contributions from individuals at treble the normal limit. The opponent also became eligible to accept unlimited "coordinated party expenditures," *i.e.* expenditures by national or state political party committees. The Supreme Court concluded the amendment "requires a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations." The discriminatory fundraising limitations constituted the "special and potentially significant burden" of conferring a "fundraising advantage[ ] for opponents in the competitive context of electoral politics." *Id.* at 2772.

In some respects the burden Plaintiffs allegedly suffer in this case is analogous to the burden in *Davis*. Plaintiffs submit evidence that they have felt "chilled" and that but for the matching provisions they would have spent or will spend more money on campaigns. Thus, it appears that in Plaintiffs' view, the "burden" is that an exercise of their First Amendment right to spend as much as they wish will result in Arizona conferring an additional benefit on publicly-financed candidates. Those candidates

presumably will spend the matching funds, *i.e.* generate more speech. In other words, the "burden" created by the Act is that Plaintiffs' speech will lead directly to more speech. Given that the purpose of the First Amendment is to "secure the widest possible dissemination of information from diverse and antagonistic sources," it seems illogical to conclude that the Act creating more speech is a constitutionally prohibited "burden" on Plaintiffs. *Buckley v. Valeo*, 424 U.S. 1, 49.

Another strange aspect of the alleged burden is that public financing of elections is permitted by the Constitution. If the Act provided for a single lump sum award, instead of incremental awards, the law would fall squarely within the regime blessed in *Buckley* and reaffirmed in *Davis*. Presumably the Act would also be permissible if the incremental awards were linked to some occurrence other than a non-publicly financed candidate's speech. Thus, Plaintiffs are left to argue their First Amendment rights are violated not by the fact of public financing, or the level of that financing, but by the fact that Arizona provides incremental grants linked to their activities. If a single lump sum award[12] would not burden Plaintiffs' free speech rights in any cognizable way, finding

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[12] Based on the practical realities, this entire case only makes sense under the assumption that single lump-sum awards are not fiscally possible. No rational candidate would prefer a system wherein his opponents receive the maximum award in a single lump sum instead of incremental awards.

a burden solely because of the incremental nature of the awards seems difficult to establish.[13]

Despite the unsettling nature of Plaintiffs' claims, *Davis* requires this Court find Plaintiffs have established a cognizable burden. Plaintiffs face a choice very similar to that faced in *Davis*: either "abide by a limit on personal expenditures" or face potentially serious negative consequences. In *Davis*, the negative consequence was having one's opponent subject to higher contribution limits. Here, the negative consequence is having one's opponent receive additional funds. "Arguably the benefit conferred by [matching funds] is more constitutionally objectionable than increasing an opponent's individual contribution limits. In the latter scenario, the opponent must still go out and raise the additional contributions . . . [Matching funds], by contrast, ensure[ ] that there will be additional money to counteract the excess expenditures by the non-participating candidate. . . ." *Green Party of Connecticut v. Garfield*, 2009 WL

[13] Using the amounts available for a general election for a legislative candidate as an example, the spending limit is $19,382. Once a non-participating candidate spends more than that amount, the participating opponent receives dollar-for-dollar matching funds, up to a maximum of approximately $54,000. Arizona could award an initial grant of $54,000 to each legislative candidate who opted for public financing, and this award would constitute no constitutionally prohibited "burden" on Plaintiffs' rights. Thus, Plaintiffs' argument is that an award under the current regime of $25,000 (the initial grant plus some matching funds) violates their rights, but an award of twice that amount (not based on matching funds) would not.

2730525, at *67 (D. Conn. 2009). Accordingly, if the statute in *Davis* constituted a burden, matching funds must also constitute a burden.[14]

Determining that matching funds constitute a cognizable burden does not end the inquiry. The weight of that burden must also be assessed. Unfortunately, *Davis* provided no guidance on how the statute at issue constituted a "substantial burden" on

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[14] The pre-*Davis* precedents from other circuits no longer appear valid. In analyzing North Carolina's matching funds regime, the Fourth Circuit found matching funds impose no burden whatsoever. That court ruled that even with matching funds, candidates "remain[ed] free to raise and spend as much money, and engage in as much political speech, as they desire. They will not be jailed, fined or censured if they exceed the trigger amounts." *N. Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008). The distribution of matching funds "furthers, not abridges, pertinent First Amendment values by ensuring that the participating candidate will have an opportunity to engage in responsive speech." *Id.* Of course, the same rationale could apply to the statute at issue in *Davis*, but the Supreme Court decided otherwise. The First Circuit also concluded matching funds pose no burden. *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000). In so holding, that court found plaintiffs had "misconstrue[d] the meaning of the First Amendment protection of their speech. They have no right to speak free from response . . . [t]he public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures." *Id.* Again, this holding cannot be reconciled with *Davis*. If the mere *potential* for your opponent to raise additional funds is a substantial burden, the granting of additional funds to your opponent must also be a burden.

the plaintiffs' rights. After explaining its holding that discriminatory fundraising limitations constituted a burden, the *Davis* court jumped to the conclusion that the burden was "substantial."[15] This *ipse dixit* was announced "without the slightest veneer of reasoning to shield the obvious fiat by which it [is] reached." *Francis v. Henderson*, 425 U.S. 536, 552 (1976) (Brennan, J. dissenting). But the lack of reasoning does not free this Court to ignore the conclusion. If lifting a candidate's opponent's fundraising limitations constitutes a "substantial burden," awarding funds to a candidate's opponent must constitute a "substantial burden" as well. Accordingly, Arizona's matching funds constitute a substantial burden and are permissible only if they are supported by a compelling government interest and are narrowly tailored to achieve that interest.

IV. The Burden Fails Strict Scrutiny

Having found the Act constitutes a substantial burden, Defendants must show the Act is "narrowly tailored to serve a compelling state interest." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990). "Further, 'if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.'" *Video Software Dealers Ass'n v.*

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[15] This was directly contrary to the lower court's factual finding that the Millionaires' Amendment was having no chilling effect. *Davis v. FEC*, 501 F. Supp. 2d 22, 31 (D.D.C. 2007).

Schwarzenegger, 556 F.3d 950, 961 (9th Cir. 2009) (quoting *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000)). The Act does not meet any of these requirements.

A. The Act is Not Supported by a Compelling Interest

Davis states the *only* legitimate and compelling interest is the elimination of corruption or the perception of corruption. Based on earlier cases, the contours of this anticorruption concern are far from clear.[16] But the most recent Supreme Court cases seem to recognize corruption only in the sense of "politicians [being] too compliant with the wishes of large contributors." *Nixon*, 528 U.S. at 389, 390. In other words, the only legitimate anticorruption interest is in preventing the reality or appearance of *quid pro quo* arrangements between politicians and contributors. This type of anticorruption interest supports some aspects of the Act, but it does not support the Act's application to self-financed candidates.

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[16] The Supreme Court has repeatedly *upheld* statutes "designed to protect against the undue influence of aggregations of wealth on the political process." 128 S. Ct. at 2781 (J. Stevens dissent). There is at least an open question whether a state's anticorruption interest includes countering "the corrosive and distorting effects of immense aggregations of wealth" on the political process. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990).

Under the Act, if a candidate wishes to expend his or her own money, that expenditure will trigger the "burden" of matching funds. Defendants have not identified any anticorruption interest served by burdening self-financed candidates' speech in this manner. In fact, the Supreme Court has recognized that "reliance on personal funds *reduces* the threat of corruption" and "discouraging use of personal funds disserves the anticorruption interest." *Davis*, 128 S. Ct. at 2773. Thus, there is no compelling interest served by the Act.

B. The Act is Not Narrowly Tailored

The conclusion that the Act is not serving a valid anticorruption interest also leads to the conclusion that the Act is not narrowly tailored. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 785 (1988). The Act allegedly seeks to target and eliminate the "evil" of the appearance or reality of corruption. But the Act places a burden on a candidate's expenditure of personal funds even though there is no apparent and constitutionally recognized anticorruption interest served by such a restriction. Thus, the Act "significantly restrict[s] a substantial quantity of speech that does not create" the appearance of corruption.[17]

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[17] At oral argument on the motions for summary judgment, Defendants stressed that "[t]he point of matching funds is not to deter self-financing," it is "to incentivize participation in the

(Continued on following page)

Ward v. Rock Against Racism, 491 U.S. 781, 799 n.7 (1989). The Act is not narrowly tailored.

C. The Act is Not the Least Restrictive Alternative

Finally, the Act is not the least restrictive alternative. At the very least, the Act could have been structured such that it does not place a burden on a candidate's expenditure of personal funds. For example, the Act could tie matching funds solely to contributions made by third parties to a candidate. Such a structure would achieve the anticorruption goal recognized by the Supreme Court without burdening a candidate's decision to expend personal funds.

The Act, in its current form, is not supported by a compelling interest, is not narrowly tailored, and is not the least restrictive alternative. The Act is unconstitutional under the First Amendment.

V. Equal Protection Claims

Plaintiffs claim the Act violates their right to equal protection based on participating and nonparticipating candidates being treated "differently with respect to direct expenditures, independent expenditures or contributions made on their behalf."

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public financing system thereby reducing the risk of corruption." But this argument does not answer the narrowly tailored issue in that matching funds present a burden on speech.

(Doc. 1 at 18). Because the Act violates the First Amendment, the Court need not resolve this issue.

VI. Severability

Plaintiffs' stated goal is a declaration that the matching funds portion of the Act violates their right to free speech. (Doc. 260 at 25-26). Matching funds, however, is just one aspect of the Act. The parties apparently believe the matching funds provision can be severed from the Act. There is disagreement, however, on whether portions of the matching funds provision can be severed.

The Court raised the issue of severance prior to the arguments on the summary judgment rulings. The parties were then instructed to brief the issue. In their briefing, Plaintiffs argue severance is not feasible. Defendants counter that severing the link between personal expenditures and matching funds is a relatively straightforward step capable of quick implementation. While Arizona utilizes a very lenient severance standard, the severance now proposed by Defendants is not possible.

"Severability is . . . a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). Pursuant to Arizona law regarding an act enacted by an initiative, "in deciding whether to sever the invalid portion of a measure adopted by popular vote and uphold the remaining, valid portion," a court must "first consider whether the valid portion, considered separately, can operate independently and is enforceable and

workable. If it is, [the court must] uphold it unless doing so would produce a result so irrational and absurd as to compel the conclusion that an informed electorate would not have adopted one portion without the other." *Randolph v. Groscost*, 989 P.2d 751, 755 (Ariz. 1999). The presence of an express severability clause requires "all doubts . . . be resolved in favor of severability."[18] *Citizens Clean Elections Comm'n v. Myers*, 1 P.3d 706, 713 (Ariz. 2000).

During the general election, the Act awards matching funds based on contributions by individuals to a candidate, a candidate's expenditure of personal funds, and expenditures by a person or political committee advocating the election or defeat of a specific candidate and made without the cooperation of the candidate. A.R.S. § 16-952. As decided above, the application of matching funds to personal expenditures is unconstitutional because Defendants have no valid interest in burdening these expenditures. Defendants may, however, have a valid interest in burdening independent expenditures and contributions by individuals to candidates. Thus, Defendants argue the Court should prohibit matching funds based on personal expenditures but permit matching funds

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[18] The Act contains a very broad severability clause that states, in relevant part, "[i]f a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application." A.R.S. § 16-960.

based on contributions and independent expenditures.

Severance requires the portion remaining be "enforceable and workable." *Randolph*, 989 P.2d at 755. Inherent in this test is the requirement that severance can occur only when the remaining portion is workable *without further action* by the State. For example, in *Myers*, the Arizona Supreme Court was presented with the issue of whether it could sever a portion of the Act regarding the appointment of members of the citizens clean election commission. *Myers*, 1 P.3d at 712. As originally drafted, the Act required the commission on appellate court appointments nominate the candidates for the commission. The Arizona Supreme Court found the Act expanded the duties of the commission on appellate court appointments in a manner "inconsistent with the Arizona Constitution." *Id.* Therefore, the court invalidated that portion of the Act, essentially excising it. Next, the court concluded that severing all references to the commission on appellate appointments did not materially impact the operation of the Act. Upon severance, the Act remained fully operational. That is, the Act was workable without *any* statutory or regulatory changes. The situation here is different.

Were this Court to sever certain portions of the matching funds provision, Defendants concede various regulatory changes would be required. Without these changes, the Act would not be enforceable and workable. Defendants expended considerable effort in supplemental briefing, including attaching a

proposed revised regulation, to persuade the Court that severance is uncomplicated. But these efforts did not meet the mark. As illustrated by Plaintiffs, severance would raise a variety of issues that would require administrative intervention to resolve. For example, the regulations governing matching funds would need to be revised to accommodate issues regarding loans obtained by candidates and in-kind contributions by candidates. Defendants agree that such revisions would have to be drafted, presented for public comment, and then submitted to the Department of Justice for approval. The Act, after a limited severance, is not workable absent further action. Thus, the matching funds provision cannot be selectively severed as Defendants propose.

VII. Stay Pending Appeal

Federal Rule of Civil Procedure 62(c) provides that "[w]hile an appeal is pending from . . . [a] final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's right." A court must consider four factors when evaluating a request for a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 129 S. Ct.

1749, 1761 (2009). "There is substantial overlap between these and the factors governing preliminary injunctions," but the tests are different in that the test for a stay appears slightly easier to meet.[19] *Id.*

When deciding whether to grant a stay, "[t]he first two factors . . . are the most critical." *Id.* The first factor – likelihood of success – requires the prospect of success be more than "negligible." *Id.* Although the Supreme Court in *Nken* did not offer elaborate analysis of the first factor, the Court did make plain what the factor was not: it is not enough that the chance of success on the merits be "negligible" or that there is a "mere possibility of relief." *Id.* Here, it is possible the Ninth Circuit will agree with the majority of the other circuits to hear this type of challenge and find no First Amendment violation. This Court believes the *Davis* decision casts grave doubt on the earlier decisions, but there is more than a "mere possibility" the Ninth Circuit will disagree. Similarly, the Ninth Circuit might take a different view regarding permissible severance options. Thus, the Court believes there is a sufficient question regarding the likelihood of success to grant a short stay to allow the Ninth Circuit to bring its considered judgment on the issues.

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[19] Delaying the effective date of the Court's order clearly qualifies as a "stay" in that it will "suspend judicial alteration of the status quo." *Nken*, 129 S.Ct. at 1758 (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986)).

The second factor – possibility of irreparable injury – requires there be more than a mere possibility of injury. *Id.* Defendants will suffer irreparable injury in the absence of a stay. Invalidating matching funds changes the entire election landscape. Once the injunction takes effect, candidates will have to change their election and fundraising strategies. In particular, candidates may begin to collect contributions they would otherwise be prohibited from collecting. Even if the appellate court were to later reinstate matching funds, those candidates would be ineligible to receive the funds. Accordingly, the first two factors weigh in favor of a stay.

"Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. These factors merge when the Government is the opposing party." *Id.* at 1762. Given the Court's finding that the matching funds provision violates the First Amendment, the continued existence of matching funds undoubtedly harms Plaintiffs. But that harm will not be felt in the immediate future. Candidates who wish to raise funds or spend personal monies without the consequence of triggering matching funds may do so while this stay is in effect because no matching funds would be awarded at this time. The third factor weighs in favor of a stay.

Finally, the public interest weighs in favor of allowing the Act to remain in place for a short time while appellate review is sought. Given the substantial impact a change to Arizona's election law will

have, the public has an interest in permitting a brief window for appellate review prior to implementation of that change.

Based on the above factors, a stay of the injunction is appropriate. Granting a stay is in no way meant to derogate the decision that the Act is unconstitutional and that the unconstitutional components of the Act cannot be severed. The discussion of the factors for granting a stay assumes only a brief stay. A stay of any substantial length, such as until the end of the 2010 elections, would not be appropriate. A stay of that length would reverse the factors such that the harm to the Plaintiffs would outweigh other considerations.

The injunction against matching funds will be stayed for ten days to allow Defendants to seek additional relief, such as a stay, from the Ninth Circuit. This ten-day stay is contingent on the Defendants filing a notice of appeal within five days of this Order. If Defendants do not file a notice of appeal within five days, the injunction shall take effect immediately.

Accordingly,

IT IS ORDERED the Motions for Summary Judgment (Doc. 287, 288) are **GRANTED**. Arizona Revised Statutes section 16-952 may not be applied.

IT IS FURTHER ORDERED the Motions for Summary Judgment (Doc. 285, 293) are **DENIED**.

IT IS FURTHER ORDERED the Motion for Leave to File Separate Response (Doc. 373) is **DENIED**.

IT IS FURTHER ORDERED the Motions to File Supplemental Authority (Doc. 393, 399) are **GRANTED**.

IT IS FURTHER ORDERED the Motion for Status Hearing (Doc. 404) is **DENIED**.

IT IS FURTHER ORDERED the Motion for Preliminary Injunction (Doc. 416) and Motion for Hearing (Doc. 418) are **DENIED**.

IT IS FURTHER ORDERED the Clerk shall enter judgment in favor of Plaintiffs.

DATED this 20th day of January, 2010.

/s/ Roslyn O. Silver
Roslyn O. Silver
United States District Judge

(ORDER LIST: 560 U.S.)

TUESDAY, JUNE 8, 2010

ORDER IN PENDING CASE

09A1163 MCCOMISH, JOHN, ET AL. V.
BENNETT, AZ SEC. OF STATE, ET AL.

The application to vacate the stay of the District Court's injunction and to stay the mandate of the United States Court of Appeals for the Ninth Circuit in case No. 10-15165 presented to Justice Kennedy and by him referred to the Court is granted pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN McCOMISH; et al.,
Plaintiffs-Appellees,

and

DEAN MARTIN; et al.,
Plaintiff-intervenors-Appellees,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; et al.,
Defendants-Appellants,

and

CLEAN ELECTIONS INSTITUTE, INC.,
Defendant-intervenor-Appellant.

Nos. 10-15165, 10-15166

D.C. No. 2:08-cv-01550-ROS
District of Arizona, Phoenix

ORDER

(Filed Feb. 1, 2010)

Before: SILVERMAN, PAEZ and BEA, Circuit Judges.

The stay issued by the district court on January 20, 2009 is extended pending further action by the panel assigned to hear the merits of these appeals. *See California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 850 (9th Cir. 2009).

These consolidated appeals are expedited. The briefing schedule is reset as follows. The opening briefs and excerpts of record are due February 9, 2010; the answering brief is due February 16, 2010; and the optional reply briefs are due within 3 days after service of the last-served answering brief.

All parties on a side are encouraged to join in a single brief to the greatest extent practicable.

This case shall be heard during the week of April 12-16, 2010 in San Francisco, California.

BEA, Circuit Judge, dissenting.

I dissent. I agree with the district court's order of January 20, 2010, that this case is determined by *Davis v. Fed. Elec. Com'n*, ___ U.S. ___, 128 S. Ct. 2759 (2008), because state intervention in the funding of campaign contributions in a manner to benefit candidates when their opponents spend their own money on speech imposes a substantial burden on the exercise of the free speech of the candidate who spends his money. In *Davis*, if Davis spent more than $350,000 of his own money in his campaign, the contribution limitations placed on how much others could contribute to his *opponents* were lifted, but not for contributions made by others to Davis. *Id.* at 2766-67. Quite naturally, this was found to be a disincentive to Davis spending money on his own campaign, lest the expenditure serve to give his opponents an advantage not open to him. Such a

disincentive was found to impose a "substantial burden" on Davis' campaign speech which had to be justified under the "strict scrutiny" test. *Id.* at 2771-73.

The primary justification for limiting campaign contributions is to prevent people from giving money to buy influence from politicians. This consideration, however, is not present when a candidate finances his own campaign. *Buckley v. Valeo*, 424 U.S. 1, 23-35, 38, 46-47 and n.53 (1976) (per curiam). In *Buckley*, the Court found a limit on how much money a candidate could spend on his own campaign was not justified by "[t]he primary governmental interest" proffered in its defense, *i.e.*, "the prevention of actual and apparent corruption of the political process." *Id.* at 53. The Court expressly rejected the argument advanced here that the expenditure cap is justified on the ground that it serves an "ancillary interest in equalizing the relative financial resources of candidates competing for elective office." *Id.* at 54 (holding the interest in a level playing field was "clearly not sufficient to justify the . . . infringement of fundamental First Amendment rights.").

Similarly, here any expenditures by Plaintiffs in the primary are matched by funds from the State of Arizona given to the Plaintiffs' opponents. Plaintiffs know that if they buy a television advertisement, at a bargain rate now for June broadcasting, or hire a consultant who might go to the other side, that expenditure will result in "matching funds" going to the candidates they are trying to beat in the July

primaries. Strategically, it makes no more sense for Plaintiffs to spend money now than for a poker player to make a bet if he knows the house is going to match his bet for his opponent.

But, I disagree with Judge Silver and with the majority of this panel that Defendant-Appellants have made a "strong showing" of a probability of success on appeal, which an applicant for a stay pending appeal is required to prove. *Nken v. Holder*, ___ U.S. ___, 129 S. Ct. 1749, 1761 (2009). Just the opposite. It is the Appellee-Plaintiffs who, on the basis of *Davis* and *Buckley*, have made a strong showing of the probability of success.

Further, I disagree with Judge Silver and with the majority of this panel that Defendants have shown the probability of "irreparable injury" to themselves should the stay not be granted, while Plaintiffs have not shown any injury in the immediate future.

That the "entire election landscape" would be changed by effecting the preliminary injunction does not state a particularized harm to any of the Defendants. That the Defendants, as "participating" (state-subsidized) candidates would have to change their fund-raising strategies – perhaps actually to do some fund-raising – does state some direct effect on them. But the "harm" claimed by fund-raising is simply the loss of state subsidies they would otherwise have if they did not raise these funds.

That "harm" is the mirror effect of the harm caused to the Plaintiffs by staying the district court's order. That is, once the stay is in effect, the Plaintiffs cannot expend money for campaign speech from now until the determination of the appeal – perhaps through the primary campaign – without causing money from the State of Arizona to flow to their opponents' coffers in equal measure to the Plaintiffs' expenditures.

In accounting terms, Plaintiffs' present expenditure of money on free speech in the campaign creates an immediate and equal account receivable for their opponents, due from the State of Arizona under the Matching Funds program, and to be paid by Arizona for use by the opponents against the Plaintiffs. Between having to hustle for campaign contributions (Defendant-Appellants' harm) and not being able to spend campaign money without helping one's opponents (Plaintiff-Appellees' harm), the balance of harm caused seems greater to Plaintiffs-Appellees.

Yes, enforcement of the preliminary injunction would have a substantial effect on the Arizona 2010 election. However, change is always uncomfortable for the vested interests – here, that of "participating" candidates who look forward to state subsidies for their campaigns. But where First Amendment free speech interests are involved, the comfort level of those causing the "chilling effect" on speech is irrelevant.

"Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people . . . For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. . . . Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers." *Citizens United v. Fed. Elec. Com'n*, ___ U.S. ___, 2010 WL 183856 at *18-19 (January 10, 2010).

Here, the participating candidates are "preferred" by the State of Arizona because Arizona matches the Plaintiffs' expenditures for speech with public monies which the preferred candidate can spend on speech.

Where, as here, the district court has found the Arizona statute would have a "chilling effect" on the Plaintiffs' free speech, we should respect that factual finding unless it constituted an abuse of discretion. *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc). The district court's finding that the Matching Funds given opponents will inhibit the Plaintiffs from spending their own money for campaign free speech is not (1) illogical, (2) implausible or (3) lacking inferences which can be based in the record. Thus, it is not an abuse of discretion. *Id.*

For these reasons, I respectfully dissent. I would deny the stay, and allow the preliminary injunction to

take effect today, as the 10-day stay granted by the district court expires.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN McCOMISH; et al., Plaintiffs-Appellees, v. KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; et al., Defendants-Appellants, and CLEAN ELECTIONS INSTITUTE, INC., Defendant-intervenor, v. DEAN MARTIN; et al., Plaintiff-intervenors-Appellees.	No. 10-15165 D.C. No. 2:08-cv-01550-ROS District of Arizona, Phoenix

JOHN McCOMISH; et al.,

Plaintiffs-Appellees,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; et al.,

Defendants,

and

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant-intervenor-Appellant,

v.

DEAN MARTIN; et al.,

Plaintiff-intervenors-Appellees.

No. 10-15166

D.C. No. 2:08-cv-01550-ROS District of Arizona, Phoenix

ORDER

(Filed Jan. 29, 2010)

Before: SILVERMAN, PAEZ and BEA, Circuit Judges.

This court sua sponte consolidates appeal Nos. 10-15165 and 10-15166. All parties on a side are encouraged to join in a single brief to the greatest extent practicable. *See* 9th Cir. R. 28-4. The briefing schedule remains unchanged.

Appellees' emergency motion to vacate the temporary appellate stay is denied.

Appellants' emergency motions for a stay pending appeal will be addressed by separate order.

BEA, dissenting.

I would grant appellees' motion to vacate the temporary appellate stay.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

John McComish, et al., Plaintiffs, vs. Jan Brewer, et al., Defendants.	No. cv-08-1550-PHX-ROS **FINDINGS OF FACT AND CONCLUSIONS OF LAW** (Filed Oct. 17, 2008)

The Court has denied Plaintiff's Motion for Preliminary Injunction which sought to block distribution of matching funds to participating candidates under the Citizens Clean Elections Act A.R.S. §§ 16-940 *et seq.*, (the "Act" or "Arizona Act"). Findings of Fact and Conclusions of Law in support of that decision are set forth below.

BACKGROUND

The Citizens Clean Elections Act was approved by voters in 1998. The Act sets up a voluntary system of campaign financing in which candidates who choose to be "participating candidates" may receive funds from the Citizens Clean Elections Fund ("CCEF"). Candidates who elect to participate must collect the required number of $5 "qualifying contributions" from voters registered in their district. If they qualify, they receive a base-level grant from

the Clean Elections fund.[1] *See* A.R.S. §§ 16-941, -945; *see also*, Citizen Clean Elections Commission, "Voter Education Guide" (2008) *available at* http://www.ccec.state.az.us/ccecweb/ccecays/ccecPDF.asp?docPath=docs/2008PrimaryCandidateStatementPamphlet.pdf.

When participating candidates have opponents who are non-participating – "traditional" candidates – they can also receive matching funds. Once a traditional candidate's contributions and expenditures exceed the base-level grant given to participating candidates, her participating opponent or opponents will receive almost dollar-for-dollar matching funds from the CCEF. These funds cap out at three times the applicable spending limit.[2] Independent expenditures by Political Action Committees ("PACs") made on behalf of a candidate – traditional or participating – or in opposition to her participating opponent also count towards the spending limit.

The first section of the statute is entitled "Findings and Declarations," which declares an intent by the people of Arizona "to create a clean elections system that will improve the integrity of Arizona

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[1] Legislative candidates receive $12,921 for the primary and $19,382 for the general election. Corporation Commission candidates receive $82,680 for the primary and $124,020 for the general election.

[2] The matching funds are a dollar-for-dollar match minus 6% meant to compensate for the fundraising expenses incurred by traditional candidates. A.R.S. § 16-952(A).

state government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech under the U.S. and Arizona Constitutions." The provisions lay out a number of findings about the pre-Clean Elections financing system, stating that it:

> 1. Allows Arizona elected officials to accept large campaign contributions from private interests over which they have governmental jurisdiction;
>
> 2. Gives incumbents an unhealthy advantage over challengers;
>
> 3. Hinders communication to voters by many qualified candidates;
>
> 4. Effectively suppresses the voices and influence of the vast majority of Arizona citizens in favor of a small number of wealthy special interests;
>
> 5. Undermines public confidence in the integrity of public officials;
>
> 6. Costs average taxpayers millions of dollars in the form of subsidies and special privilege for campaign contributors;
>
> 7. Drives up the cost of running for state office, discouraging otherwise qualified candidates who lack personal wealth or access to special-interest funding; and

> 8. Requires that elected officials spend too much of their time raising funds rather than representing the public.

Plaintiffs and Plaintiff-Intervenors are candidates for office and a Political Action Committee who argue that these matching funds chill their political speech and are a violation of their First Amendment rights. Plaintiff John McComish is an incumbent candidate for the Arizona State House of Representatives' District 20 running as a traditional candidate. The Arizona Secretary of State has designated McComish's district as a single party dominant district favoring the Republican Party, of which McComish is a member. However, he argues that "[b]oth the Republican and Democratic Party organizations now view [his] district as being a competitive district." There are two seats available in McComish's district; each major party is allowed to nominate two candidates. Thus, McComish is running against both a subsidized Democratic opponent, Rae Waters, and a subsidized Republican opponent, Jeff Dial. As of September 22, 2008, both Dial and Waters had more cash on hand than McComish.

In his affidavit, McComish states that "in the absence of the Clean Elections Act, [he] would certainly amass campaign contributions, personal contributions or personal loans to [his] campaign beginning on September 3, 2008 in excess of $25,000." However, due to the matching fund provisions, he "will certainly neither raise campaign contributions,

contribute to, nor loan [his] campaign any amount more than $14,000 above any applicable general election spending limit." Further, he states "[l]ikewise, I will be more fearful of promoting my candidacy and less active in promoting my candidacy than in the absence of the Clean Elections Act, for fear that my opposing subsidized candidate will receive one dollar for every dollar someone or some organization independently spends to support my campaign." P. Ex. 20. McComish also states that around August 20, 2008, he decided not to spend money on an "auto-dialer" program, which cost about $2,500, to avoid triggering matching funds for his opponent. McComish anticipates triggering matching funds at some point during the general election. P. Ex. 19.

During the primary election, McComish stated that some $6,000 was spent on his behalf as an independent expenditure by the Arizona Realtors Association. McComish has stated that expenditure "hurt more than it helped;" while "the expenditure on [his] behalf was not consistent with what [he] was trying to do . . . [his] opponents received the cash so that they could use it efficiently." The Arizona Realtors Association apparently did not confer with McComish before sending the mailing.

Plaintiff Nancy McLain is the incumbent candidate for the Arizona House of Representative's third district. She is a member of the Republican party who is running as a traditional candidate. She has two participating opponents, Republican Doris Goodale

and Democrat Pamela Durbin, both of whom had more cash on hand than McLain as of September 22nd, 2008. Due to an increase in the number of independent voters in her district, McLain believes that the 2008 general election might be close. Ex. 22, pg. 72. McLain states that "there is no question that . . . my campaign speech will be chilled by the Act's matching funds provision," though she could not identify "specific dollar amounts that [she] will not contribute or loan [her] campaign." She adds:

> I will be made more reluctant to personally contribute or loan money to my campaign than I otherwise would have been in the absence of these provisions, knowing that my opposing participating candidate in the general election, Pamela Durbin, will receive nearly one dollar for every dollar I raise and one dollar for every dollar someone independently spends to support my campaign.

McLain has also stated that she has made the decision not to raise any more funds for the 2008 election, though she is unsure of whether she will return any unsolicited contributions. Ex. 22, pg. 93.

Plaintiff-Intervenor Robert Burns is an Arizona State Senator representing Legislative District 9. He is a traditional candidate running against a participating opponent. Burns states that he is forced to "censor [himself] in order to avoid triggering matching funds to [his] government-funded opponent." Ex. 50. He adds that he "will be forced to stop accepting contributions to [his] campaign to make

sure that [he does] not exceed the Act's expenditure limitations for this race." *Id.* On one occasion, he turned away a contribution check in order to avoid triggering matching funds. Ex. 155, pg. 45. Burns is running in a heavily Republican district that is not one the Democrats tend to heavily target. Ex. 155, pg. 10.

Plaintiff-Intervenor Rick Murphy is an Arizona State Representative representing Legislative District 9. He is running for re-election as a traditional candidate and has three participating opponents. Thus, for every dollar Murphy raises above the spending limit, three dollars will be disbursed to his opponents – one to each participating candidate. As a result, he states, he may "be forced to forgo any fundraising in order to avoid assisting [his] opponents by sending government checks directly to their taxpayer financed campaign war chests." Ex. 51.

The final Plaintiff-Intervenor is the Arizona Taxpayers Action Committee ("ATAC"), an Independent Expenditures Committee that was organized in 2006 and made independent expenditures on behalf of a legislative candidate in a primary election that same year. The group's treasurer states that the group intends to participate in 2008 legislative races, however, "a decision must be made whether to engage in the political speech that represents our donors' interests, but which may aid the very candidate whom Arizona Taxpayers oppose." Ex. 52. ATAC alleges that the knowledge that its donations will aid a candidate it opposes "will prevent [ATAC] from the

full and unrestricted exercise of its speech," and therefore that "the Act creates a climate of self-censorship resulting in less political speech." However, Defendant-Intervenors note that not only has ATAC only made one donation to a state legislative race in its history (it has also made at least one donation in a city council race for mayor), it has "made no attempt to raise funds" in this current election cycle and has no current plans to do so before the election. Ex. 157, pg. 35, 62-66. Further, as of August 13, 2008, the group had only $52.72 in its bank account. Ex. 157, pg. 62.

ANALYSIS

I. Standard

The Ninth Circuit provides two alternate tests for granting a preliminary injunction – or rather, one test with two polarized formulations. In the first formulation, a plaintiff must show:

> (1) a strong likelihood of success on the merits,
>
> (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted,
>
> (3) a balance of hardships favoring the plaintiff, and
>
> (4) advancement of the public interest (in certain cases).

Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291 (9th Cir. 2003) (quoting *Johnson v. Cal. State Bd. Of*

Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995). Alternately, a plaintiff may "demonstrate[ ] '*either* a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor'" *Id.* These two tests represent a continuum; "[t]hus, the greater the relative hardship to [Plaintiffs] the less probability of success must be shown." *Earth Island*, 351 F.3d at 1298.

Some Ninth Circuit cases also add a statement to the effect that "[i]f the movant 'has a 100% probability of success on the merits,' this alone entitles it to reversal of a district court's denial of a preliminary injunction, without regard to the balance of the hardships." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 965 (9th Cir. 2002). However, this proposition seems to lead back only to *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1102 (9th Cir. 1998), in which the court gave the standard for a preliminary injunction as usual then decided that, in that particular case, a *permanent* injunction was in order without remand to the district court for a full trial on the merits. The court did not engage in any analysis regarding the balance of the harms in that case, nor did it appear to be a contested issue. This Court has not concluded that it is appropriate for a district court to discard the balance of the harms analysis where the court judges that there is any chance that additional useful evidence could be

adduced at a full trial on the merits,[5] especially in the volatile and unpredictable context of an election where a court is always anchored neutrally and loath to in any manner influence who will be triumphant. This is particularly true where, unlike, apparently, in *Baby Tam*, vital interests are implicated on both sides of the balance of the hardships analysis.

II. Application

A. Plaintiffs Have Shown a Strong Likelihood of Success on the Merits.

The issue in dispute is whether the matching funds provisions of the Clean Elections Act violate the First Amendment of the Constitution. If it "imposes a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech, [it] cannot stand unless it is 'justified by a compelling state interest.'" *Davis v. Fed. Election Comm'n.*, 128 S. Ct. 2759, 2772 (2008). *Id.* In considering this question, it might be helpful to look

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[5] In *Baby Tam*, the court concluded:

> Because the ordinance is unconstitutional, Baby Tam has a 100% probability of success on the merits of its suit to obtain a permanent injunction. No facts which might be adduced at a trial [on the permanent injunction] will change this result. Accordingly, there is no need to remand for a trial. Baby Tam is entitled to a permanent injunction prohibiting the City from enforcing the ordinance in its present form.

154 F.3d at 1102.

briefly at the history of campaign finance jurisprudence. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court rejected a cap on expenditures by candidates of their personal funds. The Court explained that a "candidate ... has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election," and that a cap on personal expenditures by a candidate constitutes "a substantial," "clea[r]," and "direc[t] restraint on that right." *Id.* at 52. Thus, while states may place certain reasonable limits on campaign *contributions*, personal expenditures may not be restrained. *Id.* at 21-22, 51. Campaign contributions may not prevent "candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* at 21.

Subsequent decisions have added layers of nuance to *Buckley's* original distinction. Matching funds, such as those found in Arizona's Act, have been a hotbed of controversy. Proponents argue that they place no limitations on personal campaign expenditures or on campaign contributions that might fall afoul of *Buckley*. Opponents, on the other hand, argue that, through forcing traditional candidates to accept expenditure and contribution limits or else trigger funding for speech hostile to themselves, such schemes violate the First Amendment rights of traditional candidates.

The First, Fourth and Sixth Circuits have found matching funds to pass constitutional muster. In *N.C.*

Right to Life, Inc. v. Leake, 524 F.3d 427 (4th Cir. 2008), the court held that "[t]he plaintiffs remain free to raise and spend as much money, and engage in as much political speech, as they desire." It continued, "They will not be jailed, fined, or censured if they exceed the trigger amounts." Similarly, the First Circuit, in *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000), held that Maine's matching fund provision was constitutional, writing that "[t]he public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures." *Id.* at 464; *see also Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998) (holding that a Kentucky campaign finance law which lifted expenditure limits for participating candidates when non-participating candidates exceeded those limits was constitutional).

Only the Eighth Circuit has found matching fund provisions to be unconstitutional. In *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), a Minnesota law provided that candidates would receive one half the amount of independent expenditures made by opposing candidates. The court emphasized the "'self-censorship' that has occurred even before the state implements the statute's mandates," ultimately "no less a burden on speech that is susceptible to constitutional challenge than is direct government censorship." *Id.* at 1360. The court also found that the speech restriction could not be considered content

neutral; "[i]ndependent expenditures of any other nature, supporting the expression of any sentiment other than advocating the defeat of one candidate or the election of another, do not trigger the statute's . . . provisions." *Id.* at 1361. There was, however, one substantial difference between the statute at issue in *Day* and the Arizona Act. In Minnesota, the participation rate among candidates was approaching 100% (in Arizona, it is closer to 60%), leading the court to declare that "no interest, no matter how compelling, could be served" by the restrictions on the remaining candidates. *Id.*

Into this landscape came the recent Supreme Court decision, decided after each of the above Circuits' opinions and highly relevant to the question of matching funds. In *Davis v. Fed. Election Comm'n.*, the Supreme Court considered the constitutionality of the so-called Millionaire's Amendment of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). 2 U.S.C. §441a-1(a); *id.* at 2774. The Millionaire's Amendment was triggered when a non-participating candidate's personal expenditures caused her total campaign expenditures to exceed $350,000. At that point, an opposing participating candidate was allowed to receive individual contributions at three times the normal limit (the limit for non-participating candidates remained the same), and could accept coordinated party expenditures without limit. *Id.* at 2766. The *Davis* court found that the asymmetry of this arrangement "impermissibly burden[ed] [the plaintiff's] First Amendment right to spend his own

money for campaign speech." *Id.* at 2771. Thus, although under the BCRA candidates can choose to spend their own money as desired, they "must shoulder a special and potentially significant burden if they make that choice." *Davis*, 128 S.Ct. at 2771.

Because the BCRA "impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech, the provision [could] not stand unless it [was] 'justified by a compelling state interest.'" *Id.* at 2772. The Supreme Court found that the government's stated interest of "level[ing] electoral opportunities for candidates of different personal wealth" was not a compelling state interest. *Id.* at 2773. "[P]reventing corruption or the appearance of corruption" *are* legitimate. *Id.* However, it did not find that the BCRA was justified by such an interest; "reliance on personal funds *reduces* the threat of corruption, and therefore [the challenged provision], by discouraging use of personal funds, disserves the anticorruption interest." *Id.* (emphasis in original).

The Millionaire's Amendment is not the same as Arizona's matching funds provision. Indeed, in its decision that it impermissibly burdened speech rights, the asymmetry of the Millionare's Amendment – which raised contribution limits for participating but not traditional candidates – was key. The Supreme Court noted that as there is "no constitutional basis for attacking contribution limits on the ground that they are too high," if the "elevated contribution limits applied across the board, Davis

would not have any basis for challenging those limits." *Id.* at 2771. However, the *Davis* court focused not merely on the fact that the contributions limit differs for participating and non-participating candidates, but on the fact that "the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics." *Id.* at 2772. It, too, cited to *Pacific Gas & Electric Company v. Public Utilities Commission* noting that, in that case, it found "infringement on speech rights where if the plaintiff spoke it could be forced to help disseminate hostile views." *Id.* at 2772 (internal quotations omitted). In that case, the Supreme Court expounded on the constitutional dangers of such a scheme, writing that while one does not "have the right to be free from vigorous debate," one "*does* have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents." 475 U.S. 1, 14 (1986) (emphasis in original). The "statutorily imposed choice" provided by the BCRA was not sufficient to save its constitutionality. *Davis*, 128 S. Ct. at 2772.

Ultimately, though the Arizona Act's mechanism for funding differs, it enforces substantially the same coercive choice on traditional candidates – to "abide by a limit on personal expenditures" or else endure a burden placed on that right. *Id.* And unlike in *Buckley*, the schemes contemplated in *Davis* and presently do not allow a candidate to, "by forgoing public financing, . . . retain the unfettered right to

make unlimited personal expenditures." *Id.* Under both laws, "a candidate who wishes to exercise that right has two choices: abide by a limit on personal expenditures or endure the burden that is placed on that right," by "discriminatory contribution limits" in *Davis* and by matching funds under the Arizona Act. *Id.* The Arizona Act imposes a substantial burden on the First Amendment right to use personal funds for campaign speech.

The next question, then, is whether the regulation is justified by a compelling state interest. In *Davis*, the Supreme Court explicitly rejected the idea that "level[ing] electoral opportunities" was a compelling government interest, writing that it "has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office." *Id.* at 2773. It noted further that

> [d]ifferent candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of the election.

Id. The second and seventh of the Act's Findings – that the pre-Act system gave an unhealthy advantage to incumbents and that it discourages otherwise qualified candidates who are not independently

wealthy – overlap significantly with this interest. Though the phrasing of the second finding, at least, hints that it is aimed at which candidates choose to run as well as at leveling the opportunities of those who are already candidates, it still constitutes governmental interference in the process of selecting candidates and elected officials that the Supreme Court has found impermissible. These Findings cannot be used to justify the burden on speech the Act imposes.

Reducing corruption and the appearance of corruption *are* compelling government interests. In fact, in *Davis*, the Supreme Court noted that "[p]reventing corruption or the appearance of corruption are the *only* legitimate and compelling government interests thus far identified for restricting campaign finances" *Id.* at 2773 (quoting *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) (internal quotations omitted) (emphasis added). Several of the Findings in the Act – notably the first, fourth, fifth, and sixth – fit comfortably under a "reduction of corruption or its appearance" heading. Defendants point to a number of pre-Act newspaper articles that demonstrate, at least, a public perception of or public discourse about corruption of the electoral process in Arizona. Ex. 102, 103; P/I hearing. Defendants also provide the declaration of Prof. Kenneth Mayer, a political science professor at the University of Wisconsin, Madison, who states in his report that Clean Elections has "made Arizona

state legislative elections more competitive," decreasing the overwhelming advantage of incumbents and increasing the number of highly contested races. Ex. 119, pg. 6-7. He adds that matching fund provisions are crucial to the success of clean elections programs; in Wisconsin, for instance, only 15.3% of candidates took public funding where there was no possibility of matching funds. *Id.* at 8. Ultimately, these more competitive races give incumbents "an incentive to be more responsive to the views of the district and to work towards optimal public policy rather than put all of their effort into fundraising." *Id.* at 10.

However, he also notes that "[t]he academic literature has not found a strong relationship between campaign contributions and official acts, in part because we are unable to observe most of what elected officials do." *Id.* at 9. Further, Plaintiff's expert Dr. Marc Osborn argues that "Arizona's campaign contribution limits are adequate at reducing potential interest group influence without the clean elections funding including its matching funds provisions." Ex. 14. He adds:

> Even without the Citizen's Clean Elections Act's Matching funds provisions, Arizona already has an aggressive set of campaign finance restrictions that limit both the ability of non-participating candidates to receive concentrations of contributions and

> limits individual donors and PACs from concentrating contributions.

Id.

Plaintiffs also provide evidence regarding potential gaming of the matching funds system. For instance, because matching funds will be provided to participating candidates for expenditures that PACs make on behalf of traditional candidates, PACs can run ineffective, unwished for advertising that generates funds for a participating opponent to use at her discretion. Both McComish and McLain have stated that ineffective PAC expenditures have been made on their behalf without their prior knowledge.[4] Ex. 19, pg. 31; Ex. 22, pg. 41. Though neither have alleged that those expenditures were made as part of a deliberate strategy to generate matching funds for their campaigns, the potential for such strategies to be utilized – or to appear to be utilized – remains an avenue to corrupt the Act's goal and certainly to give it the appearance of corruptibility.

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[4] McLain stated in her deposition that the PAC mailer done in her behalf also supported two other candidates. She stated:

> I have significant policy disagreements – differences, shall we say, not disagreements, with both the Senator, Ron Gould, and with Mrs. Groe. I was not comfortable being associated with the two of them. I had tried to run my own campaign and stand on my own merits.

Ex. 22, pg. 41.

Similarly, where more than one seat is available in a particular district or in a statewide race for Corporation Commission, candidates may run as an unofficial slate, something which appears to have happened in at least a couple of races. Plaintiff Tony Bouie provided reliable evidence that such a strategy had been used against him in the primary election (which he lost). Ex. 2. Bouie had a traditional and a participating opponent who shared, at a minimum, common advertising urging voters to cast each of their two votes for the two candidates. *Id.* As a result, every dollar spent above the spending cap by either Bouie or his traditional opponent generated matching funds for the participating opponent, who could then use those funds for the benefit of both slate candidates. Similarly, in the general election, candidates coordinated advertising with each other and, in some cases, shared a common campaign manager. Ex. 9, pg. 41, 45. Candidate for Corporation Commission Paul Newman, in his deposition, also stated:

> I hear that there was a quote, unquote, team of Republicans, one who is going to be running traditionally and two that were going to be running clean, I knew all three individuals, two pretty well . . . And I was pretty outraged about that and I didn't want that team to get elected to the Corporation Commission. And I thought that the outside money interests and having some people run as clean, I thought that was manipulation of the system.

Id. at 79. Whether these slate strategies have been effective or not (and whether Newman's information was correct or not), it is clear that they may attribute to the *appearance* of corruption and the appearance that the Act may be gamed to provide matching funds for speech actually made in a participating candidate's own indirect benefit.[5]

This potential for gamesmanship mitigates against the anti-corruption interest of the Act not by nullifying any anti-corruption gains but by creating entirely new corruption concerns and injecting them into the public sphere. As Defendants have shown at this point only modest anti-corruption benefits, and as even those remain largely unverifiable, the Act is not justified by the compelling government interest of reducing corruption or the appearance of corruption.

Defendant-Intervenors point to three other potential compelling state interests: (1) "facilitat[ing] communication by candidates with the electorate'" (2) "freeing candidates from the pressures of fundraising," *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st

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[5] Defendants note that there are limits to slate strategies by law – "[c]andidates cannot spend their monies supporting other candidates. *See* A.R.S. §§ 16-905(H), -948(C), Ariz. Admin. Code § R. 2-200104(C)(5). Each candidate must pay his or her own expenses and report them on the campaign finance reports." Be this as it may, it does not change the fact that candidates may share advertising and associate themselves as a slate, which allows matching funds generated by a candidate to have them used in their own support, a blatant subversion of the Act's principles.

Cir. 1993) (internal citations and quotations omitted), and (3) creating a viable public financing system that does not "fund[ ] hopeless candidacies with large sums of public money." *Buckley v. Valeo,* 424 U.S. 1, 96 (1976). This third interest need not be considered here. It has never been suggested that this was a goal of the Act's enactment. Furthermore, there has been no argument made that this goal cannot be achieved without burdening speech – by adjusting the public funding available on the basis of whether a district is designated as a single party dominant district, for instance.

The third and eight Findings of the Act, however, do go toward freeing candidates to communicate with the electorate rather than spending their time fundraising. There is no reason to conclude, however, that this is a compelling government interest that can justify the burdens on free speech that are created by the Act. It has never been found so by the Ninth Circuit and the Supreme Court's formulation in *Davis* – that "[p]reventing corruption or the appearance of corruption are the *only* legitimate and compelling government interests thus far identified for restricting campaign finances" – strongly implies that few interests indeed would be sufficient to justify such restraints.[6]

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[6] For this reason, Defendant-Intervenor's citation to *Buckley* in support of this point is rather unpersuasive.

Ultimately, Plaintiffs have shown a high likelihood of success on the merits. Because of the questions raised by Defendants and Defendant-Intervenors regarding possible compelling state interests that justify the Act's burden on free speech, this Court declines to state today that Plaintiffs have shown a *certainty* of success on the merits such that, under one possible reading of Ninth Circuit jurisprudence, a preliminary injunction *must* be granted.

B. Plaintiffs Have Shown Irreparable Injury.

Plaintiffs and Plaintiff-Intervenors will suffer irreparable injury both through the dispensation of funds that will be used to oppose them and through the mere fact that their speech is being burdened. The Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

C. The Balance of Harms and the Public Interest Lie with Defendants.

In order to grant a preliminary injunction, the balance of the harms must tilt in Plaintiffs' favor and the injunction must usually be in the public interest. This third criterion is particularly important here where the injunction seeks to interfere with an ongoing state election. It is not only the parties to this suit that would be affected by issuance of an

injunction. Each candidate that stands to trigger or receive matching funds, and the public itself, which has an overriding interest in free and fair elections, also stand to gain or lose by an injunction.

At the outset, courts will interfere with an election in process only in extraordinary circumstances. *See Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (holding that the California recall vote should not be enjoined due to questions about whether punch card voting machines violated the Equal Protection Clause, in part because "Interference with impending elections is extraordinary and interference with an election after voting has begun is unprecedented."); *see also Soules v. Kauaians for Nukolii Campaign Committee*, 849 F.2d 1176, 1179 (9th Cir. 1988) (noting that "the voiding of a state election is a 'drastic if not staggering' remedy."); *see also Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (holding that, in legislative apportionment cases, "under certain circumstances, such as where an impending election is imminent, and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief" even where the scheme has already been found unconstitutional.). To no surprise, Plaintiffs do not ask the Court to void the results of an election or to enjoin an election in its entirety. However, early voting began October 2nd, 2008, and an injunction of even relatively limited scope must

still be considered in the context of an ongoing election.

On the Plaintiffs side, they have shown a very high likelihood that their First Amendment rights of free speech are being restrained. Matching funds disbursed against them as a result of an apparently unconstitutional statute will be used against them by campaign opponents. Several Plaintiffs have provided evidence that their speech is actually being suppressed as a result of their apprehensions of triggering matching funds. This harm – particularly as it can be extrapolated to other non-party traditional candidates running in contested races – is not insigificant. Further, as Plaintiffs point out, "neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *ACLU v. Reno*, 217 F.3d 162, 181 (3d. Cir. 2000) (internal quotations omitted).

Both the government and the public can, however, claim an interest in a free and fair election. Here, that is a dual edged sword. On the one hand, the election is inextricably linked with the constitutional violations that have pervaded it. On the other hand, the fact remains that it is *inextricably* linked; to halt matching funds now would not undo the harm that has been done. Instead, it would disrupt the justifiable expectations of participating candidates who – matching funds having been in place for ten years – had every reason to rely on them. Defendants have provided evidence showing that, for a number of candidates, matching funds

were an important part of their decision to run as participating candidates. Ex. 124; Ex. 114; Ex. 121; Ex. 122. Further, at least one of these candidates has stated that he would not be able to run an effective campaign were matching funds not available. Ex. 122. Nor is it realistic to expect that participating candidates have the networks and resources available to develop and implement an effective fundraising strategy at this late date.

Plaintiffs argue that participating candidates were on notice that matching funds may be cut off due to the provisions in 16-954(j) of the statute and that they cannot be said to have justifiably relied on distribution of matching funds. However, that statutory provision reads:

> If the commission cannot provide participating candidates with all monies specified under sections 16-951 and 16-952, as decreased by any announcement pursuant to subsection E of this section, then the commission shall allocate any reductions in payments proportionately among candidates entitled to monies and shall declare an emergency. Upon declaration of an emergency, a participating candidate may accept private contributions to bring the total monies received by the candidate from the fund and from such private contributions up to the adjusted spending limits. . . .

The provision – which follows and references provisions discussing what will happen if enough money

does not remain in the fund – is clearly a reference to fiscal emergencies rather than eleventh hour litigation. And subsection (D) of that provision specifies that "[a]t least once per year, the commission shall project the amount of monies that the fund will collect over the next four years and the time such monies shall become available." The statute contemplates a sudden fiscal emergency but makes provisions for it. It cannot be stretched to mean that participating candidates ought to have been ready to have their funding source halted as a result of litigation mere weeks, or even mere months, before the election.

The timing of this litigation also deserves special attention. Defendants and Defendant-Intervenors argue that Plaintiffs delayed unreasonably in bringing this suit. Though they provide evidence that many of the Plaintiffs have known about the Clean Elections Act for a matter of years, the Court is not persuaded that they need necessarily have been required to bring their challenge before *Davis* was released and shed new light on the potential constitutionality of the matching funds provisions. *See Lathan v. Brinegar*, 506 F.2d 677, 692 (1974) (holding that it could not be said that the plaintiff was "guilty of an extreme lack of diligence in raising [the] issue" as "NEPA which has a substantial influence upon our interpretation of the effects of the amendments . . . was not operative until January 1, 1970, less than six months before this action was filed."). However, *Davis* was decided on June 26, 2008, well before the general

election and even the primary. The delay of almost two months before any action was filed in this court has to bear against the urgency of Plaintiffs' claim and certainly mitigated against any real possibility that participating candidates might have time, after an injunction, to develop their own fundraising strategy. Further, precedent shows that such a delay indicates "an absence of the kind of irreparable harm required to support a preliminary injunction." *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985).

Ultimately, in the extraordinary context of an election in progress, Plaintiffs and Plaintiff-Intervenors have not demonstrated sufficient harm to find that the balance of harms and the public interest tilts in their favor. The countervailing harm that would be done to candidates that relied on Clean Elections funding and the significant interest the public has in the smooth functioning of an election, one that would be compromised if participating candidates were unable to deliver their message to voters as planned, are sufficient to push the balance of harms in their direction, especially as the election is upon us. This Court will not interfere with the fortuitous currents and eddies of this vital democratic process. Simply, the public interest would not be served by granting an injunction.

CONCLUSION

Plaintiffs have shown a very strong likelihood of success on the merits. However, given the extraordinary balance of the harms required in the context of an ongoing election, Plaintiffs have not met their burden in showing that they are entitled to a preliminary injunction. For this reason, Plaintiffs' Motion was denied.

DATED this 17th day of October, 2008.

/s/ Roslyn O. Silver
Roslyn O. Silver
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

John McComish, et al., Plaintiffs,	)	No. CV-08-1550-PHX-ROS
vs.	)	**ORDER**
Jan Brewer, et al., Defendants.	)	(Filed Aug. 29, 2008)

Before the Court is Plaintiffs' Motion for a Temporary Restraining Order ("TRO") (Doc. 13). Plaintiffs seek to enjoin enforcement of the matching funds provisions of Arizona's Clean Elections Act, A.R.S. § 16-952 (A), (B) and (C), asserting that these provisions impermissibly burden their First Amendment rights to freedom of speech.

For the reasons below, Plaintiffs' requested relief will be denied.

BACKGROUND

The Arizona Clean Elections Act (the "Act" or "Arizona Act") was approved by Arizona voters in 1998. The Act sets up a voluntary system of campaign financing in which candidates who choose to be "participating candidates" may receive funds from the Citizens Clean Elections Fund ("CCEF"). Participating candidates are limited in the campaign contributions they may receive and personal expenditures they may make. In return, they receive campaign

funds from the CCEF in a set amount,[1] *See* A.R.S. §§ 16-941, -945; *see also*, Citizen Clean Elections Commission, "Voter Education Guide" (2008) *available at* http://www.ccec.state.az.us/ccecweb/ccecays/ccecPDF.asp?docPath=docs/2008PrimaryCandidateStatementPamphlet.pdf (hereafter "Voter's Guide").

When participating candidates have opponents who are non-participating – "traditional candidates" – they can also receive matching funds. Once a traditional candidate exceeds the spending limit for a given race, her participating opponent or opponents will receive dollar-for-dollar matching funds from the CCEF. These funds cap out at three times the applicable spending limit.[2] Independent expenditures by Political Action Committees ("PACs") made on behalf of a traditional candidate or in opposition to her participating opponent also count towards the spending limit.

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[1] For candidates for the state legislature, primary spending limits are $12,921 and general election spending limits are $19,382. Legislative candidates may collect up to $3,230 in individual early contributions of no more than $130 during the exploratory and qualifying periods, and may use $610 of personal monies for their campaigns. For candidates for Corporation Commission, the primary spending limit is $82,680 and the general election spending limit, $124,020. Candidates may collect up to $12,920 in early contributions of no more than $130 and contribute $1,230 of their personal monies. *See* A.R.S. § 16-951; Voter's Guide.

[2] The matching funds are a dollar-for-dollar match minus 6% meant to compensate for the fundraising expenses incurred by traditional candidates. A.R.S. § 16-952(A).

Plaintiffs here are non-participating candidates. Plaintiff John McComish is the current Arizona State House of Representatives Majority Whip, currently running for re-election. Plaintiff Nancy McLain is a current member of the Arizona State House of Representatives, currently running for re-election. Plaintiffs Doug Sposito, Frank Antenori, and Tony Bouie are candidates for the Arizona State House of Representatives. Plaintiff Kevin Gibbons is a candidate for the Arizona State Senate. Gibbons, Sposito, and Bouie have recently triggered matching funds to their opposing "participating" candidates by making direct expenditures to their campaign. *See* Gibbons Aff., ¶ 12, Ex. A.1; Bouie Aff., ¶ 9, Ex. B.1; Sposito Aff., ¶ 11, Ex. C.1.. Further, all three report that their campaign expenditures have been chilled because of the possibility of triggering further matching funds to their opponents, making them reluctant to spend money they would otherwise have used to fund campaign activities. *See* Sposito Aff., ¶ 12; Gibbons Aff., ¶ 10-11; Bouie Aff., ¶ 8-10.

The Act's provision can be manipulated in a number of ways. Because PACs may make expenditures on behalf of traditional candidates without their consent or even their knowledge, they may air ineffective – even deliberately ineffective – advertising that then triggers matching funds that participating opponents can use at their discretion. The occurrence of this was alluded to at the hearing for a TRO. Similarly, candidates may use a "slate" strategy against their opponents. Bouie provides an illustrative example

arising out of his district where a traditional incumbent, Representative Sam Crump, and a participating; challenger, Carl Seel, running in his district (where two seats are available) have emerged as a "slate," sharing joint advertising. Bouie Aff., 21-23, Ex. B.2. Thus, money spent by Crump generates matching funds for Seel, effectively aiding both candidates.

ANALYSIS

I. Standard

The standard for issuing a Temporary Restraining Order ("TRO") is the same as that for issuing a preliminary injunction. *Gonzalez v. State*, 435 F. Supp. 2d 997, 999 (D. Ariz. 2006). In the Ninth Circuit, there are two sets of criteria for a court to use when evaluating a request for a TRO. First, a plaintiff must show:

> (1) a strong likelihood of success on the merits,
>
> (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted,
>
> (3) a balance of hardships favoring the plaintiff, and
>
> (4) advancement of the public interest (in certain cases).

Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291 (9th Cir. 2003) (quoting *Johnson v. Cal State Bd. Of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995).

Alternately, a plaintiff may "demonstrate[ ] '*either* a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor'" *Id.* These two tests represent a continuum; "[t]hus, the greater the relative hardship to [Plaintiffs] the less probability of success must be shown." *Earth Island*, 351 F.3d at 1298.

II. Application

a. Likelihood of Success on the Merits.

The history of campaign finance jurisprudence is extensive and convoluted. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court rejected a cap on expenditures by candidates of their personal funds. The Court explained that a "candidate . . . has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election," and that a cap on personal expenditures by a candidate constitutes "a substantial," "clea[r]," and "direc[t] restraint on that right." *Id.* at 52. Thus, while states may place certain reasonable limits on campaign *contributions*, personal expenditures may not be restrained. *Id.* at 21-22, 51.

Less clear, however, has been the fate of statutes like Arizona's which, rather than placing a direct cap on personal expenditures, instead create a system that incentivizes – or, perhaps, coerces – candidates to opt into a public financing program that includes limits on contributions *and* personal expenditures.

Several circuits have considered this variation to the statute in *Buckley*. The First, Fourth and Sixth Circuits have ruled such schemes constitutional. In *N.C. Right to Life, Inc. v. Leake*, 524 F.3d 427 (4th Cir. 2008), the court held an act similar to Arizona's was constitutional. "The plaintiffs remain free to raise and spend as much money, and engage in as much political speech, as they desire," wrote the court. "They will not be jailed, fined, or censured if they exceed the trigger amounts." Similarly, the First Circuit, in *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000), held that Maine's matching fund provision was constitutional, writing that "[t]he public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech nor does it threaten censure or penalty for such expenditures." *Id.* at 464; *see also Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998) (holding that a Kentucky campaign finance law which lifted expenditure limits for participating candidates when non-participating candidate exceeded those limits was constitutional).

Of the circuits that have considered the question, only the Eighth Circuit has found matching fund provisions like those in the Arizona Act to be unconstitutional. In *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), a Minnesota law provided that candidates would receive one half the amount of independent expenditures made by opposing candidates. The court emphasized the "'self-censorship' that has occurred

even before the state implements the statute's mandates," "no less a burden on speech that is susceptible to constitutional challenge than is direct government censorship." *Id.* at 1360. The court also found that the speech restriction could not be considered content neutral; "[i]ndependent expenditures of any other nature, supporting the expression of any sentiment other than advocating the defeat of one candidate or the election of another, do not trigger the statute's . . . provisions." *Id.* at 1361. There was, however, one substantial difference between the statute at issue in *Day* and the Arizona Act. In Minnesota, the participation rate among candidates was approaching 100% (in Arizona, it is closer to 60%), leading the court to declare that "no interest, no matter how compelling, could be served" by the restrictions on the remaining candidates. *Id.*

For all that these cases have long muddied the matching funds landscape, a recent Supreme Court decision sheds light upon the issue. In *Davis v. Fed. Election Comm'n.*, 128 S. Ct. 2759 (2008), the Court quoted from *Day* extensively and affirmatively, while ignoring the conflicting opinions entirely. *See id.* at 2772. Ultimately, the Court found that provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA") – the so-called Millionaire's Amendment – violated the Constitution's First Amendment free speech protections. 2 U.S.C. §441a-1(a); *id.* at 2774. The Millionaire's Amendment was triggered when a non-participating candidate's personal expenditures caused her total campaign expenditures to exceed

$350,000. At that point, an opposing participating candidate was allowed to receive individual contributions at three times the normal limit (the limit for non-participating candidates remained the same), and could accept coordinated party expenditures without limit. *Id.* at 2766. The Court found that the asymmetry of this arrangement "impermissibly burden[ed] [the plaintiffs'] First Amendment right to spend his own money for campaign speech." *Id.* at 2771. Thus, although under the BCRA candidates can choose to spend their own money as desired, they "must shoulder a special and potentially significant burden if they make that choice." *Davis,* 128 S.Ct. at 2771.

Because the BCRA "impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech, the provision [could] not stand unless it [was] justified by a compelling state interest.'" *Id.* at 2772. The Court found that the government's stated interest of "level[ing] electoral opportunities for candidates of different personal wealth" was not a compelling state interest. *Id.* at 2773. "[P]reventing corruption or the appearance of corruption" *are* legitimate. *Id.* However, it did not find that the BCRA was justified by such an interest; "reliance on personal funds *reduces* the threat of corruption, and therefore [the challenged provision], by discouraging use of personal funds, disserves the anti-corruption interest." *Id.* (emphasis in original).

The law at issue in *Davis* differs from the Arizona Act in that the latter does not inequitably raise

the contributions limit, instead providing matching funds from the CCEF. The Defendants point to this in their brief, quoting the Supreme Court's statement that "we have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other. . . ." *Id.* Thus, Defendants argue, "[t]he Act here imposes no asymmetrical burden on a traditional candidate's ability to contribute or expend his or her own money."

However, the *Davis* court focuses not merely on the fact that the contributions limit differs for participating and non-participating candidates, but also forcefully on the fact that "the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics." *Id.* at 2772. Likewise, the Supreme Court has held (in a passage quoted approvingly in *Davis*) that, while one does not "have the right to be free from vigorous debate, one "*does* have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents." *Pacific Gas & Elec. Co. v. Pub. Utilities Comm'n.*, 475 U.S. 1, 14 (1986) (emphasis in original). The "statutorily imposed choice" provided by the BCRA was not sufficient to save its constitutionality. *Davis*, 128 S. Ct. at 2772. Though the Arizona Act's mechanism for funding differs, the effect, which forces a candidate to choose to "abide by a limit on personal expenditures" or else endure a burden placed on that right, is substantially the same. *Id.*

It is in the presence of a compelling state interest that the Arizona Act has the potential to most sharply distinguish itself from the BCRA. The Arizona Act perhaps better serves the interest of discouraging corruption; it provides matching funds for – and thus discourages – private contribution. However, as Plaintiffs point out, the Act opens up new avenues for possible corruption. Because matching funds will be provided to participating candidates for expenditures that PACs make on behalf of traditional candidates, PACs can run ineffective, unwished for advertising that generates funds for the participating candidate to use at her discretion. The Act also allows the unofficial "slate" strategy seen in Bouie's race, which allows traditional candidates to trigger matching funds that will be used partially in their own support. The possibility of such gamesmanship mitigates against any decrease in corruption or in the appearance of corruption. The Arizona Act cannot be found to serve this interest any more narrowly than did the BCRA.

Accordingly, Plaintiffs have established that the Matching Funds provision of the Act violates the First Amendment of the U.S. Constitution.

b. Irreparable Injury

Plaintiffs can be said to suffer irreparable injury both through the dispensation of funds that will be used to oppose them and through the mere fact that their speech is being burdened. The Supreme Court

has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

c. Balance of Harms and the Public Interest

The balance of harms at issue is not a simple one. On the one hand, Plaintiffs suffer a burden on their First Amendment rights and have proffered some evidence that the candidates opposing them benefit directly from that opposition. On the other hand, the State Defendants have a clear interest in running a smooth and orderly election which, in this case, includes a significant number of candidates who have been operating under the assumption that matching funds would be distributed and planning their campaign strategies accordingly. Those disadvantaged candidates are not currently parties to this litigation, but disrupting their expectations of funding shortly before an election surely interferes with the State's interest in holding a fair, contested election. Furthermore, courts have traditionally treated injunctions in election cases differently than in other contexts, as "[i]n this case, hardship falls not only upon the putative defendant" but on all citizens of the state. *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003). Certainly the fair nature of this election has been tainted by the constitutional violations with which it is entwined. However, as Defendants point out, "[c]hanging the rule now would irreparably harm the candidates who in

good faith chose to accept public funding by participating in Arizona's Clean Elections program." Defendants provide affidavits from at least two candidates who state that they are relying on matching funds to run an effective campaign. Kelty Aff. ¶ 3-4; Valdez Aff., ¶ 4.

And the length of time Plaintiffs waited to file their TRO also weighs in the balance against the Plaintiffs on the public interest determination. Candidates began qualifying for clean elections funding after January 1, 2008, candidates were required to file nomination papers by June 4, 2008, and *Davis* was decided on June 27, 2008. While it appears Plaintiffs' counsel acted quickly upon learning of the case, the fact remains that Plaintiffs filed their complaint on August 21, 2008 and their Motion for Temporary Restraining Order was filed five days later on August 26, 2008. An Oregon district court decision noted the "eleventh-hour" nature of a challenge in denying a TRO in an election case as bearing against the public interest. *Grudzinski v. Bradbury*, 2007 WL 2733826, at *3 (D. Or. Sept. 12, 2007). Further the case law discussed previously addressing matching funds were not resolved in the context of a TRO or preliminary injunction..

The tardiness of the challenge has inhibited a thorough determination of the harms on each side. In order to accurately assess the balance of the harms, Plaintiffs need to present further evidence of harm done to them through expenditures of matching funds *at this late stage of the election*. Defendants, similarly,

need adequate time to develop and present evidence as to the disruptive effect enjoining matching funds will have at this stage of the election.

CONCLUSION

Plaintiffs have shown success on the merits. However, given the special nature of an election and the seriousness of enjoining a critical facet of it at this stage in time, Plaintiffs have not shown that the balance of harms tilts in their favor.

Accordingly,

IT IS ORDERED Plaintiffs' Motion for a Temporary Restraining Order shall be **DENIED**.

IT IS FURTHER ORDERED a hearing will be held on September 3, 2008, 1:30 p.m. to determine whether a preliminary injunction should be granted or, should the parties decide that discovery is necessary, the preliminary injunction hearing will be continued and a status hearing will be held in its place.

DATED this 29th day of August, 2008.

/s/ Roslyn O. Silver
Roslyn O. Silver
United States District Judge

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S. § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

A.R.S. §16-940 Findings and Declarations.

A. The people of Arizona declare our intent to create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech under the U.S. and Arizona Constitutions. Campaigns will become more issue-oriented and less negative because there will be no need to challenge the sources of campaign money.

B. The people of Arizona find that our current election-financing system:

1. Allows Arizona elected officials to accept large campaign contributions from private interests over which they have governmental jurisdiction;

2. Gives incumbents an unhealthy advantage over challengers;

3. Hinders communication to voters by many qualified candidates;

4. Effectively suppresses the voices and influence of the vast majority of Arizona citizens in favor of a small number of wealthy special interests;

5. Undermines public confidence in the integrity of public officials;

6. Costs average taxpayers millions of dollars in the form of subsidies and special privileges for campaign contributors;

7. Drives up the cost of running for state office, discouraging otherwise qualified candidates who lack personal wealth or access to special-interest funding; and

8. Requires that elected officials spend too much of their time raising funds rather than representing the public.

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§16-941 Limits on Spending and Contributions for Political Campaigns

A. Notwithstanding any law to the contrary, a participating candidate:

1. Shall not accept any contributions, other than a limited number of five-dollar qualifying contributions as specified in section 16-946 and early contributions as specified in section 16-945, except in the emergency situation specified in section 16-954, subsection F.

2. Shall not make expenditures of more than a total of five hundred dollars of the candidate's personal monies for a candidate for the legislature or more than one thousand dollars for a candidate for statewide office.

3. Shall not make expenditures in the primary election period in excess of the adjusted primary election spending limit.

4. Shall not make expenditures in the general election period in excess of the adjusted general election spending limit.

5. Shall comply with section 16-948 regarding campaign accounts and section 16-953 regarding returning unused monies to the citizens clean elections fund described in this article.

B. Notwithstanding any law to the contrary, a nonparticipating candidate:

1. Shall not accept contributions in excess of an amount that is twenty per cent less than the limits specified in section 16-905, subsections A through E, as adjusted by the secretary of state pursuant to section 16-905, subsection H. Any violation of this paragraph shall be subject to the civil penalties and procedures set forth in section 16-905, subsections J through M and section 16-924.

2. Shall comply with section 16-958 regarding reporting, including filing reports with the secretary of state indicating whenever (a) expenditures other than independent expenditures on behalf of the candidate, from the beginning of the election cycle to any date up to primary election day, exceed seventy per cent of the original primary election spending limit applicable to a participating candidate seeking the same office, or (b) contributions to a candidate, from the beginning of the election cycle to any date during the general election period, less expenditures made from the beginning

of the election cycle through primary election day, exceed seventy per cent of the original general election spending limit applicable to a participating candidate seeking the same office. A nonparticipating candidate is exempt from this paragraph if there is no participating candidate running against that nonparticipating candidate.

C. Notwithstanding any law to the contrary, a candidate, whether participating or nonparticipating:

1. If specified in a written agreement signed by the candidate and one or more opposing candidates and filed with the citizens clean elections commission, shall not make any expenditure in the primary or general election period exceeding an agreed-upon amount lower than spending limits otherwise applicable by statute.

2. Shall continue to be bound by all other applicable election and campaign finance statutes and rules, with the exception of those provisions in express or clear conflict with this article.

D. Notwithstanding any law to the contrary, any person who makes independent expenditures related to a particular office cumulatively exceeding five hundred dollars in an election cycle, with the exception of any expenditure listed in section 16-920 and any independent expenditure by an organization arising from a communication directly to the organization's members, shareholders, employees, affiliated

persons and subscribers, shall file reports with the secretary of state in accordance with section 16-958 so indicating, identifying the office and the candidate or group of candidates whose election or defeat is being advocated and stating whether the person is advocating election or advocating defeat.

A.R.S. §16-952 Equal Funding of Candidates

A. Whenever during a primary election period a report is filed, or other information comes to the attention of the commission, indicating that a nonparticipating candidate who is not unopposed in that primary has made expenditures during the election cycle to date exceeding the original primary election spending limit, including any previous adjustments, the commission shall immediately pay from the fund to the campaign account of any participating candidate in the same party primary as the nonparticipating candidate an amount equal to any excess of the reported amount over the primary election spending limit as previously adjusted, less six per cent for a nonparticipating candidate's fund-raising expenses and less the amount of early contributions raised for that participating candidate for that office as prescribed by section 16-945. The primary election spending limit for all such participating candidates shall be adjusted by increasing it by the amount that the commission is obligated to pay to a participating candidate.

B. Whenever during a general election period a report has been filed, or other information comes to the attention of the commission, indicating that the amount a nonparticipating candidate who is not unopposed has received in contributions during the election cycle to date less the amount of expenditures the nonparticipating candidate made through the end of the primary election period exceeds the original general election spending limit, including any previous adjustments, the commission shall immediately pay from the fund to the campaign account of any participating candidate qualified for the ballot and seeking the same office as the nonparticipating candidate an amount equal to any excess of the reported difference over the general election spending limit, as previously adjusted, less six per cent for a nonparticipating candidate's fund-raising expenses. The general election spending limit for all such participating candidates shall be adjusted by increasing it by the amount that the commission is obligated to pay to a participating candidate.

C. For the purposes of subsections A and B of this section, the following expenditures reported pursuant to this article shall be treated as follows:

1. Independent expenditures against a participating candidate shall be treated as expenditures of each opposing candidate, for the purpose of subsection A of this section, or contributions to each opposing candidate, for the purpose of subsection B of this section.

2. Independent expenditures in favor of one or more nonparticipating opponents of a participating candidate shall be treated as expenditures of those nonparticipating candidates, for the purpose of subsection A of this section, or contributions to those nonparticipating candidates, for the purpose of subsection B of this section.

3. Independent expenditures in favor of a participating candidate shall be treated, for every opposing participating candidate, as though the independent expenditures were an expenditure of a nonparticipating opponent, for the purpose of subsection A of this section, or a contribution to a nonparticipating opponent, for the purpose of subsection B of this section.

4. Expenditures made during the primary election period by or on behalf of an independent candidate or a nonparticipating candidate who is unopposed in a party primary shall be deducted from the total amount of monies raised for purposes of determining the amount of equalizing funds, up to the amount of primary funds received by the participating candidate. Equalizing funds pursuant to subsection B of this section shall then be calculated and paid at the start of the general election period.

5. Expenditures made before the general election period that consist of a contract, promise or agreement to make an expenditure during the general election period

resulting in an extension of credit shall be treated as though made during the general election period, and equalizing funds pursuant to subsection B of this section shall be paid at the start of the general election period.

6. Expenditures for or against a participating candidate promoting or opposing more than one candidate who is not running for the same office shall be allocated by the commission among candidates for different offices based on the relative size or length and relative prominence of the reference to candidates for different offices.

D. Upon applying for citizen funding pursuant to section 16-950, a participating candidate for the legislature in a one-party-dominant legislative district who is qualified for clean campaign funding for the party primary election of the dominant party may choose to reallocate a portion of funds from the general election period to the primary election period. At the beginning of the primary election period, the commission shall pay from the fund to the campaign account of a participating candidate who makes this choice an extra amount equal to fifty per cent of the original primary election spending limit, and the original primary election spending limit for the candidate who makes this choice shall be increased by the extra amount. For a primary election in which one or more participating candidates have made this choice, funds shall be paid under subsections A and B of this section only to the extent of any excess over the original

primary election spending limit as so increased. If a participating candidate who makes this choice becomes qualified for clean campaign funding for the general election, the amount the candidate receives at the beginning of the general election period shall be reduced by the extra amount received at the beginning of the primary election period, and the original general election spending limit for that candidate shall be reduced by the extra amount. For a general election in which a participating candidate has made this choice, funds shall be paid under subsections A and B of this section only to the extent of any excess over the original general election spending limit, without such reduction, unless the candidate who has made this choice is the only participating candidate in the general election, in which case such funds shall be paid to the extent of excess over the original general election spending limit with such reduction. For the purpose of this subsection, A one-party-dominant legislative district is a district in which the number of registered voters registered in the party with the highest number of registered voters exceeds the number of registered voters registered to each of the other parties by an amount at least as high as ten per cent of the total number of voters registered in the district. The status of a district as a one-party-dominant legislative district shall be determined as of the beginning of the qualifying period.

E. If an adjusted spending limit reaches three times the original spending limit for a particular election, the commission shall not pay any further amounts from the fund to the campaign

account of any participating candidate, and the spending limit shall not be adjusted further.

A.R.S. §16-958 Manner of Filing Reports

A. Any person who has previously reached the dollar amount specified in section 16-941, subsection D for filing an original report shall file a supplemental report each time previously unreported independent expenditures specified by that subsection exceeds one thousand dollars. Any person who has previously reached the dollar amounts specified in section 16-941, subsection B, paragraph 2 for filing an original report shall file a supplemental report to declare that previously unreported expenditures or contributions specified by that paragraph exceed ten per cent of the original primary election spending limit or twenty-five thousand dollars, whichever is lower, during the general election period. Such reports shall be filed at the times specified in subsection B of this section and shall identify the dollar amount being reported, the candidate and the date and no other detail is required in reports made pursuant to this section.

B. Any person who must file an original report pursuant to section 16-941, subsection B, paragraph 2 or subsection D or who must file a supplemental report for previously unreported amounts pursuant to subsection A of this section shall file as follows:

1. Before the beginning of the primary election period, the person shall file a report on the first of each month, unless the person has not reached the dollar amount for filing an original or supplemental report on that date.

2. Thereafter, except as stated in paragraph 3 of this subsection, the person shall file a report on any Tuesday by which the person has reached the dollar amount for filing an original or supplemental report.

3. During the last two weeks before the primary election and the last two weeks before the general election, the person shall file a report within one business day of reaching the dollar amount for filing an original or supplemental report.

C. Any filing under this article on behalf of a candidate may be made by the candidate's campaign committee. All candidates shall deposit any check received by and intended for the campaign and made payable to the candidate or the candidate's campaign committee, and all cash received by and intended for the campaign, in the candidate's campaign account before the due date of the next report specified in subsection B of this section. No candidate or person acting on behalf of a candidate shall conspire with a donor to postpone delivery of a donation to the campaign for the purpose of postponing the reporting of the donation in any subsequent report.

D. The secretary of state shall immediately notify the commission of the filing of each report under this section and deliver a copy of the report to the

commission, and the commission shall promptly mail or otherwise deliver a copy of each report filed pursuant to this section to all participating candidates opposing the candidate identified in section 16-941, subsection B, paragraph 2 or subsection D.

E. Any report filed pursuant to this section or section 16-916, subsection A, paragraph 1 or subsection B shall be filed in electronic format. The secretary of state shall distribute computer software to political committees to accommodate such electronic filing.

F. During the primary election period and the general election period, all candidates shall make available for public inspection all bank accounts, campaign finance reports and financial records relating to the candidate's campaign, either by immediate disclosure through electronic means or at the candidate's campaign headquarters, in accordance with rules adopted by the commission.

A.R.S. §16-960 Severability

If a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable. In any court challenge to the validity

of this article, the commission and Arizonans for clean elections shall have standing to intervene.

A.R.S. §16-961 Definitions

A. The terms "candidate's campaign committee," "contribution," "expenditures," "exploratory committee," "independent expenditure," "personal monies," "political committee" and "statewide office" are defined in section 16-901.

B. 1. "Election cycle" means the period between successive general elections for a particular office.

2. "Exploratory period" means the period beginning on the day after a general election and ending the day before the start of the qualifying period.

3. "Qualifying period" means the period beginning on the first day of August in a year preceding an election, for an election for a statewide office, or on the first day of January of an election year, for an election for legislator, and ending seventy-five days before the day of the general election.

4. "Primary election period" means the nine-week period ending on the day of the primary election.

5. "General election period" means the period beginning on the day after the primary election and ending on the day of the general election.

6. For any recall election, the qualifying period shall begin when the election is called and last for thirty days, there shall be no primary election

period and the general election period shall extend from the day after the end of the qualifying period to the day of the recall election. For recall elections, any reference to "general election" in this article shall be treated as if referring to the recall election.

C. 1. "Participating candidate" means a candidate who becomes certified as a participating candidate pursuant to section 16-947.

2. "Nonparticipating candidate" means a candidate who does not become certified as a participating candidate pursuant to section 16-947.

3. Any limitation of this article that is applicable to a participating candidate or a nonparticipating candidate shall also apply to that candidate's campaign committee or exploratory committee.

D. "Commission" means the citizens clean elections commission established pursuant to section 16-955.

E. "Fund" means the citizens clean elections fund defined by this article.

F. 1. "Party nominee" means a person who has been nominated by a political party pursuant to section 16-301 or 16-343.

2. "Independent candidate" means a candidate who has properly filed nominating papers and nominating petitions with signatures pursuant to section 16-341.

3. "Unopposed" means with reference to an election for:

(a) A member of the house of representatives, opposed by no more than one other candidate who has qualified for the ballot and who is running in the same district.

(b) A member of the corporation commission, opposed by a number of candidates who have qualified for the ballot that is fewer than the number of corporation commission seats open at that election and for which the term of office ends on the same date.

(c) All other offices, opposed by no other candidate who has qualified for the ballot and who is running in that district or running for that same office and term.

G. "Primary election spending limits" means:

1. For a candidate for the legislature, twelve thousand nine hundred twenty-one dollars.

2. For a candidate for mine inspector, forty-one thousand three hundred forty-nine dollars.

3. For a candidate for treasurer, superintendent of public instruction or the corporation commission, eighty-two thousand six hundred eighty dollars.

4. For a candidate for secretary of state or attorney general, one hundred sixty-five thousand three hundred seventy-eight dollars.

5. For a candidate for governor, six hundred thirty-eight thousand two hundred twenty-two dollars.

H. "General election spending limits" means amounts fifty per cent greater than the amounts specified in subsection G of this section.

I. 1. "Original" spending limit means a limit specified in subsections G and H of this section, as adjusted pursuant to section 16-959, or a special amount expressly set for a particular candidate by a provision of this title.

2. "Adjusted" spending limit means an original spending limit as further adjusted to account for reported overages pursuant to section 16-952.

* * *

INSTITUTE FOR JUSTICE
Timothy D. Keller (019844)
Jennifer M. Perkins (023087)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
P: 480-557-8300/F: 480-557-8305

INSTITUTE FOR JUSTICE
William R. Maurer (WSBA 25451)[1]
101 Yesler Way, Suite 603
Seattle, WA 98104
P: 206-341-9300/F: 206-341-9311

Attorneys for Plaintiff-Intervenors

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*, Plaintiffs, and DEAN MARTIN, a citizen of the State Of Arizona, *et al.*, Plaintiff-Intervenors vs. KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; *et al.*,	Civil Action No. 08-1550-PHX-ROS DECLARATION OF PLAINTIFF-INTERVENOR DEAN MARTIN IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (Filed Jul. 2, 2009)

[1] Admitted *pro hac vice*

Defendants,	) (Assigned to
	) the Honorable
and	) Roslyn O. Silver)
CLEAN ELECTIONS INSTITUTE, INC.	)
	)
Defendant-Intervenor.	)

1. I, Dean Martin, pursuant to 28 U.S.C. §1746(2), hereby declare under penalty of perjury as follows:

2. I am currently the Arizona State Treasurer. I was elected to that position in 2006. From 2001 to 2006, I was an elected member of the Arizona State Senate. I make this declaration in support of Plaintiff-Intervenors' Motion for Summary Judgment in the above-referenced matter.

3. I am a citizen of the United States and a resident of Maricopa County, Arizona. I am over eighteen years of age and fully competent to make this declaration. I make this declaration based on my personal knowledge.

4. In addition to my responses to discovery requests, and the deposition that I gave on March 3, 2009, in this matter, I have provided statements in the form of Declarations in support of my claims in *Martin v. Brewer*, No. CV 04-0200-PHX-EHC, a related case. Specifically, I have provided the following statements regarding my claims against the Citizens Clean Elections Act (the "Act"):

   a. Declaration of Dean Martin, *Martin v. Brewer* (executed February 16, 2004);

b. Declaration of Dean Martin in Support of Supplemental Brief on Mootness Considerations, *Martin v. Brewer* (executed March 8, 2007);

c. Declaration of Dean Martin in Support of Amended Complaint, *Martin v. Brewer* (executed November 26, 2007);

d. Responses to Defendants' and Defendant-Intervenors' First Set of Interrogatories and Document Requests (verified January 15, 2009);

e. Responses to Defendant-Intervenor's First Set of Requests for Admission, Second Set of Interrogatories, and Second Set of Requests for [Production] Directed to Plaintiffs and Plaintiff-Intervenors (executed February 25, 2009);

f. Responses to Defendants' First Request for Admission and Second Request for Document Production to Plaintiff-Intervenors (executed February 27, 2009);

g. Plaintiff-Intervenor Dean Martin's Supplemental Response to Defendants' Request for Clarification (executed March 12, 2009;

5. I now incorporate by reference and affirm each and every prior statement I have made regarding my claims concerning the Act, as listed above.

6. Despite the fact that I have been pursuing my constitutional claims regarding the Act since 2004, it is my understanding that this case may

remain ongoing as we approach the 2010 election season.

7. I will run for statewide office in Arizona in future elections. In that regard, I will be eligible to run for a second term as State Treasurer in 2010.

8. The Act, therefore, will continue to impact my First Amendment rights in coming Arizona state elections.

9. In my experience, most candidates for Treasurer or other state-wide office would at this point have begun their campaign fundraising in anticipation of the upcoming 2010 election.

10. I have chosen not to begin raising funds for any 2010 Arizona election specifically because doing so could provide any publicly funded opponent I may have the advantage of beginning with an identical amount due to the existence of matching funds. That is, any funds that I raise beyond the initial disbursement amount would immediately be handed over to my opponent.

11. The Act thus has already forced me to alter my campaign strategy and change my fundraising plans away from what I believe is my optimum strategy to deliver my message to Arizona voters and to achieve the political goals I have set. I have made this alteration in order to mitigate the impacts of matching funds on any 2010 race for statewide office I undertake.

/s/ Dean Martin	5/6/09
Dean Martin	Date

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMMISH, ***et al.*****,** **Plaintiffs,** **V.** **JAN BREWER,** ***et al.*****,** **Defendants.**	**No. CV 08-1550-PHX-ROS**

DECLARATION OF ROBERT BURNS

(Filed Jul. 2, 2009)

1. I, Robert Burns, pursuant to 28 U.S.C. §1746(2), hereby declare under penalty of perjury as follows:

2. I am the Arizona State Senator representing Legislative District 9. I was first elected to that position in 2002. From 1988 to 2000, I served in the Arizona House of Representatives. I make this declaration in support of the Motion to Intervene in the above-referenced matter.

3. I am a citizen of the United States and a resident of Maricopa County, Arizona. I am over eighteen years of age and fully competent to make this declaration. I make this declaration based on my personal knowledge.

4. I am currently running for re-election in Legislative District 9 as a privately financed candidate. I am running as a privately financed candidate because I oppose the use of taxpayer money to fund campaigns. I have never run for office using taxpayer funds, despite the fact that the Citizens Clean Elections Act (the "Act") penalizes privately funded candidates, so I have been running with a significant disadvantage since the passage of the Act.

5. The Act puts me at a significant disadvantage because of its matching funds provisions. These provisions force me to censor myself in order to avoid triggering matching funds to my government funded opponent. Specifically, I am forced to limit my speech and abide by the Act's expenditure limits or risk being outspent by my government-funded opponent because of the operation of the Act. In that regard, I am not able to raise or spend money to engage in my fundamental first Amendment right to speak freely and communicate with Arizona voters.

6. In the upcoming general election I face a government-funded Democratic opponent. My Democratic opponent did not have any primary opposition, but still received the full cash primary disbursement under the Act of $12,921. Because my opponent did not have any primary opposition, she will be able to use every dollar of her full, government-provided war chest against me in this general election.

7. In addition, the Act may operate to provide my opponent with matching funds in the general

election as soon as my campaign raises an amount equal to my opponent's general election spending limit. Thus, the only way I can avoid being massively outspent by my opponent is to prevent the triggering of additional matching funds to her campaign. Thus, I will be forced to stop accepting contributions to my campaign to make sure that I do not exceed the Act's expenditure limitations for this race, despite the fact that I would like to continue to collect contributions in order to communicate with the voters of my district. I wish to reach more voters by expending such funds, were I able to collect them. I am thus likely to be coerced into accepting the same limits as my government-funded opponent and yet I will not receive any of the benefits of being a government-funded candidate, such as the receipt of matching funds for independent expenditures that oppose my candidacy and the label "participating" or "clean" candidate.

8. As the Clean Elections Commission spends funds to promote the Clean Elections system, especially during election years, I have personally noticed that there is an increasing public perception that candidates who do not accept government funding are "dirty" candidates because they are not participating in the "clean" elections system. The label "nonparticipating" candidate punishes me, as a privately financed candidate, for doing nothing more than exercising my constitutional right to raise money to run for political office and to speak without government-imposed regulations and limits on my speech.

9. Pursuant to 28 U.S.C. §1746(2), I, Robert Burns, hereby declare under penalty of perjury under the laws of the United States and the State of Arizona that the foregoing is true and correct to the best of my knowledge, information and belief.

/s/ Robert L. Burns
Robert Burns

EXECUTED ON
AUGUST 29, 2008

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

DEAN MARTIN, ***et al.,*** **Plaintiffs,** **V.** **JAN BREWER,** ***et al.,*** **Defendants.**	**No. CV 04-0200-PHX-EHC**

DECLARATION OF CHAD KIRKPATRICK

(Filed Jul. 2, 2009)

1. I, Chad Kirkpatrick, pursuant to 28 U.S.C. §1746(2), hereby declare under penalty of perjury as follows:

2. I am the Chairman, of the Arizona Taxpayers Action Committee ("Arizona Taxpayers"), an Independent Expenditures Committee organized pursuant to Ariz. Rev. Stat. Ann. § 16-902. I make this declaration in support of Plaintiffs' First Amended Complaint in the above-referenced matter.

3. I am a citizen of the United States and a resident of Maricopa County, Arizona. I am over eighteen years of age and fully competent to make this declaration. I make this declaration based on my personal knowledge.

4. Arizona Taxpayers was first organized in 2006. That same year, Arizona Taxpayers made independent expenditures in the primary election cycle in Legislative District 8.

5. In Legislative District 8, Arizona Taxpayers supported a government-funded candidate who was running against a privately financed candidate, meaning that Arizona Taxpayers' expenditures did not trigger any matching funds to the candidate it opposed.

6. Arizona Taxpayers also made expenditures to advocate the defeat of two Arizona Propositions, Prop. 201 and Prop. 203.

7. Arizona Taxpayers will make independent expenditures in the 2008 and 2010 elections and in other future elections. Arizona Taxpayers will soon have to decide whether to speak out against government-funded candidates (or in support of a privately financed candidates with government-funded opponents) thus trigging matching-funds under the Citizens Clean Elections Act (the "Act").

8. In the 2008 election cycle, Arizona Taxpayers will participate in at least three and up to five state legislative races within Maricopa County. Arizona Taxpayers will make a decision as to the precise number of legislative races in which it will participate, and the extent of such participation, based in part on whether Arizona's Taxpayers speech will trigger matching funds to a government funded candidate whom Arizona Taxpayers, and its donors, desires to defeat. Arizona Taxpayers will either not voice its opinion, or will

voice its opinion to a lesser extent, when its expenditures will help a candidate with whom it disagrees.

9. When the Clean Elections Commission provides government funds to candidates with whom Arizona Taxpayers and its donors disagrees, based solely on Arizona Taxpayer's exercise of its free speech and free association rights, Arizona Taxpayers, and its donors, will be severely and negatively impacted by the operation of the Act. Because the expenditure of funds by Arizona Taxpayers will directly be responsible for adding to the government-funded candidate's campaign coffers by spending that money, Arizona Taxpayers' speech and association rights will be impaired. The knowledge that a candidate Arizona Taxpayers does not want to be elected will receive a government subsidy, as a direct result of Arizona Taxpayers speech, will prevent Arizona Taxpayers from the full and unrestricted exercise of its speech in such races. Thus, rather than creating and fostering a system where there is "more" speech, the Act creates a climate of self-censorship resulting in less political speech.

10. During the 2006 election cycle some prospective donors expressed concern that their contributions would trigger government funds being distributed to a candidate they disagreed with. Donors were reassured that Arizona Taxpayers were not participating in an election where the opposing candidate was receiving government funds. Heading into the 2008 election cycle, when an opposing candidate receives funds from the Act, Arizona Taxpayers will either not spend money to

voice its opinion, or it will curtail its spending, due to concerns raised by potential donors in the 2006 election cycle.

11. Pursuant to 28 U.S.C. §1746(2), I, Chad Kirkpatrick, hereby declare under penalty of perjury under the laws of the United States and the State of Arizona that the foregoing is true and correct to the best of my knowledge, information and belief.

/s/ Chad Kirkpatrick
Chad Kirkpatrick

EXECUTED ON
NOVEMBER 20, 2007

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, KEVIN GIBBONS, FRANK ANTENORI, TONY BOUIE, AND DOUG SPOSITO,

Plaintiffs,

and

DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, AND ARIZONA TAXPAYERS ACTION COMMITTEE,

Plaintiff-Intervenors,

vs.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, et al.,

Defendants,

and

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant-Intervenor.

No. CV 08-1550-PX-ROS

DEPOSITION OF STEPHEN JAMES VOELLER

(Filed Jun. 12, 2009)

Phoenix, Arizona
February 26, 2009
9:07 a.m.

REPORTED BY:
WILMA A. WEINREICH, CSR, RPR
Certified Reporter
Certificate No. 50530

PREPARED FOR:

(ASCII/MUSCD/ETRAN)

* * *

[12] Q. Earlier, you said you spoke to Governor Symington [13] about the PAC's opposition to the Clean Elections system and also that you spoke with him about the matching funds provisions. What exactly did you speak to Governor Symington about with respect to the matching funds provisions?

A. The matching funds provision is – it was my understanding that it was a central part of the case that we are involved in, so that's why I specifically spoke to him about the matching funds provision.

When we discuss any activities that the PAC is going to engage in, that provision is always a topic. If we do this, does the other guy get matched? And so that's how the matching funds provision was discussed.

* * *

[64] Q. Have you ever decided not to make an independent expenditure through either the PAC or Arizonans For a Sound Economy because of your fears that you would trigger matching funds for a candidate you did not support?

A. I don't recall ever making a decision not to spend money. I do recall having it determined when we spend money.

Q. Okay. And how does it determine when you spend money?

A. There are numerous reporting requirements and notifications and filings depending on when you spend money. So on the advice of counsel, we have to look at – we have to factor in the matching funds provision when we decide when or whether to spend money.

* * *

INSTITUTE FOR JUSTICE
Timothy D. Keller (019844)
Jennifer M. Perkins (023087)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
P: 480-557-8300/F: 480-557-8305

INSTITUTE FOR JUSTICE
William R. Maurer (WSBA 25451)[1]
101 Yesler Way, Suite 603
Seattle, WA 98104
P: 206-341-9300/F: 206-341-9311

Attorneys for Plaintiff-Intervenors

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*, Plaintiffs, and DEAN MARTIN, a citizen of the State Of Arizona, *et al.*, Plaintiff-Intervenors vs. KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; *et al.*, Defendants, and	Civil Action No. 08-1550-PHX-ROS DECLARATION OF PLAINTIFF-INTERVENOR RICK MURPHY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (Filed Jul. 12, 2009) (Assigned to the Honorable Roslyn O. Silver)

[1] Admitted *pro hac vice*.

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant-Intervenor.

1. I, Rick Murphy, pursuant to 28 U.S.C. §1746(2), hereby declare under penalty of perjury as follows:

2. I am currently an Arizona State Representative in Legislative District 9. I was first elected to that position in 2004, and was re-elected in. November 2008. I make this declaration in support of Plaintiff-Intervenors' Motion for Summary Judgment in the above-referenced matter.

3. I am a citizen of the United States and a resident of Maricopa County, Arizona. I am over eighteen years of age and fully competent to make this declaration. I make this declaration based on my personal knowledge.

4. In addition to my responses to discovery requests, and the deposition that I gave on September 11, 2008, I have also provided statements in the form of Declarations in support of my claims in this matter. Specifically, I have provided the following statements regarding my claims against the Citizens Clean Elections Act (the "Act"):

   a. Declaration of Rick Murphy, (executed August 29, 2008);

   b. Responses to Defendants' and Defendant-Intervenors Interrogatories Document Requests (verified September 23, 2008);

c. Responses to Defendants' and Defendant-Intervenors' First Set of Interrogatories and Requests for Production (verified January 15, 2009);

d. Responses to Defendant-Intervenor's First Set of Requests for Admission, Second Set of Interrogatories, and Second Set of Requests for [Production] Directed to Plaintiffs and Plaintiff-Intervenors (executed February 25, 2009);

e. Responses to Defendants' First Request for Admission and Second Request for Document Production to Plaintiff-Intervenors (executed February 27, 2009);

5. I now incorporate by reference and affirm each and every prior statement I have made regarding my claims concerning the Act, as listed above.

6. It is my understanding that this case may remain ongoing as we approach the 2010 election season.

7. At this time, I intend to run in 2010 for legislative office, either for re-election as State Representative or possibly for State Senator in Legislative District 9.

8. The Act, therefore, will continue to impact my First Amendment rights in coming Arizona state elections.

9. In addition to the specific harms to my First Amendment rights described in the materials listed in paragraph 4 above, based on my experience in Arizona state politics, I believe that

the existence of matching funds coerces traditionally funded candidates into changing their message and the timing of getting out their message, even if ultimately the amount of messaging a traditional candidate chooses to engage in does not change. That is to say, traditionally funded candidates like myself are forced to alter our campaign strategy in order to take into account the damaging effects of matching funds and to mitigate that damage by delaying the triggering of matching funds as long as possible.

10. Specifically, in my 2008 re-election campaign, during the general election, I ran against three publicly financed candidates for the two open Representative seats. This meant that anytime I triggered matching funds by raising one dollar in campaign contributions, I would trigger one dollar to each of my three opponents to use in running against me.

11. I therefore chose to delay my fundraising until the very end of my general campaign so that even if I did trigger matching funds to my opponents, I would do so late enough in the process that their advantage would be lessened.

12. As it turned out, independent expenditures played a significant role in my campaign this year, and it is my understanding that independent expenditures totaling nearly $100,000 were made in Legislative District 9 during this election cycle.

13. Those independent expenditures caused matching funds to issue to my publicly funded opponents.

Altogether, the Clean Elections Commission provided my three opponents over $176,000 in funding as compared to the approximately $21,000 I raised for my campaign.

14. The 2008 general election was particularly disturbing because it appears that the independent expenditures that triggered matching funds did so in a way that doubled the negative impact against me, and appeared to me an abuse of the matching funds provision. Specifically, there were two Democratic candidates in the general election. Significant independent expenditures were made on behalf of one Democratic candidate, Shawn Hutchinson, which triggered matching funds to the other Democratic candidate, Sheri Van Horsen (as well as to Republican candidate Debbie Lesko). Ms. Van Horsen was then able to use that funding to campaign negatively against me.

15. This means that the independent expenditure made ostensibly to benefit one specific candidate actually benefitted both Democratic candidates and working to my detriment. The independent expenditures could have specifically been made on behalf of both Democratic candidates, but in that case Ms. Van Horsen would not have received matching funds with which to campaign against me.

16. My experience with the Act, and particularly the matching funds provision, is that I am forced to alter my campaign strategy and change my fundraising plans away from what I believe is my optimum strategy to deliver my message to

Arizona voters and to achieve the political goals I have set. Even with that alteration, I am nonetheless likely to be massively outspent by the candidates funded by the Clean Elections Commission.

17. In addition to my own experiences, it is my understanding that some traditionally funded candidates have avoided triggering matching funds to their publicly funded opponents toward the end of their general election campaigns by making necessary expenditures during that time frame on credit, intending to raise funds after the general election occurs. While I do not recall any specific candidate names who have engaged in this strategy, I am certain that I have heard it discussed as one strategy candidates have used in the past.

/s/ Rick Murphy 5-19-09

Rick Murphy Date

OPPOSITION BRIEF

(4) (5)

Nos. 10-238 and 10-239

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ARIZONA TAXPAYERS ACTION COMMITTEE, DEAN MARTIN, and RICK MURPHY,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TIMOTHY A. NELSON
Chief Deputy Attorney General
MARY R. O'GRADY
Solicitor General
Counsel of Record
JAMES E. BARTON II
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007-2926
(602) 542-3333
Solicitor.General@azag.gov

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the First Amendment's requirement that "Congress shall make no law . . . abridging the freedom of speech" and this Court's cases that prohibit discriminatory, asymmetric limitations on privately funded candidates, but affirm the authority of regulators to seek disclosure in order to prevent corruption, allow the citizens of Arizona to combat the presence and appearance of corruption by establishing a campaign-finance system in which candidates forego private contributions in exchange for accepting various restrictions, including conditioning access to two-thirds of their funds based on the campaign activity that privately funded candidates or independent expenditure groups report.

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STATEMENT OF THE CASE

1. Responding to the practice of exchanging large campaign contributions for political favors, the United States enacted the Federal Election Campaign Act ("FECA"). *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976). This Court explained that "[a]lthough the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate[d] that the problem [wa]s not an illusory one." *Id.* at 27. This Court approved of the government's using disclosure requirements as a tool to deter corruption and "public financing of Presidential elections as a means to reform the electoral process . . . ." *Id.* at 67, 90. It further held that the federal public-funding system was a "congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93.

2. In 1998, Arizona voters passed the Citizens Clean Elections Act (the "Act"). In passing the initiative, Arizona voters declared that at the time Arizona's election-financing system "[a]llow[ed] Arizona elected officials to accept large campaign contributions from private interests *over which they ha[d] governmental jurisdiction*; . . . [u]ndermine[d] *public confidence in the integrity of public officials*; . . . [and] [c]ost[ ] average taxpayers millions of dollars in the form of *subsidies and special privileges for campaign contributors*." Arizona Revised Statutes ("A.R.S.")

§ 16-940. (emphasis added). The Act made it possible for state candidates to finance their campaigns with money from a public fund that the Act established, thus eliminating the possibility of actual quid pro quo corruption and the appearance of such corruption among participating candidates.

3. The Act establishes the maximum amount of money available to candidates participating in the Clean Elections system. For example, candidates seeking their party's nomination for governor in the primary election can spend no more than approximately $1,900,000.[1] A.R.S. §§ 16-961(G)(5), -952(E). Participating candidates do not, however, automatically receive the maximum amount of funds available. Before being eligible to receive Clean Elections funds, candidates must demonstrate that sufficient voter interest exists in their candidacy by collecting a designated number of $5 qualifying contributions. A.R.S. § 16-946. A candidate who has no opponent in either the primary or general election receives only an amount equal to five dollars for each qualifying contribution that the candidate submitted to the Clean Elections Commission. A.R.S. § 16-951(A)(3). A candidate who has an opponent receives an initial grant equal to the initial spending limit, which is

[1] Pursuant to A.R.S. §§ 16-905(H) and 16-959(A), the Secretary of State adjusts the dollar amounts in the Clean Elections Act and the Elections Code for inflation. For simplicity, this brief will cite the initial values that the Act provided without regard to inflationary adjustments.

one-third of the full grant, regardless of the activity in that candidate's race. A.R.S. § 16-951(A)(1). For gubernatorial primaries, participating candidates receive an initial grant of approximately $640,000. The Commission distributes the remaining two-thirds through matching funds only if there is sufficient activity in the candidate's race to justify releasing the funds. A.R.S. § 16-952. If the participating candidate's opponents – either nonparticipating candidates or independent expenditure groups – spend or raise more than an amount equal to the initial grant, the candidate is given matching funds that are roughly equal to the opponents' expenditures until the candidate has received the full grant.[2] A.R.S. § 16-952.

---

[2] During the primary election, participating candidates begin receiving matching funds once the sum of expenditures by their nonparticipating primary opponents, minus six percent to account for fundraising costs, and expenditures by independent expenditure groups exceeds the sum of the initial primary election spending limit and the amount of early contributions that the participating candidate has collected. A.R.S. § 16-952 (A), (C). During the general election, participating candidates begin receiving matching funds once the sum of the funds that their nonparticipating general election opponents raise, minus six percent to account for fundraising costs, and the expenditures by independent expenditure groups exceeds the initial general election spending limit. A.R.S. § 16-952 (B), (C). As the participating candidates receive matching funds, the spending limit is adjusted by an amount equal to the matching funds; this new spending limit is used for future matching-funds calculations until the maximum spending limit is reached. A.R.S. § 16-952 (A), (B), (E). After the participating candidates reach the maximum spending limit, they receive no more funding from any source. A.R.S. §§ 16-952 (E), -941.

Under no circumstances will a participating candidate receive more than the full grant. *Id.* The candidate may not raise private money to match money that the candidate's opponents have raised or spent above and beyond the full grant amount. A.R.S. § 16-941.

Participating candidates agree to other restrictions in addition to having their access to two-thirds of the full grant of public money conditioned on their opponents' activities. For instance, they can raise only limited funds from private contributions. Gubernatorial candidates, for example, can raise only $40,000 in early contributions. A.R.S. § 16-945. Also, they can do so only during the qualifying and exploratory periods, which end shortly before the primary. *Id.*; A.R.S. § 16-961(B)(2), (3). Furthermore, candidates may accept private contributions only from individuals, and each contributor may give no more than $100. A.R.S. §§ 16-941, -945. Candidates may not accept money from a political party or from political action committees. A.R.S. § 16-941(A)(1). By contrast, nonparticipating candidates have no limit on the total amount of funds that they may raise from private donors, and they are free to raise private money during the entire campaign. A.R.S. § 16-905 (listing limits on nonparticipating candidates). Nonparticipating candidates may accept money from political parties or political action committees. *Id.* A nonparticipating candidate for governor may accept contributions of up to $808 from individuals, which is eight times the limit imposed on participating candidates.

A.R.S. §§ 16-905(A), -941(B). Participating candidates agree to spend no more than $1000 of their personal money on their campaigns. A.R.S. § 16-941(A)(2). There is no limit on the amount of personal money that nonparticipating candidates may use on their own campaigns. 2009 Ariz. Sess. Laws, ch. 114 (striking the reporting requirements for candidates using personal money). The Act requires of nonparticipating candidates only that they report the contributions that they receive and the expenditures that they make so that the Commission may give participating candidates access to additional funding up to the full grant amount. A.R.S. § 16-941(B).

Petitioners John McComish, Nancy McLain, and Tony Bouie ("McComish Petitioners") wrongly claim that they must fund and disseminate speech that rebuts their positions. *See, e.g.*, McComish Pet. at 10 ("[r]eeling from a deluge of hostile speech financed by his campaign expenditures"), 17 ("Arizona's matching-funds trigger effectively forces traditional candidates and their supporters to disseminate hostile speech . . . ."). Arizona voters created the Clean Elections Fund from money received from a voluntary tax check-off box, tax-credit donations, and a surcharge on fines and penalties. A.R.S. § 16-954 (A)-(C). Nonparticipating candidates have no part in funding or distributing the message of participating candidates. *See Buckley v. Valeo*, 424 U.S. 1, 91 n.124 (1976) (holding that tax check-offs do not create a system that involves compelled speech); *Bd. of Regents v. Southworth*, 529 U.S. 217, 230 (2000) (holding that

the university's collecting fees used to promote "the free and open exchange of ideas by, and among its students," did not amount to compelled speech, so long as the program satisfied "the viewpoint neutrality requirement").

4. Since Arizona voters approved the Clean Elections program in 1998, the public-funding option has become an integral part of Arizona's campaign-finance system. This system has been used in every state election since 2000. In the elections since 2002, fifty-two percent to sixty-seven percent of the candidates for state offices have run as participating candidates. Resp. to 2d Renewed Application for Stay at App. 15.

5. a. The McComish Petitioners filed their Complaint against the Arizona Secretary of State and the members of the Arizona Clean Elections Commission on August 21, 2008. The Complaint sought to deny their opponents access to two-thirds of the funds made available to participating candidates and thus to limit their opponents' exercise of political speech. The district court permitted Petitioners Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee, Dean Martin, and Rick Murphy ("PAC Petitioners"), who were parties to a separate challenge, to intervene in this action. The PAC Petitioners' complaint asserted claims similar to those that the McComish Petitioners' complaint did. The basis of the McComish Petitioners' and the PAC Petitioners' (collective "Petitioners") objection was that conditioning the distribution of two-thirds of the

total grant on the activities of nonparticipating candidates and of those making independent expenditures had a chilling effect on Petitioners' spending because it caused them to avoid or delay spending to prevent participating candidates from receiving more than the initial grant – that is, more than the one-third of the total funds available to participating candidates.

b. On January 20, 2010, the district court entered an order granting Plaintiffs' motions for summary judgment, denying Defendants' motions for summary judgment, and enjoining enforcement of the Act's matching-funds provision, A.R.S. § 16-952. McComish Pet. App. 47-80. Even in granting summary judgment for Plaintiffs, the district court found no definitive evidence that matching funds in fact deter spending in Arizona, *Id.* at 54, and recognized that it was "illogical to conclude that the Act creating more speech is a constitutionally prohibited 'burden' on Plaintiffs," *Id.* at 66. Furthermore, after acknowledging that if Arizona simply provided the full grant to each participating candidate, there would be no question of the Act's constitutionality, the district court noted that "[i]f a single lump sum award would not burden Plaintiffs' free speech rights in any cognizable way, finding a burden solely because of the incremental nature of the awards seems difficult to establish." *Id.* at 66-67. The district court, however, concluded that "[d]espite the unsettling nature of Plaintiffs' claims, *Davis* [*v. F.E.C.*, 128 S. Ct. 2759 (2008),] requires this Court find Plaintiffs have

established a cognizable burden." *Id.* at 67. The district court also believed that, notwithstanding these findings, the Supreme Court's decision in *Davis* required it to hold that matching funds are subject to strict scrutiny. *Id.* at 69. Despite the Act's anticorruption purpose, the district court concluded that matching funds are not narrowly tailored to advance a compelling interest and therefore do not satisfy strict scrutiny. *Id.* at 72.

c. The Ninth Circuit reversed. The court of appeals analyzed the matching funds provision as though it affected fully protected speech because it impacted both contributions and expenditures. McComish Pet. App. 23. Turning to the level of burden the provision placed on Petitioners' speech, the court of appeals recognized that this case is unlike *Davis*, writing that "the law in *Davis* was problematic because it singled out the speakers to whom it applied based on their identity. The Act's matching-funds provision makes no such identity-based distinctions." McComish Pet. App. 28. Rather, the Act placed an "indirect or minimal" burden on Petitioners' speech. *Id.* Furthermore, "[a]lthough Plaintiffs [could] not point to any specific instance in which their speech has been chilled by the Act," the court of appeals recognized the potential for "a theoretical chilling effect on donors." *Id.* at 32, 34. Thus based on this Court's holding in *Citizens United v. F.E.C.*, 130 S. Ct. 876 (2010), the court of appeals examined the matching funds provision under intermediate scrutiny. *Id.* The court of appeals noted this Court's holding

that "the State's interest in eradicating the appearance of *quid pro quo* corruption to restore the electorate's confidence in its system of government is not 'illusory,' it is substantial and compelling." *Id.* at 35. The court of appeals also found that "the State has an interest in providing matching funds to encourage participation in its public funding scheme." *Id.* Finally, the court of appeals rejected the district court's reasoning that this interest was mitigated when a publicly financed candidate was running against a self-funded candidate because "[i]t is not relevant under this analysis what the source of a nonparticipating candidate's campaign contribution is when he or she triggers matching funds." *Id.* at 37. Thus, the court of appeals held that "matching funds bear a substantial relation to the State's anticorruption interest." *Id.* In his concurrence, Judge Kleinfeld agreed that the Act passed constitutional muster, but reasoned that Arizona's public-financing system simply imposed "no limitations whatsoever on a [nonparticipating] candidate's speech." *Id.* at 39.

REASONS TO DENY THE PETITIONS

This Court should deny the Petitions for Certiorari because the court of appeals correctly rejected Petitioners' First Amendment challenges to Arizona's matching-funds provision. Also, the Court should deny the Petitions because the alleged circuit split is the result of peculiarities of various state

public-financing systems, rather than the application of incompatible rules of law.

1. Contrary to the Petitioners' contention, the court of appeals' opinion correctly applied this Court's holdings in *Buckley*, *Davis*, and *Citizens United*. In *Davis* this Court found that a discriminatory rule for similarly situated speakers imposed a substantial burden and could stand only if it survived strict scrutiny. 128 S. Ct. at 2772. The Court made it clear that absent this asymmetric burden "Davis' argument would plainly fail." *Id.* at 2771. Thus, the Ninth Circuit correctly applied *Davis* in finding that where there is no discriminatory rule, as in subjecting candidates "to entirely different regulatory schemes when some candidates voluntarily choose to participate in public financing," a provision should be analyzed under intermediate scrutiny. McComish Pet. App. 27. Analyzing the Millionaire's Amendment in *Davis*, this Court also found that the government's interest, leveling the playing field, was not a compelling interest. *Id.* at 2773-74. By contrast, this Court has repeatedly recognized that preventing corruption is an important or a substantial governmental interest. *Buckley*, 424 U.S. at 80-81; *Davis*, 128 S. Ct. at 2770; *Citizens United*, 130 S. Ct. at 901-02. For that reason, the Ninth Circuit correctly concluded that the State's interest in this case was an important one. McComish Pet. App. 35. Given the insubstantial burden and important governmental interest this case presents, the court of appeals properly applied *Buckley* and *Citizens United* in determining that

"there is a 'substantial relation' between the Act's matching-funds provision and 'a sufficiently important governmental interest[ ]' [to] conclude that it does not violate the First Amendment." McComish Pet. App. 25, 34 (quoting *Citizens United*, 130 S. Ct. at 914) (internal quotation marks omitted).

a. Petitioners' claims rest on the notion that this Court's ruling in *Davis* disallows the matching-funds component of Arizona's public-funding system because the availability of those funds to participating candidates is conditioned on the activity of non-participating candidates or independent expenditure groups. *See, e.g.*, McComish Pet. at 32-33; Ariz. Free Enterprise Club's Freedom Club PAC Pet. ("PAC Pet.") at 29-34. The first problem with this analysis is that Arizona's matching-funds provision, unlike *Davis*'s Millionaire Amendment, does not unfairly burden privately funded candidates' or political committees' free speech.

Davis considered a scheme in which one privately funded candidate had a different contribution limit than another privately funded candidate. When a candidate spent more than $350,000 of his personal money on the campaign, he became classified as a self-funded candidate. 128 S. Ct. at 2766, 2770. By virtue of "a new, asymmetrical regulatory scheme," the self-funded candidate's opponent qualified "to receive both larger individual contributions than would otherwise be allowed and unlimited coordinated party expenditures." *Id.* at 2766, 2770.

A side-by-side comparison of the provisions at issue in *Davis* and this case reveals the dramatic differences between the two. In *Davis*, both candidates were privately funded with no expenditure limit; in this case, Petitioners' opponents are publicly funded with expenditure limits set by statute. 128 S. Ct. at 2769; A.R.S. §§ 16-961(G)(5), -952(E). In *Davis*, both candidates could raise funds from private sources during the entire cycle; in this case, Petitioners' opponents may raise funds from private sources only until shortly before the primary election. 128 S. Ct. at 2768-69; A.R.S. §§ 16-945; -961(B)(2), (3). In *Davis*, the contribution limit for those contributing to Davis was one-third the limit of those contributing to his opponent; in this case, Petitioners that are candidates can accept contributions of up to eight times the limit for their opponents, and Petitioners that are political committees can accept unlimited contributions from individuals. 128 S. Ct. at 2766; A.R.S. §§ 16-902.01 (listing requirements for political committees), -905(A), -941(B). In *Davis*, his opponents could accept assistance from their party that was not available to him; in this case, it is the Petitioners who can accept additional assistance from their parties. 128 S. Ct. at 2766; A.R.S. § 16-941(A). The Act does not place a substantial burden on the Petitioners' speech, but establishes two completely separate campaign-finance systems with their own advantages and disadvantages. Accordingly, it should be analyzed under intermediate scrutiny. *Compare Davis*, 128 S. Ct. at 2772 (holding that a provision "impos[ing] a substantial burden on the exercise of the First

Amendment . . . cannot stand unless it is 'justified by a compelling state interest'") (citation omitted) *with Citizens United*, 130 S. Ct. at 914 (upholding a provision that neither imposes a ceiling on campaign activities nor prevents speech so long as the provision bears a substantial relation to a sufficiently important governmental interest) (citation omitted); *see also* McComish Pet. App. 34.

b. The second major flaw in the Petitioners' analysis is that while the Millionaire's Amendment at issue in *Davis* did not serve an anticorruption purpose, the Act's matching-funds provision does. This Court explained that "by discouraging use of personal funds, [the Millionaire's Amendment] disserves the anticorruption interest." *Davis*, 128 S. Ct. at 2773. Because public funds were not at issue in *Davis*, the plaintiff's only alternative was to turn to other private sources. By contrast, the Act enables candidates to run campaigns without private contributions. By eliminating a necessary component of any contributions-for-political-favors scheme, it fights quid pro quo corruption; in the words of the Act, it hopes to save taxpayers "millions of dollars in the form of subsidies and special privileges for campaign contributors." A.R.S. § 16-940. The matching-funds provision encourages candidates to participate in the public-funding system. As the Court of Appeals explained "[b]ecause *Buckley* held that public financing of elections furthers First Amendment values, federal courts have found that states may structure them in

a manner which will encourage candidate participation in them." McComish Pet. App. 35.

The matching-funds provision distributes payments in proportion to activity in a race and is an important part of Arizona's campaign finance system. If the State provided full grants at the outset of the race, the program would be wasteful and would thus undermine the voter confidence that the Act seeks to restore. *See* A.R.S. § 16-940(B)(5) (illustrating that the Act hopes to restore confidence). Also, if the State provided equal funding in competitive and noncompetitive races, it might not be possible for the Clean Elections Fund to provide sufficient funds to make participation in competitive districts feasible. *See* A.R.S. § 16-954(D)-(F) (recognizing that the fund has limited resources). Disabling the state's response to quid pro quo corruption in these races would deal a major blow to the system's effectiveness. McComish Pet. App. 38. Consequently, the Act and its matching funds provision bear a substantial relation to the State's important anticorruption interest.

2. The alleged circuit split does not warrant reviewing the court of appeals' decision in this case because the difference in applying *Davis* can be attributed to differences in the various campaign-finance systems. For example, the Eleventh Circuit did not address whether Florida's public-funding system would match the expenditures of nonparticipating candidates without limit, or if it was a system like Arizona's that merely provided access to a limited amount of funds. *Scott v. Roberts*, 612 F.3d 1279,

1285-86 (11th Cir. 2010). An unlimited match of funds spent by the privately funded candidate is a more significant burden than a system that is capped. Also, some states use a blended system that requires candidates to accept large amounts of private donations that are a major portion of the total funding for their campaigns, which undermines the anticorruption effect of those systems. *See, e.g.*, *Scott*, 612 F.3d at 1290-98; *Green Party of Conn. v. Garfield*, 616 F.3d 213, 220-22 (2d Cir. 2010). The level of participation is another variable among state cases. It is almost a tautology that a system that allows some candidates to run without accepting private campaign contributions will address the problem of accepting private campaign contributions in exchange for political favors. And while it generally follows directly that encouraging participation in such systems serves the same anticorruption purpose, this is not the case if there is nearly complete participation without matching funds. *See Day v. Holahan*, 34 F.3d 1356, 1361 (8th Cir. 1994) (refraining from deciding whether matching funds served this interest because "candidate participation in public campaign financing [was nearly] 100% *before* enactment of [the matching funds provision]).

The matching funds provisions at issue in the above cited cases did not bear a substantial relation to preventing quid pro quo corruption or the appearance of such corruption due to the specific facts of those cases. Most circuits, on the other hand, have upheld matching funds based on this Court's support

of public financing in *Buckley*. For example, in *Daggett v. Comm'n on Governmental Ethics & Election Practices*, the First Circuit recognized that reporting requirements that helped to administer a capped public-funding system were constitutional. 205 F.3d 445, 451, 466 (1st Cir. 2000); *see also N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 440 (4th Cir. 2008); *Gable v. Patton*, 142 F.3d 940, 947 (6th Cir. 1998); *Rosenstiel v. Rodriquez*, 101 F.3d 1544, 1553 (8th Cir. 1996). This Court need not grant review to resolve a circuit split.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

TIMOTHY A. NELSON
Chief Deputy Attorney General

MARY O'GRADY
Solicitor General
Counsel of Record
JAMES E. BARTON II
Assistant Attorney General

Counsel for Respondents

OPPOSITION BRIEF

(5) (6)

Nos. 10-238 and 10-239

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IN THE

Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *ET AL.*,

Petitioners,

v.

KEN BENNETT, *ET AL.*,

Respondents.

JOHN MCCOMISH, *ET AL.*,

Petitioners,

v.

KEN BENNETT, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

BRADLEY S. PHILLIPS*
GRANT A. DAVIS-DENNY
ELISABETH J. NEUBAUER
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
brad.phillips@mto.com

MONICA YOUN
MIMI MARZIANI
THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas
New York, NY 10013
Telephone: (212) 992-8158
Facsimile: (212) 995-4550
monica.youn@nyu.edu

Counsel for Respondent Clean Elections Institute, Inc.

October 2010

*Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TIMOTHY M. HOGAN
ARIZONA CENTER FOR LAW
IN THE PUBLIC INTEREST
202 EAST MCDOWELL ROAD
SUITE 153
Phoenix, AZ 85004
Telephone: (602) 258-8850
Facsimile: (602) 258-8757
thogan@aclpi.org

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly apply intermediate scrutiny to Arizona's triggered matching funds provision after finding that this provision does not limit campaign expenditures and imposes only a minimal burden on spending, in light of this Court's holdings in *Buckley v. Valeo* and *Citizens United v. FEC* that intermediate scrutiny applies to disclosure laws that do not limit but may place significant burdens on campaign expenditures?

2. Did the Court of Appeals correctly follow *Buckley* in holding that Arizona's triggered matching funds provision survives intermediate scrutiny because it bears a "substantial relation" to Arizona's sufficiently-important interest in combating *quid pro quo* corruption while protecting the public fisc, where the record established that, without triggered matching funds, participation in Arizona's public funding system would drop and the effectiveness of the system at preventing corruption would therefore decline?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent Clean Elections Institute, Inc. ("CEI") has no parent company and no publicly held company owns 10 percent or more of CEI.

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INTRODUCTION

Under Arizona's public financing law, candidates who choose public financing are given a small initial grant and may thereafter be entitled to additional public funding that is triggered by contributions to or expenditures by their privately financed opponents and independent political committees ("triggered matching funds").[1] The Court of Appeals held that Arizona's triggered matching funds provision is subject to intermediate scrutiny and is constitutional because it bears a substantial relation to Arizona's important interest in reducing actual and apparent corruption. Neither Petition addresses the Ninth Circuit's rationale for applying intermediate scrutiny or makes any serious argument that Arizona's law does not survive that level of scrutiny.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), and again in *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876 (2010), this Court recognized that disclosure requirements, while capable of discouraging political spending, place no limit on expenditures. Accordingly, in both cases, the Court declined to apply strict scrutiny to assess particular disclosure rules and instead held that intermediate scrutiny is proper. Similarly, the Court of Appeals here correctly

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[1] Triggered matching funds are different in kind from provisions in other systems, such as the presidential primary public financing system, in which public grants are provided to publicly funded candidates based on small contributions *to those candidates themselves*, usually in the form of a one to one or greater ratio, and which are sometimes also referred to as "matching funds."

recognized that, even if triggered matching funds are capable of imposing some minimal strategic burden on Petitioners' spending, *Buckley* and *Citizens United* require application of intermediate scrutiny to this provision. Petitioners do not explain why the Ninth Circuit should have disregarded *Buckley* and *Citizens United* or treated triggered matching funds differently than disclosure requirements.

The Court of Appeals also correctly held that this Court's decision in *Davis v. Federal Election Comm'n*, 128 S.Ct. 2759 (2008), which struck down a scheme of discriminatory contribution limits in a system of purely private financing, does not control the proper level of scrutiny for Arizona's triggered matching funds provision in an overall scheme that offers public and private fundraising. Petitioners attempt to create a post-*Davis* circuit split on the constitutionality of the Arizona model based on the Second Circuit's decision in *Green Party of Connecticut v. Garfield*, 616 F.3d 213 (2d Cir. 2010) and the Eleventh Circuit's decision in *Scott v. Roberts*, 612 F.3d 1279, 1290-98 (2010). Neither *Scott* nor *Green Party*, however, addressed the constitutionality of a system like the Arizona model. Moreover, the public funding programs at issue in those cases were very different from Arizona's and from each other, in ways that are significant to the constitutional analysis.

In *Scott*, the Eleventh Circuit granted a preliminary injunction against a Florida campaign statute that provided triggered matching funds to candidates who were also permitted to raise the same potentially corrupting private contributions as their fully privately financed opponents. *See Scott*, 612 F.3d at 1290-98. Unlike the Arizona approach, Florida's law did not provide a complete alternative

to private fundraising and its attendant risks of corruption. Rather, Florida supplemented potentially corrupting private contributions with public funds and arguably treated one set of privately financed candidates differently than another set of privately funded candidates. Whatever the merits of such an approach, it is fundamentally different from the model adopted by Arizona voters and upheld by the Ninth Circuit.

The Connecticut law at issue in *Green Party* combined triggered matching funds with an initial grant that, standing alone and without any additional funds, equaled the average amount spent on *competitive* races in previous elections. *See Green Party of Connecticut v. Garfield*, 616 F.2d at 219-21. Connecticut's particular financing structure distinguishes it from the Arizona model of low initial disbursements combined with triggered matching funds as necessary in competitive races. If, as the Second Circuit found, the initial funding amount in Connecticut was sufficient to run a competitive campaign, that might raise questions about whether Connecticut's triggered matching funds: (1) were necessary to encourage participation in public funding, (2) operated to truly expand speech, and (3) were carefully designed to protect the public fisc. No such questions can be raised about the Arizona model.

In short, *Scott* and *Green Party* did not address the constitutionality of the Arizona model of public funding, in which triggered matching funds are instrumental to protecting the state's limited resources while encouraging participation in a system that reduces both the reality and appearance of *quid pro quo* corruption. Although the three circuits may have employed different reasoning, their holdings are

reconcilable. The Court should deny the petitions and allow states like Arizona to continue to serve as laboratories for innovative campaign finance reforms

STATEMENT OF THE CASE

I. THE CITIZENS' CLEAN ELECTIONS ACT

For over a decade, Arizona's unique voter-enacted Citizens' Clean Elections Act (the "Act") has promoted free speech and helped combat corruption and the appearance of corruption in Arizona government, while protecting the public fisc. The Act offers candidates a carefully tailored public funding alternative to the traditional approach of raising potentially corrupting private contributions.

The Act, which was passed in 1998, is the Arizona electorate's carefully considered response to one of the worst state-level corruption scandals in this nation's history. In the early 1990s, elected officials in Arizona were caught on tape accepting campaign contributions and bribes in exchange for agreeing to support gambling legislation. (ER 3247-49, 5556-60, 5576-96).[2] AzScam, as the scandal came to be known, received widespread coverage, including newspaper headlines like "Videotapes Show Payoffs" and candid quotes from state legislators such as "We all have our prices," "I sold way too cheap," and "There's not an issue in this world I give a [expletive] about." (ER 3247-49, 5576-81). Unsurprisingly, AzScam fostered a widespread perception of political corruption, even among state capitol insiders. Arizona voters, for example, read post-AzScam reports that 100% of journalists, 66% of legislative staffers, and 42% of legislators and lobbyists believed that most major contributors received special advantages from legislators. (ER 5603-5608).

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[2] "ER" refers to "Appellants' Excerpts of Record" filed before the Ninth Circuit.

AzScam occurred five years into Arizona's experiment with a campaign finance system based on contribution limits. Ariz. Rev. Stat. § 16-905 (2010) (historical note). As AzScam demonstrated, those contribution limits proved insufficient, by themselves, to prevent actual incidences of *quid pro quo* corruption and the public appearance of corruption. In the years following AzScam, the public received yet more evidence that contribution limits alone would not prevent improper acts in Arizona. For example, just months before the adoption of the Act, *The Arizona Republic* reported in a front-page story that the Arizona Senate's President had "assigned the state's most powerful lobbyists to raise money for specific candidates" and had "warned . . . lobbyists that they [would] suffer political retribution in the next session of the Legislature if they raise[d] money" for the opposing party. (ER 5641).

As the plain language of the Act makes clear, Arizona voters passed the Act in response to their finding that the then-existing "election-financing system . . . [u]ndermine[d] public confidence in the integrity of public officials." Ariz. Rev. Stat. § 16-940(B)(5) (2010). The Act was intended to "improve the integrity of Arizona state government . . ., encourage citizen participation in the political process, and . . . promote freedom of speech under the U.S. and Arizona Constitutions." Ariz. Rev. Stat. § 16-940(A) (2010).

Under the Act, in exchange for agreeing to abide by expenditure limits, forgo potentially corrupting private fundraising, and participate in public debates, candidates who qualify by collecting a specified number of five-dollar contributions (to demonstrate a base of support among voters) can receive public funding for their statewide and state

legislative campaigns. Ariz. Rev. Stat. §§ 16-941, 16-945, 16-946, 16-950, 16-956(A)(2) (2010).

Arizona's model for distributing limited state monies to candidates who choose public funding is innovative and thoughtfully designed. The Act is designed to both provide candidates with sufficient resources to run competitive campaigns and avoid wasting limited state funds on non-competitive races. Thus, it provides eligible candidates with a base grant equal to only one-third of the maximum per-candidate funding allotment. If a publicly funded candidate's traditionally funded opponent spends more than the initial base grant on his or her campaign, or if the publicly funded candidate is targeted by independent expenditures, the publicly-funded candidate receives additional triggered matching funds up to twice the amount of the initial grant. § 16-952(A), (C)(1)-(2), (E) (2010).

At deposition, the lead drafter of the Act explained the rationale behind Arizona's carefully calibrated procedure for distributing scarce public funds. As he testified, in Arizona there was a "wide disparity . . . in the amount of money that was spent on various races." (ER 5648). Prior to the Act, over 80% of Arizona's legislative districts were uncontested or uncompetitive. In those districts, candidates tended to spend $10,000 or less. But, in a handful of competitive districts, average expenditures were three times that amount. (ER 5649). The Act's drafters faced a dilemma. If all candidates received only $10,000 in public funding, it would be "too easy to outspend the Clean Elections candidate and no one would run as a Clean Elections candidate." (ER 5650). On the other hand, if all candidates were given $30,000 in public funding, "there would be millions of dollars of wasted Arizona money." (*Id.*) Thus, a one-

size-fits-all approach would not work in Arizona. By combining low initial disbursements with the potential to trigger additional funds, the Act's drafters developed a system that "allow[ed] us to set the bar at the low amounts that would be needed for the bulk of campaigning, and yet allow it to flow upwards [when] there was a competitive race in which the candidate was opposing a well-funded opponent." (ER 5651).

In short, by assuring candidates that they will have enough funds to run viable campaigns in competitive races, Arizona's model encourages participation in the public-funding system and thereby reduces the potential for *quid pro quo* corruption or its appearance. At the same time, Arizona's approach protects the public fisc against unnecessarily high public-funding grants in races that are not competitive.

II. THE LAWSUIT, DISCOVERY, AND THE LOWER COURT DECISIONS

A. The Complaints

Petitioners are non-participating candidates and independent spenders who are ideologically opposed to public financing in all its forms. Although this Court has long held that public financing "furthers, not abridges, pertinent First Amendment values," *Buckley*, 424 U.S. at 92-93, Petitioners allege that the Act's triggered matching funds provision, which provides additional monies for campaign speech, violates the First Amendment. Petitioners do not and cannot allege that the Act prohibits them from spending as much as they want in support of their campaigns; the Act does not limit expenditures by either non-participating candidates or independent expenditure committees. Petitioners assert instead

that the potential that their spending might trigger matching funds for publicly funded opponents has a chilling effect on their speech. Petitioners allege also that the triggered matching funds provision violates the Equal Protection Clause.

B. Triggered Matching Funds Have Not Chilled Speech

Despite having access to both incumbent officeholders and candidates in Arizona and having conducted extensive discovery, Petitioners did not uncover evidence of any chilling effect from triggered matching funds during the decade that they have been in effect. In fact, discovery revealed that Petitioners and other traditionally funded candidates did not spend less money on their campaigns because of triggered matching funds. Rather, they regularly exceeded the triggered matching funds threshold. For instance, Senator Robert Burns[3] testified that while running for office he paid no attention to his opponents' receipt or expenditure of triggered matching funds. (ER 5687-90.) In 2008, Senator Burns and independent groups spent freely above the threshold for triggering matching funds for his opponents, resulting in $28,250 of triggered matching funds to finance additional speech. (ER 1540.) Representative Richard Murphy conceded at deposition that triggered matching funds never led him to turn away a contribution, and his campaign consultant testified that Murphy never stopped

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[3] Senator Burns was a Plaintiff-Intervenor below. According to Petitioners, because Senator Burns is not running for re-election, he is not a Petitioner in this case.

fundraising out of fear of triggering matching funds. (ER 1554, 1635.)[4]

Expert Donald Green, Director of the Institute for Social and Policy Studies at Yale, found that triggered matching funds do not have an effect on candidate spending in Arizona. Professor Green reported that spending by traditionally funded candidates with participating opponents does not cluster just below the triggering threshold of $17,918, which is the spending pattern that would be expected if triggered matching funds had actually chilled their spending—that is, non-participating candidates would be expected to spend up to, but not beyond, the triggering threshold. (ER 5905, 5920.) Rather, of the 46 traditionally funded legislative candidates who faced a participating opponent in 2006, 39 candidates spent less than $15,000 (almost $3,000 short of the threshold), demonstrating that their expenditure levels were controlled by factors unrelated to triggered matching funds; and 6 candidates spent well above the threshold, showing that they were not deterred by triggered matching funds. (*Id.*) Only one candidate spent between $15,000 and $26,000. (*Id.*) In sum, the factual and expert evidence in this case revealed that triggered matching funds do not in fact suppress candidate spending in Arizona.

Based on the extensive factual record developed during discovery, Petitioners and Respondents filed

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[4] As noted below, the Court of Appeals' opinion identifies extensive additional record evidence that established that the triggered matching funds had no chilling effect on Petitioners' speech. *McComish v. Bennett*, 611 F.3d 510, 517-19 (9th Cir. 2010).

four separate cross motions for summary judgment, which were accompanied by 23 declarations and over 4,500 pages of evidentiary submissions. These motions sought judgment on Petitioners' First Amendment and Equal Protection claims.

C. The District Court's Summary Judgment Findings And Ruling

On January 20, 2010, the district court entered an order finding that Petitioners' evidence concerning the alleged burden imposed by the Act was "somewhat scattered" and "vague" and did not "definitively establish a chilling effect." (ER 7.) The court further found that the Act's supposed "burden" was "that [Petitioners'] speech will lead directly to more speech." As the court correctly noted, "it seems illogical to conclude that the Act creating more speech is a constitutionally prohibited 'burden' on [Petitioners]." (ER 14.)

The district court nonetheless concluded that this Court's decision in *Davis*, although it did "not answer the precise question" raised by the Petitioners, "require[d] [the district court to] find [Petitioners] have established a cognizable burden." (ER 13, 15.) Applying strict scrutiny, the district court held that the Act is not narrowly tailored to serve the State of Arizona's anti-corruption interest because, although that interest "supports some aspects of the Act, . . . Defendants have not identified any anticorruption interest served by burdening self-financed candidates' speech [with triggered matching funds]." (ER 17.)

While it reached the merits of Petitioners' First Amendment claim, finding in favor of the Petitioners, the district court declined to decide the merits of Petitioners' Equal Protection claim. On January 21,

2010, the district court entered judgment for Petitioners.

D. The Court Of Appeals' Findings And Ruling

Respondents appealed the district court's grant of summary judgment for Petitioners to the United States Court of Appeals for the Ninth Circuit. On May 21, 2010, after considering the parties' written and oral submissions, and the over 6,300-page record, the court unanimously held that Arizona's triggered matching funds provision does not violate the First Amendment. The panel's thorough and carefully reasoned 31-page decision included a separate concurrence by Judge Kleinfeld.

The principal opinion found that the Act should be subject to intermediate, not strict, scrutiny because it "imposes only a minimal burden on First Amendment rights." *McComish*, 611 F.3d at 513, 525. The court then found that the Act "survives intermediate scrutiny because it bears a substantial relation to the State's important interest in reducing *quid pro quo* political corruption [and the] appearance of *quid pro quo* corruption to the electorate . . ." *Id.*

In reaching its conclusion that the Act imposes only a minimal burden on speech, the Court of Appeals "agree[d] with the district court's observation that 'Plaintiffs' testimony is somewhat scattered and shows only a vague interpretation of the burden of the Act.'" *Id.* at 517-18. The Court of Appeals also pointed to specific instances in the record where, for example, Plaintiffs had testified that they had been willing to trigger matching funds in previous elections, could not recall whether they had triggered matching funds, or had their testimony contradicted by their own campaign consultants. *Id.* at 518-519.

The Court of Appeals held that the "burden created by the Act is most analogous to the burden of disclosure and disclaimer requirements in *Buckley* and *Citizens United*" to which this Court had applied intermediate scrutiny. *Id.* at 525. The Court of Appeals also considered at length and rejected Plaintiffs' contention that *Davis*, a case about discriminatory contribution limits, decided the fate of triggered matching funds. *Id.* at 521-524.

The principal opinion declined to reach the Equal Protection claim in the first instance and remanded the case to the district court for further proceedings. *Id.* at 527.

In his concurring opinion, Judge Kleinfeld reasoned that the Act "imposes no limitations whatsoever on a candidate's speech" and found that *Davis* was "easily distinguished." *Id.* at 527. Thus, Judge Kleinfeld concluded that it was unnecessary to apply even intermediate scrutiny to the Act. *Id.* at 529.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS CORRECTLY APPLIED WELL-ESTABLISHED LAW IN HOLDING THAT ARIZONA'S TRIGGERED MATCHING FUNDS PROVISION WITHSTANDS INTERMEDIATE SCRUTINY

A. The Court Of Appeals Followed *Buckley* and *Citizens United* In Applying Intermediate Scrutiny

The Court of Appeals' decision is faithful to this Court's existing precedents regarding campaign finance regulation. Although Petitioners essentially ignore this fact, the Court of Appeals squarely relied on this Court's decisions in *Buckley* and *Citizens United* in holding that triggered matching funds are

subject to intermediate scrutiny. *McComish*, 611 F.3d at 524-25. Application of strict scrutiny here, which Petitioners urge, would create inconsistency—namely, that different levels of scrutiny would be applied to laws with similar First Amendment effects. The Court of Appeals correctly rejected this incoherent approach to campaign finance law.

Triggered matching funds indisputably place no ceiling on campaign spending. Petitioners and other non-participating candidates and independent expenditure committees in Arizona remain free to spend as much as they choose in order to advocate their positions.

The most Petitioners can and do claim is that candidates and committees might make a strategic choice not to spend money in order to avoid triggering matching funds for participating candidates. But neither the district court nor the Court of Appeals found evidence supporting the supposed chilling effect of the triggered matching funds—that candidates or committees actually make that choice in the real world. 611 F.3d at 524 ("Plaintiffs have not demonstrated that any chilling effect exists."); Pet. App. at 54 ("Plaintiffs' testimony is somewhat scattered and shows only a vague interpretation of the burden of the Act.").[5]

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[5] Presumably, there was no evidence of any chilling effect because a speaker would not be deterred by matching funds unless he believed his message was less persuasive than his opponent's. If he believes his message is *more* persuasive, he (like voters) should always prefer more speech by both candidates over less speech by both.

Nevertheless, giving Petitioners the benefit of the doubt, the Court of Appeals assumed that the potential but unproven chilling effect of triggered matching funds imposed a minimal burden on spending. *McComish*, 611 F.3d at 525. Based on the level of scrutiny that this Court had consistently applied to campaign finance disclosure and disclaimer provisions, which may impose minimal burdens similar to those assumed to flow from triggered matching funds, the Court of Appeals concluded that triggered matching funds are subject to intermediate scrutiny.

In so holding, the Court of Appeals correctly applied this Court's campaign finance doctrine. This Court has held that contribution and expenditure disclosure requirements, which may burden or deter speech, are subject to intermediate scrutiny. *Buckley*, 424 U.S. at 64-68, 80-81; *Citizens United*, 130 S. Ct. at 914. In considering the constitutionality of the Federal Election Campaign Act's ("FECA's") disclosure provisions, this Court in *Buckley* assumed that such provisions might have a "deterrent effect on the exercise of First Amendment rights [that] arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure," and that "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 65, 66. The Court nevertheless held that the burdens of disclosure are lesser in magnitude to the burden of an expenditure limit because "disclosure requirements impose no ceiling on campaign-related activities." *Id.* at 64. Accordingly, the Court applied intermediate scrutiny, inquiring into whether FECA's disclosure provisions exhibited a "substantial relation between"

a "sufficiently important" governmental interest "and the information required to be disclosed." *Id.* Although Petitioners contend that *any* burden on expenditures (no matter how slight) results in strict scrutiny, that contention is squarely refuted by the *Buckley* Court's application of intermediate, not strict, scrutiny to FECA's disclosure provisions with respect to expenditures. *Id.* at 80.

For over three decades, this Court has reaffirmed that campaign finance laws that do not cap spending but may nevertheless cause a party to strategically choose not to make expenditures is subject to intermediate, rather than strict, scrutiny. *See Citizens United*, 130 S. Ct. at 914. Just last term in *Citizens United*, this Court subjected the Bipartisan Campaign Reform Act's ("BCRA's") disclaimer and disclosure provisions concerning expenditures to intermediate scrutiny. *Id. Citizens United* reasoned that "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities', [ ] and 'do not prevent anyone from speaking.'" *Id.* (quoting *Buckley*, 424 U.S. at 64 and *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 201 (2003)).

Here, the Court of Appeals correctly relied on *Buckley* and *Citizens United* in selecting intermediate scrutiny:

> In this case, as in *Buckley* and *Citizens United*, the burden that Plaintiffs allege is merely a theoretical chilling effect on donors who might dislike the statutory result of making a contribution or candidates who may seek a tactical advantage related to the release or timing of matching funds. The matching funds provision does not actually prevent anyone from speaking in the first place or cap campaign

> expenditures. Also, as in *Buckley* and *Citizens United*, there is no evidence that any Plaintiff has actually suffered the consequence they allege the Act imposes. We conclude that the burden created by the Act is most analogous to the burden of disclosure and disclaimer requirements in *Buckley* and *Citizens United*. Following the Supreme Court's precedents in those cases, because the Act imposes only a minimal burden on fully protected speech, intermediate scrutiny applies.

611 F.3d at 525.

Petitioners do not challenge the Court of Appeals' reliance on *Citizens United* and *Buckley* or its well-reasoned analogy between the burden of disclosure laws and the assumed burden of triggered matching funds. Because, as explained below, Petitioners make no serious attempt to argue that Arizona's triggered matching funds provision fails intermediate scrutiny, their petitions should be denied.

B. The Court of Appeals Correctly Interpreted *Davis* As A Case About Discriminatory Contribution Limits Which Did Not Resolve The Constitutionality Of Arizona's Triggered Matching Funds Provision

Overlooking the Court of Appeal's reasoning, Petitioners urge this Court to apply strict scrutiny based on Petitioners' reading of *Davis*. McComish Pet. at 32-35; Freedom Club PAC Pet. at 29-34. The Court of Appeals appropriately rejected Petitioners' misinterpretation of *Davis*.

Davis concerned the constitutionality of BCRA's Section 319(a), which replaced the normal rule in

Congressional elections—that all candidates in privately funded Congressional elections are subject to the same contribution limits—with "a new, asymmetrical regulatory scheme." *Davis*, 128 S. Ct. at 2766. Specifically, Section 319(a) provided that, once a privately funded candidate spent more than $350,000 of personal funds on his or her campaign[6] in any particular race, the initial contribution limits were tripled and the limits on coordinated party/candidate expenditures were eliminated entirely—*but only for that privately financed candidate's privately financed opponent*. Because Section 319(a) thus subjected otherwise similarly situated candidates to "asymmetrical" and "discriminatory" fundraising limitations just because one candidate chose to spend personal funds rather than other private funds, *Davis* concluded that the law resulted in an "unprecedented penalty" that was subject to strict scrutiny and unsupported by any compelling interest. *Id.* at 2771.

Davis is properly understood as a case about the unconstitutionality of a particular type of penalty—an "asymmetrical" and "discriminatory" contribution limit that treated similarly situated, privately funded candidates differently merely because of one's personally funded expenditures. *Davis* did not involve either public funding or triggered matching funds; and the *Davis* Court therefore did not examine whether triggered matching funds within a public funding program burden spending. Accordingly, *Davis* provides no guidance on the extent of any burden posed by trigger provisions, the appropriate level of scrutiny a court should use to assess such

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[6] This amount was subject to certain adjustments.

provisions, or the compelling anti-corruption interests served by public financing schemes.[7]

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[7] Petitioners' argument for analogizing *Davis* to this case relies heavily on the *Davis* Court's "see" citation to *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), an Eighth Circuit decision that struck down a Minnesota law that increased expenditure limits and public subsidies for candidates who were opposed by independent expenditures. In stark contrast to the evidence in this case, however, the record evidence in *Day* showed that the intent and actual effect of Minnesota's provision was to suppress independent expenditures rather than to increase participation in a public funding system. *See Day*, 34 F.3d at 1360-61 & n.4. Indeed, the Eighth Circuit later expressly explained that, in *Day*, the state's asserted interest in incentivizing candidate participation appeared to be "contrived for the purposes of this litigation," since "candidate participation in the public financing scheme was approaching 100 percent when the challenged provision was enacted." *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1555 (8th Cir. 1996) (citing *Day*, 34 F.3d at 1361).

Moreover, *Davis* cited *Day* in *dicta* only for the proposition that Section 319(a) imposed a "potentially significant burden." *Davis*, 128 S. Ct. at 2772. "In so citing *Day*, *Davis* did not affirm or adopt the Eighth Circuit's approach." *McComish*, 611 F.3d at 523 n.9. Even if *Davis's* "see" citation to *Day* means that this Court believed that Minnesota's law imposed a "potentially significant burden," that burden is certainly no more substantial than the burden that this Court assumed might accompany compelled

The Court of Appeals appropriately held that *Davis*'s analysis of discriminatory contribution limits in a purely private financing scheme does not determine the appropriate level of scrutiny for a system of voluntary public financing with triggered matching funds. *McComish*, 611 F.3d at 521-23. Arizona's system does not discriminate among similarly situated candidates. Instead, Arizona offers all candidates an initial choice between two systems of financing, each with its own particular set of regulatory benefits and burdens. It is true, of course, that Arizona offers triggered matching funds only to publicly financed candidates; but it does so because only these candidates are precluded from raising additional private funds in competitive races. As *Buckley* held, and as the Court of Appeals recognized, when candidates are given a choice between a public and private financing option, the government need not subsidize candidates who choose a system of unlimited private fundraising and spending. *Buckley*, 424 U.S. at 97; *McComish*, 611 F.3d at 522.

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disclosure: "the potential for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 66. Because this Court has repeatedly held that the potentially significant burden of compelled disclosure requires intermediate, rather than strict, scrutiny, Petitioners' contention that *Davis's* brief citation to *Day* calls for strict scrutiny of all trigger provisions, regardless of their actual effects, is meritless.

C. The Court Of Appeals Appropriately Held That Arizona's Triggered Matching Funds Withstand Intermediate Scrutiny Because They Further The State's Compelling Anti-Corruption Interest

The Court of Appeals' determination that triggered matching funds survive under intermediate scrutiny was faithful to this Court's campaign finance doctrine. *See McComish*, 611 F.3d at 525-27.

In applying intermediate scrutiny, this Court has asked whether the challenged law bears a "substantial relation" or "relevant correlation" to a "sufficiently important" governmental interest. *See Buckley*, 424 U.S. at 64; *accord Citizens United*, 130 S. Ct. at 914. There is no doubt that combating corruption qualifies as a "sufficiently important" interest. *Buckley*, 424 U.S. at 66. Indeed, *Buckley* expressly found that "[it] cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest." *Id.* at 96.[8]

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[8] The Court of Appeals correctly recognized that "one of the principal purposes of the Act was to reduce *quid pro quo* corruption." *McComish*, 611 F.3d at 515-16. Neither petition challenges this finding. Ignoring *Buckley's* recognition that public financing furthers this anti-corruption interest, Petitioners spend much of their briefs arguing that one purpose of public financing is to "level the playing field." McComish Pet. at 29-30. But Arizona's law does not impermissibly "level the playing field" by restricting some candidates' spending. Instead, as contemplated

Thus, the only element of the intermediate scrutiny analysis not resolved directly by this Court's precedent is whether triggered matching funds bear a "substantial relation" or "relevant correlation" to

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by the *Buckley* Court, it "substitutes public funding for what the parties would raise privately." 424 U.S. at 96, n.129. Under a system of private financing, a candidate who engaged in high levels of expenditures would expect her opponent to respond with renewed levels of fundraising. The Arizona Act simply provides publicly financed candidates—who have chosen to forgo private contributions—a similar ability to run a viable campaign against privately financed candidates, although the publicly financed candidate is still subject to an absolute spending cap. This Court has specifically held that a public financing system may constitutionally provide participating candidates the "enhancement of opportunity to communicate with the electorate." *Buckley*, 424 U.S. at 95. This Court in *Davis* rejected only "[t]he argument that a candidate's speech may be *restricted* in order to 'level electoral opportunities' . . . ." *Davis*, 128 S.Ct. at 2773 (emphasis added). Nothing in this Court's precedents suggests that the First Amendment requires that a publicly financed candidate be unable to engage in the responsive speech that a privately financed candidate would undertake as a matter of course. To be viable, publicly financed candidates must have the ability to respond to escalating spending by her opponent or by outside groups, and triggered matching funds enable the state to provide this ability in a manner sensitive to the demands of the public fisc.

public funding's furtherance of the state's crucial anti-corruption interests. *See Buckley*, 424 U.S. at 64.

Here, the record evidence confirms that triggered matching funds incentivize participation in Arizona's public-funding system, thereby furthering the State's recognized interest in combating corruption and its appearance. As the Court of Appeals correctly reasoned,

> A public financing system with no participants does nothing to reduce the existence or appearance of *quid pro quo* corruption. If participants were not given matching funds, they would not join the program because they would not be viable candidates in their elections.

McComish, 611 F.3d at 527. The Court of Appeals' common-sense conclusion that, absent triggered matching funds, participation in public financing would drop was based on undisputed evidence. Specifically, participating candidates, a veteran political consultant, and a firm opponent of Arizona's public-financing system all testified that, absent triggered matching funds, participation in Arizona's public funding program would decline. (E.R. 1479, 5668, 5675-79, 6235-49.)

Petitioners' only argument for striking down triggered matching funds under intermediate scrutiny (raised in a footnote in just one of the petitions) ignores Arizona's actual experience with campaign finance regulations. McComish Pet. at 31 n.1. The McComish Petitioners assert, without analysis, that Arizona's "private campaign financing is already stringently regulated." *Id.* To the extent Petitioners mean to suggest that Arizona's contribution limits are sufficient to protect against corruption, they overlook that Arizona had

contribution limits in place five years before it experienced the AzScam corruption scandal. Ariz. Rev. Stat. § 16-905 (historical and statutory note); *McComish*, 611 F.3d at 514 ("Even with these campaign contribution limits in place, Arizona experienced a series of massive political corruption scandals.").

Fortunately, the First Amendment does not require Arizona to revert to a system that was rife with corruption. Because there is no substantial question that triggered matching funds survive intermediate scrutiny, the Court should deny the Petitions.[9]

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[9] This Court could also deny the petitions on the basis that triggered matching funds are constitutional even under strict scrutiny. Although the Ninth Circuit found it unnecessary to reach this issue, this Court has already held that public funding furthers anti-corruption interests, *Buckley*, 424 U.S. at 96, which qualify as "compelling." *Federal Election Comm'n v. Nat'l Conservative PAC*, 470 U.S. 480, 496-97 (1985) (identifying "preventing corruption or the appearance of corruption" as "compelling government interests"). The evidence below established that Arizona had no less restrictive alternative to a public funding system with matching funds. A contribution-limits-only approach had already failed in Arizona, and alternative financing schemes were considered and justifiably rejected as not well-tailored and wasteful. *See* Ariz. Rev. Stat. §16-905 (2010) (historical note). (*See also* E.R. 3247-49, 5556-60, 5576-96, 5603-08, 5641, 5647-52.) In short, Arizona's matching funds are narrowly tailored to serve a compelling interest.

II. THIS IS NEITHER THE RIGHT VEHICLE NOR THE RIGHT TIME FOR THIS COURT TO RESOLVE ANY APPARENT CONFLICT AMONG THE CIRCUITS.

A. There Are Significant Differences Among The Various State Laws That May Directly Affect The Constitutional Analysis.

As explained above, the Ninth Circuit's decision is entirely consistent with and supported by this Court's decisions in *Buckley*, *Davis*, and *Citizens United*. Because Arizona's triggered matching funds provision places no limit on expenditures—unlike the spending limits struck down in *Buckley*; does not discriminate among similarly situated candidates—unlike the law struck down in *Davis*; and places at most an indirect burden on campaign spending—like the disclosure provisions upheld in *Citizens United*—it is subject to intermediate scrutiny. Because there is a substantial relationship between the law and a sufficiently important state interest, it is constitutional.

Petitioners contend that the Court should grant certiorari because, they assert, there is an irreconcilable split among the circuits with respect to application of this Court's decisions in *Davis* and *Citizens United* to state triggered matching funds laws. Petitioners are correct that three Courts of Appeal have recently rendered decisions on the merits of particular trigger provisions in the public funding programs of three different states. To the extent that there may be some differences among the Circuits, however, those differences do not warrant review by this Court.

The public funding laws at issue in the three Circuit court decisions relied upon by Petitioners are,

however, distinct in ways that are relevant to the constitutional analysis.[10] Each has a different mix of benefits and burdens that must be taken into account when assessing both the severity of any First Amendment burden posed by triggered matching funds and the extent to which those provisions advance each state's interests.

The Florida law addressed in *Scott* allows candidates who choose to accept public funding to

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[10] Prior to *Davis*, three federal circuit courts had ruled that public financing trigger provisions pass constitutional muster. *See North Carolina Right to Life Comm. Fund v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008), *cert. denied*, 129 S.Ct. 490 (2008); *Daggett v. Comm'n on Gov't'l Ethics*, 205 F.3d 445, 464 (1st Cir. 2000); *Rosenstiel*, 101 F.3d at 1552. The First Circuit recently denied an emergency motion for an injunction pending appeal in a case involving a challenge to parts of Maine's campaign finance law, including its matching funds provision. *Respect Maine PAC v. McKee*, No. 10-2119, slip. op. at 3-4 (1st Cir. Oct. 5, 2010). The Court of Appeals held that the plaintiffs had not established that they would suffer an immediate injury, that an injunction issued just weeks before the election would cause "chaos," and that any emergency was of the plaintiffs' making because they had waited until late in the election cycle to bring their suit. *Id.* The Court of Appeals stated that it "cannot forecast what our ultimate judgment on the merits will be" and that the plaintiffs' challenges to Maine's election laws "will require careful analysis, on a fully developed record." *Id.* at 3.

continue to raise private contributions in the same amounts as candidates who do not choose public funding. *Scott*, 612 F.3d at 1285 ("Participating candidates remain subject to the $500 cap on campaign contributions from persons or committees . . . ."). By contrast, in Arizona, once they qualify for and elect public funding, participating candidates are prohibited from accepting private contributions. *McComish*, 611 F.3d at 516. ("If a candidate opts to participate in the public financing system, she or he agrees to forfeit her or his right to fund her or his campaign with private contributions.").

This difference could be significant to the constitutional analysis for at least two reasons. First, under Florida's law, participating and non-participating candidates may be considered more alike from a regulatory perspective than Arizona candidates: both may accept private contributions in the same amounts, like the two types of candidates in *Davis* but unlike the two types in Arizona. Other regulatory differences between the two types of candidates—such as eligibility for triggered matching funds—might, under *Davis*, therefore justifiably be more closely examined in Florida than in Arizona. *See Scott*, 612 F.3d at 1291 ("*Davis* concerned a discriminatory contribution system").

Second, because participating candidates in Florida may continue to raise private contributions *in the same amounts as other candidates*, it may be less obvious that Florida's public funding law—as opposed to Arizona's, which eliminates private contributions to participating candidates—is carefully tailored to further the state's interest in combating actual and apparent corruption. Indeed, the Eleventh Circuit emphasized its skepticism, at the preliminary injunction stage, with respect to precisely this issue.

See Scott, 612 F.3d at 1292 ("The parties have not sufficiently explained how the Florida public financing system furthers the anticorruption interest [because, other than limiting expenditures and providing public money,] the system enables candidates who run campaigns that are indistinguishable from the campaigns of nonparticipants . . . ."); 1293 ("The limit on general campaign expenditures . . . does not appear to enable candidates who are, or who may be perceived as being, less corrupt than their nonparticipating peers . . . [E]very candidate for public office, whether participating or not, is subject to a $500 limit on campaign contributions."); 1294 ("Florida could encourage participation to virtually the same degree that it maintains it currently does by doing no more than releasing participating candidates from the expenditure ceiling.").

By contrast, as the Ninth Circuit found after full discovery and summary judgment briefing, because Arizona's law largely prohibits participating candidates from accepting private contributions, there is no doubt that it furthers the state's interest in reducing actual and apparent corruption. *See McComish*, 611 F.3d at 526 ("In exchange for public funding, participating candidates relinquish their right to raise campaign contributions from private donors. They therefore have both reduced opportunities and reduced incentives to trade legislative favors for financial favors."); *id.* ("The more candidates that run with public funding, the smaller the appearance among Arizona elected officials of being susceptible to *quid pro quo* corruption, because fewer of those elected officials will have accepted a private campaign contribution

and thus be viewed as beholden to their campaign contributors or as susceptible to such influence.").

Connecticut's public funding law is also different from Arizona's in a way that is potentially significant to the constitutional analysis of the triggered matching funds. While Connecticut's law prohibits participating candidates from accepting private contributions, it provides participating candidates with "full" public grants once they have qualified. *Green Party*, 616 F.2d at 220-21. The district court and the Second Circuit in *Green Party* found that those initial, full public grants were "'based on the average expenditures in the most competitive races.'" *Green Party*, 616 F.2d at 240 (quoting *Green Party of Connecticut v. Garfield*, 648 F. Supp. 2d 298, 338 (D. Conn. 2009)); *see also id.* at 240 ("It is true that the CEP's grant amounts and expenditure limits were based on historic expenditures in *competitive* districts") (emphasis in original). In the 2008 election cycle, no privately financed candidate's spending reached the threshold for triggering matching funds in Connecticut, confirming that publicly funded candidates in Connecticut had sufficient funding to finance competitive campaigns even without any additional funds. *Green Party*, 648 F. Supp. 2d at 415-44 (expenditure tables). The Connecticut Legislature apparently decided that it could afford to provide participating candidates at the outset with initial, "full" grants that would enable them to run competitive campaigns in just about any race, without regard to additional triggered matching funds.

By contrast, Arizona's electorate took an approach that is much more fiscally conservative. As explained above, Arizona initially provides a participating candidate with only *one-third* (1/3) of a "full" public

grant—the amount presumptively needed to run a competitive campaign, at least in many districts. Arizona then uses triggered matching funds, based on actual events during the campaign, to calibrate the overall public grant to the competitiveness of the campaign. Arizona uses actual contributions and spending as a proxy for the competitiveness of a particular race, and it then adjusts its public grants in dynamic fashion (using triggered matching funds) accordingly, in order to ensure that participating candidates can run competitive campaigns while not wasting public money. *See McComish*, 611 F.3d at 527 ("By linking the amount of public funding in individual races to the amount of money being spent in these races, [Arizona] is able to allocate its funding among races of varying levels of competitiveness without having to make qualitative evaluations of which candidates are more 'deserving' of funding beyond the base amounts provided to all publicly-funded candidates.").

This difference between Connecticut's and Arizona's laws is relevant to the constitutional analysis for three reasons. First, if, as the district court in *Green Party* found, under Connecticut's law almost all participating candidates would have sufficient money from their initial grants alone to run competitive campaigns, there may be reason to scrutinize the legislative purpose behind triggered matching funds more carefully than where, as in Arizona, it is beyond doubt that triggered matching funds are necessary to assure candidates that, if they elect public financing, they will have enough money to run a competitive campaign. *See id.* at 526 ("In order to promote participation in [Arizona's] program, and reduce the appearance of *quid pro quo* corruption, the State must be able to ensure that

participating candidates will be able to mount competitive campaigns . . . .") Second, if a participating candidate has already been given presumptively sufficient funds for a competitive campaign, providing her with more public money based on others' spending might be viewed as less essential for enabling responsive speech and therefore advancing First Amendment values. This is unlike Arizona where, as the Ninth Circuit found, triggered matching funds were necessary to enable responsive speech. *See* 611 F.3d at 524 ("The essence of [Petitioners'] claim is . . . that the speech of their opponents has been enabled. We agree . . . that . . . the purpose of the First Amendment is to secure the widest possible dissemination of information from diverse and antagonistic sources." (internal quotations and citations omitted)). Third, if, as the district court in *Green Party* found, Connecticut's initial grants give candidates *more* money than they historically could have raised or spent, Connecticut would have a weaker argument than Arizona that its triggered matching funds provision works to protect the public fisc. *See Green Party*, 648 F. Supp. 2d at 373 (rejecting, on this basis, "state's claim that the matching funds are necessary to prevent against wasting the public fisc with high initial grant amounts").

These fundamental differences among the laws at issue in *Scott*, *Green Party*, and this case militate against this Court's granting certiorari. There is no clearly irreconcilable conflict among the results reached by the Second, Ninth, and Eleventh Circuits with respect to the various laws addressed by them. Particularly given that many other states are experimenting with these and still other types of public funding programs, *see infra*, and that only a

few courts have yet had the opportunity to consider the operation and effects of such laws, this Court should refrain from addressing the important but difficult issues raised by them at this time.

B. States Are Continuing To Experiment With Creative Ways In Which To Implement Public Financing Of Elections While Being Fiscally Responsible.

Many states have adopted or are considering adopting various forms of public financing of elections, some of which (in addition to Arizona, Connecticut, and Florida) include matching funds triggered by contributions or expenditures. *See* Neb. Rev. Stat. § 32-1606(1) (2010) (triggered matching funds for Nebraska elections for public office); N.M. Stat. Ann. § 1-19A-14 (West 2010) (triggered matching funds for New Mexico elections for public regulation commissioner and offices of the judicial department subject to statewide elections); N.C. Gen. Stat. Ann. § 163-278.67(a) (West 2010) (triggered matching funds for elections for North Carolina Supreme Court justice and North Carolina Court of Appeal judges); W. Va. Code Ann. §§ 3-12-1–3-12-17 (2010) (pilot program providing for triggered matching funds for elections for the office of Justice of the West Virginia Supreme Court of Appeals); Wis. Stat. Ann. § 11.512(2), 11.513(2) (West 2009) (triggered matching funds for Wisconsin Supreme Court justice elections); Albuquerque, N.M., Charter of the City of Albuquerque art. XVI, § 16 (2009) (triggered matching funds for Albuquerque, New Mexico elections for mayor and city council); Chapel Hill, N.C., Code of Ordinances §§ 2-95(a)–(b) (2010) (triggered matching funds for Chapel Hill, North Carolina elections for mayor and city council); L.A.,

Cal., Municipal Code § 49.7.20(A) (2007) (triggered matching funds for Los Angeles, California elections for mayor, city controller, city attorney, and city council); New Haven, Conn., Code of Ordinances § 2-825(c) (2010) (triggered matching funds for New Haven, Connecticut elections for mayor); N.Y., N.Y., New York City Administrative Code § 3-706(3) (2007) (triggered matching funds for New York City elections for mayor, public advocate, comptroller, borough president, and city council); Portland, OR, City Code § 2.10.145 (2009) (triggered matching funds for Portland, Oregon elections for public office). *See also* R.I. Gen. Laws § 17-25-24 (allowing participants to raise additional private contributions and make additional expenditures if their traditionally-funded opponent's expenditures exceed the maximum allowable expenditure limit for candidates receiving public funds); Vt. Stat. Ann., tit. 17, § 2855 (providing public funding grants for qualifying candidates for governor and lieutenant governor in Vermont without triggered matching funds but with a limited continued ability to fundraise); 2010 Haw. Sess. Laws, Act 211 (providing for public funding for Hawaii statewide and local political races without triggered matching funds).

These efforts by states reflect their varied attempts to craft successful public financing programs to promote participation and combat real and apparent corruption at a time when state budgets are already strained to the breaking point. Triggered matching funds are one important approach to achieving the compelling purposes of public financing while protecting the public fisc, because they allow a state to provide publicly financed candidates with sufficient funds to run competitive campaigns without wasting money. States (as well as Congress)

are also experimenting with other public financing models that involve different trade-offs among the states' interests in promoting participation, preventing corruption, and protecting the public fisc. It is too early to know which of these various models will emerge as the most effective or popular, and the Court should not stifle this democratic experimentation by entirely precluding, at this early stage, one entire approach.

This Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon v. Ice*, ___ U.S. ___, 129 S.Ct. 711, 718-719 (2009); *see Smith v. Robbins*, 528 U.S. 259, 275 (2000) ("We will not cavalierly impede the States' ability to serve as laboratories for testing solutions to novel legal problems.") (internal quotations omitted). This Court will be better able to accurately assess the balance between the states' compelling interests in protecting and enhancing the democratic process and the dictates of the First Amendment in light of more, rather than less, experimentation and after the lower courts have had more opportunities to assess the actual effects of those experiments.

The differences among triggered matching funds in Arizona, Connecticut, and Florida are exemplary of the experimentation that is going on in states across the country in an effort to combat corruption, enhance political speech, and restore faith in our democracy while being fiscally responsible. This Court may eventually need to step into this process to address the constitutional issues that will indisputably be raised by these experiments. This, however, is neither the appropriate vehicle nor the right time for the Court to do so.

CONCLUSION

For the reasons stated above, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

BRADLEY S. PHILLIPS*
GRANT A. DAVIS-DENNY
ELISABETH J. NEUBAUER
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
brad.phillips@mto.com

Counsel for Clean Elections Institute, Inc.

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*Counsel of Record

REPLY BRIEF

(6)

No. 10-238

In The Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ARIZONA TAXPAYERS ACTION COMMITTEE, DEAN MARTIN, and RICK MURPHY,

Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, LORI S. DANIELS, and LOUIS HOFFMAN in their official capacities as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

CLEAN ELECTIONS INSTITUTE, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

INSTITUTE FOR JUSTICE
WILLIAM R. MAURER*
101 Yesler Way, Suite 603
Seattle, WA 98104
(206) 341-9300
wmaurer@ij.org

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320

INSTITUTE FOR JUSTICE
TIMOTHY D. KELLER
PAUL V. AVELAR
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
(480) 557-8300

Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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In *Davis v. FEC*,[1] *Scott v. Roberts*,[2] *Green Party of Connecticut v. Garfield*,[3] and the Ninth Circuit's decision below,[4] each court considered a system of campaign regulation in which a speaker's political activity resulted in funding advantages to the speaker's political or ideological opposition during an election. Except for the Ninth Circuit below, each court concluded that the program before it was a substantial burden on First Amendment rights. Except for the Ninth Circuit below, each court applied strict scrutiny to the program before it. And except for the Ninth Circuit below, each court found the challenged program did not withstand judicial scrutiny. As argued in the Petition, the Ninth Circuit's decision below deepens a clear and significant split among the circuits and contravenes this Court's decision in *Davis*.[5]

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[1] 128 S. Ct. 2759 (2008).

[2] 612 F.3d 1279 (11th Cir. 2010).

[3] 616 F.3d 213 (2d Cir. 2010).

[4] *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010); App. 1-44.

[5] As discussed in the Petition, the split among the circuits predates *Davis* and currently involves six different circuits. *See* Pet'rs Br. 20-21 (discussing the current three-to-three split among circuit courts regarding the constitutionality of triggered matching fund systems). The persistence of this split, especially after *Davis*, militates strongly in favor of this Court's grant of certiorari here. *See* Thomas D. Edmondson, *'Matching Funds' Under State Election Laws Split Appeals Courts, Beckon Supreme Court*, 79 U.S. Law Week 1371 (Sept. 28, 2010) (describing the courts of appeals' approach to triggered matching funds as "all over the map").

In arguing against certiorari, Respondents Ken Bennett, *et al.*, and Clean Elections Institute, Inc. (CEI) attempt to explain the Ninth Circuit's divergence from the holdings of this Court and the Eleventh and Second Circuits by stressing distinctions among the various laws at issue. However, what is constitutionally significant is not what differences exist among these laws. Instead, what is important is that each law attempted to coerce speakers into limiting their political activities by turning the exercise of their First Amendment rights into the catalyst by which their political and ideological opponents gain funding advantages.

The Ninth Circuit's decision applying intermediate scrutiny and upholding a system of triggered matching funds is an anomaly among post-*Davis* cases and substantively departs from well-established First Amendment jurisprudence. It has created further confusion and unpredictability in the law. This lack of certainty is unacceptable, especially when these systems are becoming increasingly common throughout the nation and litigation over their constitutionality shows no sign of abating. *See, e.g., Respect Maine PAC v. McKee*, No. 10-2119, 2010 U.S. App. LEXIS 20545 (1st Cir. Oct. 5, 2010), *application for injunction denied*, No. 10-A362, 2010 U.S. LEXIS 8326 (Oct. 22, 2010). Despite Respondents' arguments to the contrary, this Court's immediate intervention is thus not only appropriate – it is imperative.

ARGUMENT

THE SPLIT AMONG THE CIRCUITS IS ATTRIBUTABLE TO THE NINTH CIRCUIT'S FAILURE TO FOLLOW *DAVIS*, NOT TO IRRELEVANT DISTINCTIONS AMONG THE DIFFERENT STATUTES.

As discussed in the Petition, there is a pronounced split among the circuits regarding the constitutionality of "clean elections" laws employing triggered matching fund provisions. *See* Pet'rs Br. 19-28. Nonetheless, Respondents argue that the decisions of the Eleventh Circuit in *Scott* and the Second Circuit in *Green Party* do not conflict with the Ninth Circuit's decision below. Respondents instead allege that the differences in outcomes are the result of distinctions among the laws at issue. *See* Resp't Clean Elections Inst. Br. Opp'n ("CEI Br.") 2 ("[T]he public funding programs at issue in those cases were very different from Arizona's . . ."); Resp'ts Bennett, *et al.* Br. Opp'n ("State Br.") 14 ("The alleged circuit split does not warrant reviewing the court of appeals' decision in this case because the difference in applying *Davis* can be attributed to differences in the various campaign-finance systems.").

Respondents are wrong. The reason the Eleventh and Second Circuits did not follow the Ninth Circuit's decision is not because the Eleventh and Second Circuits found the laws before them distinguishable from Arizona's, but because the Eleventh and Second

Circuits correctly followed *Davis* while the Ninth Circuit did not. *Compare Scott*, 612 F.3d at 1290 ("We agree with Scott that *Davis* requires us to subject the excess spending subsidy to strict scrutiny."), *and Green Party*, 616 F.3d at 244 ("The Supreme Court's analysis in *Davis* directly governs plaintiffs' challenge to the CEP's trigger provisions. . . ."), *with* App. 24 ("[W]e conclude that *Davis* is easily and properly distinguished from the case at bench."). That is, the Eleventh and Second Circuits concluded that *Davis* applied and was controlling. These courts also held that the laws they considered were more constitutionally objectionable than the law at issue in *Davis*. *See* Pet'rs Br. 32-33. In contrast, the Ninth Circuit concluded that *Davis* did not apply and the Arizona law was less burdensome than the Millionaire's Amendment. *See* App. 26-27.[4] Thus, the difference in outcomes reflects a fundamental disagreement

[4] CEI also argues that because Petitioners engaged in political activity despite triggered matching funds, Arizona's law constitutes a "minimal burden" on speech subject to intermediate scrutiny. *See* CEI Br. 13-17. CEI errs on the facts. In their Petition, Petitioners detailed the significant harm to the nature, timing, and amount of their speech caused by Arizona's law. Pet'rs Br. 8-12. Moreover, CEI's standard for First Amendment harms, adopted by the Ninth Circuit below, is simply another way of disagreeing with *Davis*' conclusion that laws giving funding benefits to a candidate based on the political activity of those opposing that candidate significantly burden speech. In that regard, in *Davis*, the candidate triggered the Millionaire's Amendment during both of his campaigns and this Court nonetheless applied strict scrutiny to that law. *Davis*, 128 S. Ct. at 2767.

between this Court, the Eleventh Circuit, and the Second Circuit, on one hand, and the Ninth Circuit, on the other, over the meaning and application of the First Amendment. As the Second Circuit explicitly stated, "We are not persuaded by the Ninth Circuit's opinion. . . ." *Green Party*, 616 F.3d at 245 n. 19.

Like Arizona's law, the statutes at issue in *Davis*, *Scott*, and *Green Party* were governmental programs in which the government gave additional funding benefits to a speaker's political and ideological opposition based on the amount of political activity in which the speaker engaged. Despite outward differences among these laws, they shared a common and primary purpose with Arizona's law – namely, to level electoral opportunities. Indeed, both the Eleventh and Second Circuits specifically noted the similarity of the laws before them to the Arizona Citizens Clean Elections Act. *Scott*, 612 F.3d at 1287 (noting that the Ninth Circuit case "involved a materially similar subsidy provision"); *Green Party*, 616 F.3d at 245 n. 19 (noting that "Arizona's public financing system bears some similarity to the [Connecticut law's] excess expenditure provision"). Thus, at their core, these laws are essentially the same in all relevant respects, which makes the Ninth Circuit's decision upholding Arizona's law an anomaly in post-*Davis* jurisprudence.

Respondents are therefore simply incorrect that there are any meaningful differences among the laws at issue in *Scott*, *Green Party*, and the Ninth Circuit's decision below. There is no way to reconcile the

decisions of the Eleventh and Second Circuits with the decision of the Ninth Circuit. The split among the circuits is real and significant and derives from a fundamental disagreement over the meaning and application of this Court's decision in *Davis*.

Finally, there is no reason for this Court to delay so that states can continue to "experiment" with similar laws burdening First Amendment rights. *See* CEI Br. 32-34. As CEI correctly notes, "[m]any states have adopted or are considering adopting various forms of public financing of elections, some of which . . . include matching funds triggered by contributions or expenditures." CEI Br. 32. For these states and jurisdictions, there is no discernable answer as to why Arizona's law survived judicial scrutiny and Florida's and Connecticut's systems did not. In light of the large number of jurisdictions affected by this uncertainty, the need for a nationally binding rule of law is clear.

CONCLUSION

The Ninth Circuit's decision below conflicts with *Davis*, *Scott*, and *Green Party*. Respondents' arguments to the contrary do not demonstrate how the Ninth Circuit's decision can be reconciled with these three cases, leaving considerable uncertainty in the significant number of jurisdictions in which triggered

matching funds operate. This Court's immediate intervention is therefore warranted.

Respectfully submitted,

INSTITUTE FOR JUSTICE
WILLIAM R. MAURER*
101 Yesler Way, Suite 603
Seattle, WA 98104
(206) 341-9300

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320

INSTITUTE FOR JUSTICE
TIMOTHY D. KELLER
PAUL V. AVELAR
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
(480) 557-8300

Counsel for Petitioners

**Counsel of Record*

AMICUS CURIAE BRIEF

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BRIEF OF CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

JONATHAN F. COHN*
MATTHEW D. KRUEGER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jcohn@sidley.com

Counsel for Amicus Curiae
* Counsel of Record

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. The instant case concerns Cato because the law at issue significantly burdens political speech and activity, the constitutional protection of which lies at the very heart of the First Amendment.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision deepened an existing circuit split and falls on the wrong side of it, disregarding long-established, fundamental First Amendment principles by upholding severe burdens on core political speech. At issue is Arizona's matching-funds statute. The statute gives additional public funding to candidates for political office whose opponents spend above a certain threshold amount.

---

[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no entity or person, aside from the *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that counsel of record for both parties received timely notice of *amicus curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

In effect, the law compels candidates to facilitate the speech of their opponents as a condition of exercising their First Amendment rights.

The Cato Institute endorses petitioners' arguments and will not belabor them here. Regardless of any other considerations, the well-defined conflict among the courts of appeals regarding the constitutionality of matching-funds provisions warrants this Court's immediate review. *Compare Scott v. Roberts*, No. 10-13211, 2010 U.S. App. LEXIS 15897, at *32-33 (11th Cir. July 30, 2010), *Green Party v. Garfield*, No. 09-3760, 2010 U.S. App. LEXIS 14286, at *73 (2d Cir. July 13, 2010), *and Day v. Holahan*, 34 F.3d 1356, 1359, 1361-63 (8th Cir. 1994), *with McComish v. Bennett*, 611 F.3d 510, 516, 527 (9th Cir. 2010), *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 433, 437 (4th Cir.), *cert. denied sub nom.* 129 S. Ct. 490 (2008), *and Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 450-51 (1st Cir. 2000). Additional States have adopted or are considering similar matching-funds provisions. *See* Pet'n for a Writ of Cert. at 17-18, *McComish v. Bennett*, No. 10-239 (filed Aug. 17, 2010).

This brief underscores just how badly the Ninth Circuit's decision offends the Court's well-established campaign finance jurisprudence, as well as broader First Amendment principles. The Arizona statute is indistinguishable from the law invalidated in *Davis v. FEC*, because both "impose[] an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right" by correlating "the vigorous exercise of the right" to spend in support of one's campaign with "fundraising advantages for opponents in the competitive context of electoral politics." *Davis v. FEC*, 128 S. Ct. 2759, 2771-72

(2008). The decision, moreover, flies in the face of this Court's established precedents that have consistently found expenditures for political campaigns to be highly protected speech.

Perhaps most importantly, the decision below contradicts cardinal First Amendment principles regarding laws that impose negative consequences, whether direct or indirect, on the exercise of free speech. Time and again, the Court has made clear that the government cannot enact schemes that deter speech that the government cannot ban directly. *E.g.*, *Speiser v. Randall*, 357 U.S. 513, 526 (1958). The Ninth Circuit disregarded volumes of U.S. Reports to reach the untenable, opposite conclusion. In short, the Ninth Circuit's decision is ill-reasoned, conflicts with decades of this Court's precedents, and must be corrected.

ARGUMENT

I. THE DECISION BELOW CANNOT BE SQUARED WITH THIS COURT'S CAMPAIGN FINANCE PRECEDENTS.

This Court has not minced words in describing the importance of a political candidate's speech: "The First Amendment ''has its fullest and most urgent application' to speech uttered during a campaign for political office.'" *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (quoting *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)). Nonetheless, the Arizona statute punishes candidates for speaking too much. The Ninth Circuit's decision upholding the law clashes with this Court's campaign finance decisions, including, most pertinently, *Davis v. FEC*. This Court should grant certiorari and vindicate the First Amendment's core protections.

A. The Arizona Statute Cannot Be Distinguished From the Law Struck Down in *Davis v. FEC*.

1. *Davis v. FEC* leaves no doubt that the Arizona statute transgresses the First Amendment. In *Davis*, the challenged Bipartisan Campaign Reform Act (BCRA) provisions allowed an opponent of a candidate who self-financed his own campaign with over $350,000 to "receive individual contributions at treble the normal limit," even "from individuals who ha[d] reached the normal aggregate contributions cap." *Davis*, 128 S. Ct. at 2766. The law also allowed such opponents to "accept coordinated party expenditures without limit." *Id.* The Court struck down the law, explaining that it "impose[d] an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right." *Id.* at 2771-72. That penalty took the form of "fund-raising advantages for opponents" granted solely because a candidate engaged in the "vigorous exercise of the right" to spend and to speak in support of his campaign. *Id.*

The Arizona statute suffers from the same fatal flaw. It similarly creates a more favorable funding regime for candidates whose opponents spend above a certain threshold amount. It provides for disbursal of additional funds to candidates participating in a public financing program whose nonparticipating opponents spend more than the initial grant to program participants. *See McComish*, 611 F.3d at 516. By rewarding the opponents of nonparticipating candidates that "vigorously exercise the right" to spend money on their campaigns, the Arizona statute substantially burdens free speech in violation of the First Amendment.

The main difference between the Arizona statute and the BCRA provisions at issue in *Davis* makes the Arizona statute *more* burdensome. *Cf. Green Party*, 2010 U.S. App. LEXIS 14286, at *82 (noting that Connecticut's matching-funds scheme imposed a "penalty" that was "*harsher* than the penalty in *Davis*") (emphasis added). Whereas the law in *Davis* merely gave opponents of candidates who spent above the threshold the opportunity to collect higher contributions (with time and effort), *see Davis*, 128 S. Ct. at 2766, the Arizona statute actually dispenses funds to opponents of such candidates, *see McComish*, 611 F.3d at 516, making the harsh consequences of speech more certain and therefore more chilling.

2. The Ninth Circuit's attempt to distinguish *Davis* is specious. The Ninth Circuit reasoned that the law in *Davis* "was unconstitutional because it specifically sought to disadvantage the rich" and thereby "singled out the speakers to whom it applied based on their identity." *Id.* at 522. Tested against that misreading, the Arizona statute was permissible, the Ninth Circuit held, because it did not distribute matching funds "specifically to the opponents of wealthy candidates" and thus did not make "identity-based distinctions." *Id.* But *Davis* did not create a novel equal protection rule or issue a narrow holding shielding only a wealthy candidate's expenditures from disfavored treatment. Rather, *Davis* enforced the well-established principle that "the First Amendment simply cannot tolerate" restrictions "upon the freedom of a candidate"—rich or poor—"to speak without legislative limit on behalf of his own candidacy." *Buckley v. Valeo*, 424 U.S. 1, 54 (1976) (per curiam); *see Davis*, 128 S. Ct. at 2771 (noting "*Buckley*'s emphasis on the fundamental nature of

the right to spend personal funds for campaign speech").[2]

The Arizona statute disregards that principle and burdens even more protected speech than the law struck down in *Davis* because it applies to all non-participating candidates, regardless of their wealth. Indeed, the Arizona statute would chill even a modest spending of personal funds by a candidate if his overall campaign expenditures approached the trigger point. This burden on a candidate's speech is utterly incompatible with the "right to spend personal funds for campaign speech." *Davis*, 128 S. Ct. at 2771.

Finally, the Arizona statute is not helped by the fact that it awards matching funds when a non-participating candidate's financing comes from third-party contributions, rather than solely from his personal funds. *Contra McComish*, 611 F.3d at 522. The breadth of the Arizona statute does not salvage it. To the contrary, because the Arizona statute applies even when a candidate's fundraising success is due to wide popular support, *see id.* at 516, 522, it threatens to impair the ability of thousands of

[2] The Ninth Circuit's misjudgment is evident in what its reasoning would justify. By the Ninth Circuit's logic, a State seemingly could grant a publicly funded candidate *double* the funds (or more) spent by the opponent. After all, such a scheme would make no "identity-based distinctions" disfavoring wealthy candidates. *McComish*, 611 F.3d at 516, would simply "enable" more speech, *id.* at 524, and would advance the State's interest in "encourag[ing] participation in its public funding scheme." *Id.* at 526. Even though such massive state assistance to a publicly funded opponent would obviously punish a non-participating candidate's speech, absent evidence of "actual[] chill[ing]," *id.* at 522-23, the Ninth Circuit would sustain that law.

grassroots contributors to make their voices heard. The Arizona statute "operate[s] to constrain campaigning by candidates who raise sums in excess of the spending ceiling," and thus runs afoul of this Court's clear holding in *Buckley*, 424 U.S. at 20. Limits on a campaign's expenditures, no less than limits on a candidate's personal expenditures, "impose . . . severe restrictions on protected freedoms of political expression and association," and therefore are subject to strict scrutiny. *Id.* at 19-23; *see also id.* at 55-58 (striking down limits on campaign expenditures). The Court should grant certiorari to uphold its precedent.

B. The Decision Below Conflicts With This Court's Broader Campaign Finance Jurisprudence.

The decision below especially warrants review because it clashes with this Court's broader, well-established protections of core political speech. As this Court has made clear, "[s]peech is an essential mechanism of democracy," for "it is the means to hold officials accountable to the people." *Citizens United*, 130 S. Ct. at 898. "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Id.* Accordingly, "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Id.*

Furthermore, this Court has specifically protected campaign expenditures as political speech, the very type of speech burdened by the Arizona statute. "The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer." *Id.* at 918 (Roberts, C.J., concurring). It also protects the political candidate and the expenditures needed

to mount a campaign. Indeed, the Court has indicated that "expenditure limitations 'impose significantly more severe restrictions on protected freedoms of political expression and association than' do contribution limitations." *Randall v. Sorrell*, 548 U.S. 230, 241 (2006) (plurality opinion) (quoting *Buckley*, 424 U.S. at 23). This reflects the reality that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression." *Buckley*, 424 U.S. at 19. Thus, the speech burdened by the Arizona statute is core political speech of the highest order.

Appropriately, "[l]aws that burden" a right so vital to our system of government as "political speech are 'subject to strict scrutiny.'" *Citizens United*, 130 S. Ct. at 898 (quoting *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 464 (2007)). This most searching standard of review requires the government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* (quoting *Wisconsin Right to Life*, 551 U.S. at 464) (internal quotation marks omitted). This Court has never suggested that limits on expenditures are anything but severe burdens, and certainly has never suggested that they are comparable to disclosure requirements and therefore subject only to intermediate scrutiny, as the Ninth Circuit held. *See McComish*, 611 F.3d at 525.

Given that the Arizona statute severely burdens expenditures, it must also be subjected to strict scrutiny. *See Davis*, 128 S. Ct. at 2772. The Court should grant certiorari to clarify that matching-fund provisions like the Arizona statute, which substantially burden core speech and are not

narrowly tailored to serve a compelling state interest, violate the First Amendment.

II. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT STRIKING DOWN LAWS THAT BURDENED PROTECTED SPEECH BY TYING IT TO NEGATIVE CONSEQUENCES.

Not only does the decision below run counter to established campaign finance case law, it also tramples principles that undergird this Court's wider First Amendment jurisprudence. Certiorari should be granted.

A first principle of our constitutional system is that the state may not, by cunning manipulation of the laws, circumvent rights guaranteed to the people. *See Elrod v. Burns*, 427 U.S. 347, 359 (1976) (forbidding state action in which "[t]he belief and association which government may not ordain directly are achieved by indirection"); *Speiser*, 357 U.S. at 526 (invalidating law because it "produce[d] a result which the State could not command directly").

This principle is particularly strong in the First Amendment context. The government cannot, using statutes that stop just short of actual prohibition, "deter[] . . . speech which the Constitution makes free." *Id.* Such a state of affairs would expose one of our most precious liberties to the power of any government clever enough to veil its commands in the form of suggestions, encouragement, and threats. Thus, this Court has often struck down laws that impinge on the exercise of free speech by conditioning exercise of that right on acceptance of negative consequences. While the laws the Court has invalidated vary greatly in the type and magnitude of the penalty imposed on speech, a single theme

emerges from this Court's unconstitutional conditions cases: The state may not prevent through the threat of negative consequences the speech it cannot ban directly. And yet, this is precisely the operation of the Arizona statute approved by the decision below.

A. The State Cannot Condition Free Speech on the Promotion of a Viewpoint Contrary to the Speaker's.

The Court has long made clear that conditioning the exercise of First Amendment rights on promotion of a viewpoint contrary to the speaker's position substantially burdens speech and cannot be tolerated. In *Miami Herald Publishing Co. v. Tornillo*, the Court struck down a "right to reply" law that provided that if a political candidate "is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges." 418 U.S. 241, 244 (1974). Noting that "[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers," the Court struck down the law because a "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" *Id.* at 256-57 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)).

The Court reached the same conclusion in *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986) (plurality opinion). In that case, a state agency required "a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagree[d]." *Id.* at 4. The Court found a First Amendment violation because the utility was forced to "contend with the

fact that whenever it speaks out on a given issue, it may be forced . . . to help disseminate hostile views," and that the utility "'might well conclude' that . . . 'the safe course is to avoid controversy'" and remain silent. *Id.* at 14 (quoting *Tornillo*, 418 U.S. at 257).

The Arizona statute presents the very dangers that this Court warned of in *Tornillo* and *Pacific Gas*. An Arizona candidate cannot spend over a certain threshold amount without facilitating his opponent's promotion of a contrary viewpoint. The Arizona law, by affixing penalties to a candidate's expenditures above the threshold amount, "operates as a command in the same sense as a statute or regulation forbidding [a candidate] to publish specified matter." *Tornillo*, 418 U.S. at 256. It forces a candidate "to help disseminate hostile views," *Pacific Gas*, 475 U.S. at 14, as a condition of exercising his or her First Amendment rights. As a result of the penalties it imposes on speech, it "inescapably 'dampens the vigor . . . of public debate,'" *Tornillo*, 418 U.S. at 257 (quoting *New York Times*, 376 U.S. at 279).

In *Davis v. FEC*, the Court recognized the application of *Pacific Gas* to the campaign finance law at issue. *See* 128 S. Ct. at 2772. The Court should do the same here and affirm that provisions, like the Arizona statute, which condition free speech on the promotion of a contrary viewpoint cannot be tolerated under the Constitution.

B. The Decision Contradicts the Court's Wider Unconstitutional Conditions Jurisprudence.

In numerous additional contexts, the Court has struck down laws that, while not limiting the freedom of speech directly, attached conditions that unduly burdened its exercise. The negative consequences at

issue in these cases varied in kind and degree, but the cases make clear that even relatively insignificant conditions on speech can offend the Constitution. Judged against these cases, the substantial consequences triggered under the Arizona statute by a non-participating candidate's core political speech cannot be tolerated.

The Court has expressed the unconstitutional conditions principle in public benefits cases. In *Perry v. Sindermann*, for example, the Court declared that a State "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech." 408 U.S. 593, 597 (1972). Likewise, in *Elrod v. Burns*, the Court stated that its "decisions have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, *however slight the inducement* to the individual to forsake those rights." 427 U.S. at 358 n.11 (emphasis added). Thus even conditions that "slight[ly]" chill the exercise of First Amendment rights can constitute impermissible burdens.

In *Perry*, a teacher who had been employed by a public college on a year-to-year basis alleged that the college's "decision not to rehire him was based on his public criticism of the policies of the college administration and thus infringed his right to freedom of speech." 408 U.S. at 595. The Court declared that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Id.* at 597. Despite the fact that the teacher had no contractual right to renewal of his contract, the Court held that "the nonrenewal of a nontenured public

school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights." *Id.* at 598.

The Arizona statute likewise inhibits speech by tying it to a significant burden—increased funding to a candidate's political opponent. Because the Arizona statute links the exercise of core First Amendment rights to a hardship for the speaker, the Court should grant certiorari to strike down the statute.

This limit on unconstitutional conditions applies with even greater force when the speech at issue "is 'indispensable to the discovery and spread of political truth.'" *FEC v. League of Women Voters*, 468 U.S. 364, 383 (1984) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). In such cases, the Court has been "especially careful in weighing the interests that are asserted in support of th[e] restriction and in assessing the precision with which the ban is crafted." *Id.* Thus, in *League of Women Voters*, the Court invalidated a law that conditioned funding from the Corporation for Public Broadcasting on a television or radio stations' refusal to "engage in editorializing," *id.* at 366 (internal quotation marks omitted). The Court found that the law impermissibly "operate[d] to restrict the expression of editorial opinion on matters of public importance" by attaching negative consequences on the stations' speech. *Id.* at 375. In that way, the Court found, the stations were not truly free to speak as they wished. *See id.* at 402. Accordingly, the law violated the First Amendment by infringing on core political speech, and the Court struck it down.

The Arizona statute commits the same offense. It imposes negative consequences on core political speech and thereby interferes with "the liberty to discuss publicly and truthfully all matters of public

concern without previous restraint or fear of subsequent punishment." *Id.* at 381-82 (internal quotation marks omitted). Just as the law in *League of Women Voters* made it difficult for the stations to survive financially without curtailing their speech, the Arizona statute discourages candidates from discussing the pressing issues of the day to the full extent they believe necessary. As it was in *League of Women Voters*, the Court should be highly skeptical of a law that imposes such burdens on political speech.

The Court's decision in *Speiser v. Randall* likewise demonstrates how even minimally burdensome conditions on speech can run afoul of the First Amendment. In that case, the Court struck down a California law that denied a tax exemption to persons who could not carry the state-imposed burden to show they refrained from advocating the overthrow of the government. 357 U.S. at 515-17. The Court noted that the law burdened speech, since "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech." *Id.* at 519. Even assuming for the sake of argument that the law applied only to illegal (and therefore unprotected) speech, the Court nonetheless found a constitutional violation because California shifted the burden of proof to the taxpayer. *See id.* at 528-29. Describing "[t]he vice of the [California] procedure," the Court explained, "[t]he man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." *Id.* at 526. Even though the California law required only proof that one's speech was lawful, and pertained only to the availability of a

tax exemption, the Court held the statute unconstitutional.

In contrast, the Arizona statute poses a significantly greater burden on free speech. Whereas a speaker under the California law could avoid being denied the tax exemption simply by proving that his speech was legal, the Arizona law provides no means to escape its strictures: A candidate who spends above the threshold amount *will* trigger additional funding for the candidate's opponent. The Arizona statute fails to "provide any way in which a candidate can exercise [his free speech] right without abridgement." *See Davis*, 128 S. Ct. at 2772. Moreover, the nature of the Arizona statute's penalty strikes at the heart of the First Amendment. It affects not the speaker's tax bill, but the speaker's prospects in a political election—a central event in our republican form of government. Because the *Speiser* Court found the California statute imposed an unconstitutional condition, there can be no doubt that the Arizona statute does likewise and should be invalidated.

While the particular consequences attached to speech in these cases differed, a consistent rule runs throughout them: Tying burdensome consequences to protected speech is no more permissible than directly banning speech itself. This rule is strong; even consequences which result in mere "slight . . . inducement[s]" to curtail speech, *Elrod*, 427 U.S. at 358 n.11, can be impermissible under this Court's precedents. And the rule gains additional strength when the speech in question is political. *League of Women Voters*, 468 U.S. at 383.

The Arizona statute significantly impairs core political speech by attaching an inescapable condition to it. It therefore falls into the most forbidden

category of unconstitutional conditions and should be struck down. The Ninth Circuit failed to recognize this vital part of First Amendment jurisprudence. And numerous States have adopted or are considering matching-funds statutes that similarly burden speech in disregard for this Court's precedent. This Court's review is urgently needed.

CONCLUSION

For these reasons, and those stated by petitioners, the petitions for a writ of certiorari should be granted.

Respectfully submitted.

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

JONATHAN F. COHN*
MATTHEW D. KRUEGER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jcohn@sidley.com

Counsel for Amicus Curiae

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* Counsel of Record

AMICUS CURIAE BRIEF

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Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ARIZONA TAXPAYERS ACTION COMMITTEE, DEAN MARTIN, and RICK MURPHY,
Petitioners,
v.
KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, LORI S. DANIELS, and LOUIS HOFFMAN in their official capacities as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, CLEAN ELECTIONS INSTITUTE, INC., and JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,,
Respondents.
and
JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,
Petitioners,
v.
KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, LORI S. DANIELS, and LOUIS HOFFMAN in their official capacities as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, CLEAN ELECTIONS INSTITUTE, INC., and ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ARIZONA TAXPAYERS ACTION COMMITTEE, DEAN MARTIN, and RICK MURPHY,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF PETITIONERS

ALLISON R. HAYWARD
Counsel of Record
CENTER FOR COMPETITIVE POLITICS
124 S. West Street, Suite 201
Alexandria, VA 22314
(703) 894-6800
ahayward@campaignfreedom.org
Counsel for Amicus Curiae

September 16, 2010

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INTEREST OF THE *AMICUS CURIAE* [1]

The Center for Competitive Politics (or CCP) is a non-profit organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. CCP's mission, through studies, legal briefs, historical and constitutional analysis, and media communication, is to educate the public on the effects of money in politics, and the desirability of a more free and competitive electoral process.

CCP is interested in these cases because they challenge the selective governmental subsidy of political expression, which is part of a misguided effort to encourage participation in tax-funded political campaigns that cannot be shown to serve the state's legitimate interests. CCP believes these subsidies ultimately impede political activity and the flow of political information.

SUMMARY OF ARGUMENT

In the decision below,[2] the Ninth Circuit concluded that Arizona's clean elections law, including its statute titled "Equal Funding of Candidates" (*see* Ariz. Rev. Stat. § 16-952), survived intermediate scrutiny because it bore a substantial relation to the State's important interest in reducing *quid pro quo* corruption. CCP urges this Court to review this case, so it can reexamine the assumption that "clean elections" laws serve a sufficient state interest, whether

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, and no counsel or party funded its preparation or submission.

[2] The original decision of the court of appeals is reported at 605 F.3d 720. The court's amended decision is unreported, but included in parties' Appendix.

that interest is deemed "important" or "compelling." We wish to draw to the Court's attention the numerous independent evaluations of clean elections laws, and the lack of evidence that such laws benefit the political system or reduce corruption. Yet in this case, the court below presumed the state's interest had been shown, instead of requiring the state to bear its burden to show how any proper interest is served by these laws. This Court can correct that oversight by taking review of this case.

We believe it is impossible to conclude that government funding of campaigns, and (it follows) an incentive payment to participate in such a system, serve the state's anti-corruption interests. Arizona's law seeks not merely to equalize, but to assist participating candidates, by putting the government's thumb on the scale to insure that those candidates – but only those -- will not be outspent. Arizona, and the court below, claims this is necessary to encourage candidates to participate in the public financing system, which, in turn, it claims is necessary to prevent corruption. But, the anti-corruption effect of public financing is unsupported by scholarly reviews of the evidence. Moreover, incentive payments pervert campaign communications by encouraging gaming of the system. Those state-imposed burdens on expression and association cannot pass any level of heightened scrutiny. The necessary rationale for the "Equal Funding of Candidates" payment is thus absent.

ARGUMENT

Introduction

The Arizona Clean Elections Act, Ariz. Rev. Stat. § 16-940 *et seq.* provides government funding for campaigns for many Arizona state elective offices.[3] Participation in the Act is voluntary. As an incentive to participate, the Act also guarantees "equal" funding when participating candidates face a traditionally funded primary or general election challenger who spends (in the primary) or raises (in the general) an amount over the "initial disbursement" the state gave the subsidized candidate.[4] The Act also adds to the participating candidate's funding when independent groups spend enough to bring the opponent's total above the amount of the subsidy.[5]

The title of the law, "Equal Funding for Candidates," is misleading. For example, if only one of four primary candidates enrolls in the program, and any one of the other three spends over his or her public grant level, the participating candidate alone can receive additional funding. If an outside interest group makes an independent expenditure on behalf of one of the opponents that brings the spending level

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[3] The Act funds races for Governor, Secretary of State, Attorney General, Treasurer, Superintendent of Public Instruction, Corporation Commissioner, Mine Inspector, State Senator, and State Representative.

[4] Ariz. Rev. Stat. § 16-952(A). The additional amount is determined by the amount spent that exceeds the initial disbursement, less 6%, which is intended to reflect fundraising costs otherwise incurred, and certain adjustments for early fundraising not relevant here. The threshold is triggered by opposition spending in the primary, but by fundraising in the general election.

[5] Ariz. Rev. Stat. § 16-952(C).

over the participant's grant level, then the participating candidate (again, alone) can receive additional funding.

Proponents of the Act, as well as the court below, contend that the additional "equal" funding is essential to motivate Arizona candidates to participate in the Clean Elections Act. *McComish v. Bennett*, 605 F.3d 720, 735-37 (9th Cir. 2010). The court rejected the idea that the Act's regime could function without the incentive payment:

> If participants were not given matching funds, they would not join the program because they would not be viable candidates in their elections. ... In contrast, if the Act were to raise the amount of its lump-sum grants and do away with matching funds altogether, it would make the Act prohibitively expensive and spell its doom.

Id. at 736-37. For the court below, just keeping the Act viable served Arizona's interest in preventing *quid pro quo* corruption, since every candidate participating in the system would be one more candidate not accepting campaign contributions. *Id.* at 736. The court merely assumed that private funding of campaigns is both a necessary and exclusive source of corruption, and that the government's funding is a remedy.

Notwithstanding the appeals court's limited appreciation for the various means by which politicians can misbehave, lurking behind its analysis is the assumption that "clean elections" laws that provide government funding to campaigns have a salutary effect in the states that adopt them. If that were true, it could then follow that a provision like Arizona's "Equal Funding for Candidates" law performs

a worthwhile task by encouraging candidates to participate in a program that produces benefits overall. We wish to direct the Court's attention to the absence of any evidence that such benefits do accrue in these states.

There is no evidence that government financing of campaigns reduces corruption, or fosters indirect changes (like increased competitiveness or incumbent turnover) that then could be shown to reduce corruption in politics.[6] If "clean elections" systems fail to improve a jurisdiction's political system (and indeed some studies observe deterioration in some contexts) then the state's rationale for paying incentive funds evaporates. The court below was wrong to presume that state interests are served by clean election programs (and by extension this subsidy). Indeed, it should have required the state to demonstrate that this law served an anti-corruption interest, and was tailored to fit the state's interest. It is up to this Court to correct this holding, so that it does not function as authority in other cases, allowing state regulators to assert without evidence that some restriction or another fights corruption. Given the scholarly research we now present, we contend that Arizona, or any other state with such laws, would be unable to make this showing.

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[6] As an aside, although enhancing competition is a permissible goal of government policy, this Court has never suggested that it constitutes a compelling interest that would overcome the First Amendment rights of speakers.

I. STUDIES UNABLE TO SHOW THAT CLEAN ELECTIONS LAWS DELIVER PROMISED BENEFITS

A. Studies from federal and state governments show no real benefits in jurisdictions from "clean elections" laws

1. Federal Government Reports from the Government Accountability Office and the Congressional Research Service

Federal and state governments have made only modest attempts to ascertain the benefits that states with tax funded "clean elections" programs might experience. Early studies found little effect, but were possibly handicapped by a limited data set, since the first full-funding programs took effect in 2000. Those studies that identified some benefits conceded that they were modest at best, and possibly not resulting from the programs at all. Other studies produced contradictory results. Thus, the best that can be said is that some governmental studies have possibly identified some modest correlating benefits, but the causal relationship between those improvements and the laws are not evident.

In the Bipartisan Campaign Reform Act of 2002, Congress mandated the Government Accountability Office ("GAO") to review the tax financing programs in Maine and Arizona. *See* Pub. L. No. 107-155, 116 Stat. 81 (2002). The GAO reported in 2003, with only two election cycles to examine, that it was too soon to observe whether the "clean elections" systems improved the intended goals of increasing competition, voter choice and participation, or confidence in government; or reducing campaign spending and interest

group influence. *See* GAO, *Campaign Finance Reform: Experiences in Two States That Offer Full Public Funding for Political Candidates* (GAO-10-390) (May 2010) (summarizing 2003 Report, GAO 03-453).

In 2007, the Senate directed GAO to revisit and update its study. In May 2010, GAO reported that it had found statistically significant changes in only one of the five goals of these government funding programs. It only observed a decrease in the winner's margin of victory in legislative races in both Maine and Arizona. GAO-10-390, *supra*, at 35-37. But GAO could not attribute this to the "clean elections" programs, however. Significantly, GAO found that spending in Arizona had increased, and that the public funding program changed the timing of campaign spending, shifting it toward the end of the campaign. *Id.* at 59-60. Individuals interviewed by GAO opined that spending increases were due in part to increases in independent spending, which triggered matching funds for participating candidates. *Id.* at 64-66. In reaction, nonparticipating candidates in Arizona had focused fundraising and spending activity at the very end of the campaign, so that participating opponents could not use effectively what matching funds they received. *Id.* at 80.[7] In the end, the GAO study could not resolve whether public funding served any of its articulated goals in either Arizona or Maine. *Id.* at 84.

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[7] This is not a shift that campaigns would likely choose on their own. This delay in spending occurred notwithstanding the fact that more voters are casting their ballots early. Thus the matching subsidy directed campaign spending away from communicating with many voters before they voted. *See* Prof. Michael McDonald, *Early Voting 2008*, http://elections.gmu.edu/Early_Voting_2008_Final.html.

The Congressional Research Service has also reviewed government financing of state campaigns. *See* R. Sam Garrett, *Public Financing of Congressional Campaigns: Overview and Analysis* (CRS Aug. 4, 2009). This report, which is a survey of existing studies, observed that comparisons between programs are hard to construct given the variety of public funding programs. *Id.* at 42. Moreover, many studies are narrow in scope. *Id.* CRS noted that the evidence that public funding increases competitiveness in elections was "mixed." *Id.* at 43. In the cases of Arizona, Connecticut and Maine, it reported that only advocacy groups contend that competitiveness and diversity have improved under clean elections laws. *Id.* at 46. But CRS concluded instead that the data on effectiveness was contradictory. *Id.* at 47. "Consequently, there are few certainties about how public financing might apply to congressional campaigns." *Id.* at 50.

2. State Government Reports From Arizona, Maine, and New Jersey

State governments have also made modest efforts to ascertain the effectiveness of "clean elections" laws. The Arizona Clean Elections Commission is responsible for the administration of Arizona's public funding law. It has never assessed the Arizona Act overall, but has instead commissioned a series of surveys, most recently in 2008. This latest survey measured how state voters viewed the law. Arizona Clean Elections Commission, *Statewide Voter Survey*, Jan. 2008, http://www.azcleanelections.gov/2007-2008-docs/Survey.sflb.ashx. In general, substantial majorities in Arizona favored the law, but admitted to little knowledge of how it worked. When asked what they liked about the law, the most popular answer by far

(with 30% of respondents) was that it "leveled the playing field." *Id.* at 8.

Maine, by contrast, has reviewed its program. Maine Commission on Governmental Ethics and Election Practices, *2007 Study Report*. It observed some positive trends in increasing the number of candidates and reducing private money in politics, although admitted that these trends "might be difficult to attribute" to public financing. *Id.* at 1. This report conceded that total spending in races, including independent spending, had increased under tax funding, and observed that changing campaign finance "will not, by itself, control spending by PACs and political parties, encourage more substantive discussion of issues, or increase voter interest in elections." *Id.* at 2, *see also id* at 43-45. Notably, it identified as a *problem* in administration the narrow definition of "expenditures" that includes only express advocacy, which would follow from the constitutional constraints on legislation in this area. As in the GAO analysis, this Maine study observed that the law encouraged spending to shift later in the election so as not to trigger "matching funds" to participating candidates. *Id.* at 65-67. As noted, campaigns are shifting spending even though more voters are casting ballots early, before receiving these communications and contacts.[8]

In 2008, New Jersey assessed its 2007 Clean Elections Pilot Project, which provided public funding in three legislative districts. New Jersey Election Law Enforcement Commission, *2007 Fair and Clean Elections Report* (Mar. 28, 2008), http://www.elec.state.nj.us/clean_elect/downloads/_ce_report2007.pdf.

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[8] *See supra* note 7.

The 2007 program followed a 2005 pilot project involving two districts, for which only two candidates ever qualified. In the 2007 project, sixteen candidates running in three legislative districts received grants, and two also received "rescue money" in response to independent spending by an "outside" group, Commonsense America. *Id.* at 31, 39, 48. A third candidate excluded from a local news debate applied for rescue funds, but was rejected. Under the New Jersey law spending by a *bona fide* news organization is not deemed "as favoring or opposing any candidate." *Id.* at 49. The New Jersey Report observed that the Clean Elections Pilot Project did not improve turnout, *id.* at 35; did not reduce spending, *id.* at 41-42; and did not improve the public perception of politics, *id.* App. 1 at 8.

B. Academics have been unable to establish the benefits, if any, of adopting government funded "clean elections" programs.

In contrast with the scant number of government reports, academics have released numerous studies of governmental funding for campaigns. Despite these efforts, scholars can still say little definitively about the effect of such funding on politics and elections. As Dr. Kenneth Mayer, an expert in this case for the Respondents, observed when assessing the literature on whether public financing increased diversity, made elections more competitive, reduced private influence or costs: "Does public financing achieve any of these goals? The short answer is that nobody knows . . ." Kenneth Mayer, Timothy Werner and Amanda Williams, *Do Public Funding Programs Enhance Electoral Competition?*" IN MICHAEL P. MCDONALD AND JOHN SAMPLES, EDS., THE MARKET-

PLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS 245, 246 (2006). Mayer's own study suggested tentatively that public financing may increase the number of candidates and the number of races in which the victor wins by under 60% of the vote, and may reduce the incumbent reelection rate.

In the same anthology, a second set of scholars (one of whom served as an expert for Petitioners in this case) similarly stated that "[d]espite the attention given to electoral competitiveness and campaign money, and the assertions made by both proponents and opponents . . . we know surprisingly little about the impact of campaign finance laws on electoral outcomes." Primo, David M., Jeffrey Milyo, and Tim Groseclose, *State Campaign Finance Reform, Competitiveness, and Party Advantage in Gubernatorial Elections*, in THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS, *supra* at 268, 269. These scholars used a different model to conclude that public financing has an insignificant effect on the margin of victory.

One of the reasons scholars writing for a 2006 publication could express only tentative conclusions would be the lack of data at that time from states offering full governmental funding for campaigns. *See* NOLAN REICHL, WHAT WE KNOW AND WHAT WE DON'T: A REVIEW OF THE LITERATURE EMPIRICALLY ANALYZING THE EFFECTS OF STATE CAMPAIGN FINANCE REFORM LAWS at 34-35 (Apr. 21, 2006)(unpublished J.D. senior thesis, Stanford Law School), http://ssrn.com/abstract=924434. There are thousands of state and local elections nationally, but only a limited number in Maine and Arizona, the two jurisdictions with full public financing since 2000. Within that

group, some candidates opt into the system, but not all do, reducing again the number of incidents available for study. Arizona also elects two representatives for each State House seat, making difficult any comparisons between its elections and those for conventional single-representative districts in other states.

Given the passage of time, and the additional data from 2006 and 2008, has more recent scholarship been able to generate more definitive results? No.

Perhaps the most recent paper, by Michael Miller of the University of Illinois, is a critique of the GAO study from 2010 discussed above. Michael G. Miller, *After the GAO Report: What do We Know about Public Election Funding* (working paper, July 17, 2010), http://sites.google.com/site/millerpolsci/research. Miller questioned whether GAO's contention that independent expenditures have risen was anecdotal, but nevertheless concluded that more study of independent expenditures would be needed. *Id.* at 10. He noted that participating candidates in Maine tend to win, while those in Arizona tend to lose, and attributed this fact to ideological differences between the two states.

Political scientists disagree about the best statistical techniques, and often attribute contradictory findings among studies to methodological differences. Miller's paper criticized many GAO techniques. Miller observed that GAO did not attempt to evaluate the effect of public funding on candidate diversity (but conceded that the evidence suggests that "clean elections" do not alter the number or demographics of legislative candidates). *Id.* at 16. Miller rejected the way GAO evaluated competitiveness, and criticized its unwillingness to attribute lower victory margins

to public funding. Yet Miller credited the GAO finding that the matching funds provisions encourage candidates to withhold spending until late in the election. *Id.* at 21; *see also* Michael Miller, *Gaming Arizona: Public Money and Shifting Candidate Strategies*, PS: POLITICAL SCIENCE & POLITICS (July 2008).

Many academic studies have evaluated who uses public funding, and whether new or different candidates are able to enter politics because of these programs. Overall, there is little evidence that a "new kind" of politician will emerge from tax-funded jurisdictions. A very recent working paper observed only that participation in tax funding programs is increasing, and that Democratic candidates are relatively more likely to participate than Republicans. William M. Salka, *Publicly Funded Legislative Campaigns Through Citizens Election Programs: Who Participates and Does it Matter?* (paper delivered at the Western Political Science Ass'n annual meeting, April 2010), http://ssrn.com/abstract=158114.[9] This study also suggested that "public money is more likely to be used by stronger candidates, either those in more competitive districts or those who have previously won elective office." *Id.* at 26. Overall, Salka's study found that candidates who used public funding tended to receive more votes, and candidates

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[9] This amicus brief cites working papers and papers that have been presented but not published. We believe it is worthwhile to assess the most recent scholarship in this area, given that data becomes more plentiful (and conclusions more robust) with every election. Given the time it takes for a paper to make it through the academic cycle to formal publication in a peer-reviewed journal, we believe it is necessary to consider works in progress that can draw on data from 2006 and 2008. The cited authors are experts in this field with sound professional reputations.

whose challengers accepted public funding tended to receive fewer votes. *Id.* at 27. Similarly, a 2008 published study concluded that quality challengers are attracted to public funding, and thus these programs "do not simply fill the coffers of unserious and low-quality candidates." Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 STATE POLITICS AND POLICY QUARTERLY 263, 277 (2008)[10]. Nevertheless, he found "the Arizona clean elections law had no significant effect on increasing mean electoral competition in the [State Senate] overall." *Id.* at 273, *see also* Michael J. Brogan, *Experiment and Institutionalization: Clean Elections in New Jersey*, 7 LEX LOCALIS – JOURNAL OF LOCAL SELF-GOVERNMENT (2009), http://pub.lex-localis.info:60/index.php/Lex Localis/article/view/7.4.371-392%282009%29 (concluding that clean elections programs unlikely to make elections more competitive).

Another scholar in a recent paper observed, based on survey research, that public funding does not change the demographic characteristics of the individuals who decide to run for office. Raymond J. La Raja, *Does Public Funding of Elections Encourage More Citizens to Run for Office?* (paper presented to the 2009 annual meeting of the American Political Science Association) http://ssrn.com/abstract=145095.[11] But another paper, comparing survey results from

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[10] Although published in 2008, this paper includes data only through 2006.

[11] The American Political Science Association's State Politics and Policy Section dedicated its 2009 panel to "Connecticut's New Public Financing System: A First Look" held September 5, 2009, *see* http://www.apsanet.org/mtgs/program_2009/program.cfm?event=1513708.

Connecticut candidates in 2006 (before public financing) and 2008 (after) reported evidence of some demographic diversification, and also an increased role for outside groups in issue advertising. Keith Hamm and Robert E. Hogan, *Perspectives of State Legislative Candidates on Connecticut's Implementation of Clean Election Law* at 31 (paper also presented to the 2009 annual meeting of the American Political Science Association) http://ssrn.com/abstract=1450959. Thus it appears that governmental funding goes to candidates who have already shown political skill in the traditionally funded system, with little if any effect on diversity or competition.

When the focus moves away from the laws' effects on competitiveness (where changes might indirectly reduces corruption as noted), and moves more directly to consider their effects on corruption, the picture becomes even bleaker for advocates of governmental campaign financing. A recent study concluded that strong campaign finance laws (including governmental financing as the most stringent of such laws) lead to increases in perceptions of corruption. Beth Ann Rosenson, *The Effect of Political Reform Measures on Perceptions of Corruption*, 8 ELECTION LAW JOURNAL 31, 41 (2009). As to *quid pro quo* corruption, a study examined participation in committee deliberations by members of the pre-Clean Elections Connecticut General Assembly from 2003-08 revealed "no evidence that money can buy legislators' time and effort, even on bills identified [] as priorities." Vincent G. Moscardelli, *Money, Participation and Deliberation in the Connecticut General Assembly* at 13 (paper presented at the 2009 annual meeting of the American Political Science Association), http://ssrn.com/abstract=1452226. Economist Thomas Stratmann concluded, in a paper published in 2003 comparing the

laws in various nations, that contribution limits were positively correlated with increased corruption. Thomas Stratmann, *Do Strict Electoral Campaign Finance Rules Limit Corruption*, 1 CESIFO DICE REPORT, 24-27 (2003), http://www.cesifo.de/~DocCIDL/dicereport1-03-research-reports-2.pdf. Yet one study found that government funding permitted recipient candidates to spend more time campaigning, less time fundraising, and that their races experienced less down-ballot roll off. Michael G. Miller, *Citizen Engagement and Voting Behavior in Publicly Funded Elections* (working paper) http://sites.google.com/site/millerpolsci/research). How candidates use their time is not itself a state interest justifying regulation, *see Randall v. Sorrell*, 548 U.S. 230, 236-37 (2006), and has an attenuated connection to any interest in combating corruption.

Even in the most recent scholarship available, no consistent picture emerges about the effects of selective government funding on campaigns and elections. Studies performed using professional econometric analyses draw contradictory conclusions, when they detect any effect at all. Moreover, there is much debate within social science about the appropriate data to study, and the proper methodology to use. It is beyond the cognizance of this Court, or any court, to settle those disputes. But the Court can surmise that each of these scholars is toiling in good faith. That being said, the benefits of government financing to a state seeking to reduce corruption have eluded observation thus far. It following that a governmental incentive payment also lacks sufficient justification.

II. THE BURDENS IMPOSED BY "CLEAN ELECTIONS" REGIMES ARE SIGNIFICANT ACROSS THE NATION

In the case below, the United States Court of Appeals for the Ninth Circuit concluded that Arizona's "clean elections" law, including its "Equal Funding of Candidates" provision, survived intermediate scrutiny because it bore a substantial relation to the State's important interest in reducing *quid pro quo* corruption. 605 F.3d at 732-33. We express no opinion in this brief on whether the Circuit adopted the correct standard of scrutiny. We write to urge the Court to reexamine the assertion that selective government funding laws, including subsidies for participation in government funding, serve a sufficient state interest, whether it be deemed "important" or "compelling." We wish to draw to the Court's attention the numerous independent evaluations of clean elections laws that attempt to identify the beneficial effects of funding campaigns with public tax dollars. As noted, it is impossible, from this body of research, to conclude that these systems serve the state's anti-corruption interests. Correspondingly, the rationale for incentive payments to participants also fails.

This issue is of national significance, and the Court should realize that the same issues presented in this case have resonance throughout the country. Seven states have offered some form of the so-called "clean money" model of public tax financing: Arizona, Connecticut, Maine, New Mexico, North Carolina, Vermont, and a New Jersey pilot program. *See* Congressional Research Service, *Public Financing of Congressional Campaigns: Overview and Analysis* (Aug. 4, 2009) at 35. Massachusetts also had a "clean

money" program from 1998-2003. *Id.* at 41. The burdens these laws, with their incentive payments for participants, impose, extend beyond Arizona, and resolving their constitutionality is critical to the proper functioning of American politics.

CONCLUSION

Government funding for political campaigns (such as the Arizona Clean Elections Act), enjoys ardent support among some activists.[12] Many states, and members of Congress, continue to entertain the adoption of similar systems. Yet neither governmental studies, nor the work of independent scholars can confirm that these laws further the state's interest in reducing corruption or the appearance of corruption. Nor is there any evidence that these programs further goals that might indirectly improve the quality of governance, such as competition or diversity. Since Arizona's "Equal Funding of Candidates" statute offers an incentive payment for some candidates to participate in the Act, if the rationale for the Act cannot be defended, neither can the rationale for the incentive subsidy. This Court should grant review of the decision below, and resolve for all states entertaining similar systems that the burdens imposed by the subsidy cannot be justified by a sufficient state interest, and is therefore unconstitutional.

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[12] Public support is less evident. Public opinion data vary depending on how pollsters word their questions. *See* Garrett, *supra* at 48-49. Public opinion is negative when polling questions reference the governmental source of funds for such programs. *Id.*

Respectfully submitted,

ALLISON R. HAYWARD
Counsel of Record
CENTER FOR COMPETITIVE POLITICS
124 S. West Street, Suite 201
Alexandria, VA 22314
(703) 894-6800
ahayward@campaignfreedom.org

Counsel for Amicus Curiae

September 16, 2010

JOINT APPENDIX

Nos. 10-238, 10-239

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ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, et al.,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

JOHN MCCOMISH, et al.,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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NICHOLAS C. DRANIAS*
GOLDWATER INSTITUTE
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION
500 East Coronado Road
Phoenix, AZ 85004
Tel: (602) 462-5000
Fax: (602) 256-7045
ndranias@goldwaterinstitute.org
Counsel for Petitioners John McComish, et al.

WILLIAM R. MAURER*
INSTITUTE FOR JUSTICE
101 Yesler Way, Suite 603
Seattle, WA 98104
Tel: (206) 341-9300
Fax: (206) 341-9311
wmaurer@ij.org
Counsel for Petitioners Arizona Free Enterprise Club's Freedom Club PAC, et al.

MARY R. O'GRADY*
Solicitor General
1275 West Washington
Phoenix, AZ 85007
Tel: (602) 542-3333
Fax: (602) 542-4085
Solicitor General@azag.gov
Counsel for Respondents Ken Bennett, et al.

BRADLEY S. PHILLIPS*
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071
Tel: (213) 683-9100
Fax: (213) 687-3702
Brad.Phillips@mto.com
Counsel for Respondent Clean Elections Institute, Inc.

*Counsel of Record

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[Additional Counsel Listed On Inside Front Cover]

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CLINT BOLICK
GOLDWATER INSTITUTE
SCHARF-NORTON CENTER FOR
CONSTITUTIONAL LITIGATION
500 East Coronado Road
Phoenix, AZ 85004
Tel: (602) 462-5000
Fax: (602) 256-7045
Additional Counsel for Petitioners
John McComish, et al.

WILLIAM H. MELLOR
STEVEN M. SIMPSON
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
wmellor@ij.org
Additional Counsel for Petitioners
Arizona Free Enterprise Club's Freedom Club PAC, et al.

TIMOTHY D. KELLER
PAUL V. AVELAR
INSTITUTE FOR JUSTICE
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
Tel: (480) 557-8300
Fax: (480) 557-8305
tkeller@ij.org
pavelar@ij.org
Additional Counsel for Petitioners
Arizona Free Enterprise Club's Freedom Club PAC, et al.

TIMOTHY A. NELSON
Chief Deputy Attorney General
JAMES E. BARTON II
Assistant Attorney General
1275 West Washington
Phoenix, AZ 85007
Tel: (602) 542-3333
Fax: (602) 542-4085
Additional Counsel for Respondents
Ken Bennett, et al.

GRANT A. DAVIS-DENNY
ELISABETH J. NEUBAUER
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071
Tel: (213) 683-9100
Fax: (213) 687-3702
Additional Counsel for Respondent
Clean Elections Institute, Inc.

MONICA YOUN
MIMI MARZIANI
THE BRENNAN CENTER
FOR JUSTICE AT NYU
SCHOOL OF LAW
161 Avenue of the Americas
New York, NY 10013
Tel: (212) 992-8158
Fax: (212) 995-4550
monica.youn@nyu.edu
Additional Counsel for Respondent
Clean Elections Institute, Inc.

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..... 10-239 Cert. App. 137

Arizona Citizens Clean Elections Act, Ariz. Rev. Stat. § 16-940 et seq. ..... 10-238 Cert. App. 134
..... 10-239 Cert. App. 138

U.S. District Court
DISTRICT OF ARIZONA (Phoenix Division)
CIVIL DOCKET FOR CASE #: 2:08-cv-01550-ROS

McComish et al v. Brewer et al

Date Filed	#	Docket Text
08/21/2008	1	COMPLAINT. Filing fee received: $ 350.00, receipt number PHX074822, filed by Doug Sposito, John McComish, Nancy McLain, Kevin Gibbons, Frank Antenori, Tony Bouie.(MHA) (Entered: 08/22/2008)
08/21/2008		This case has been assigned to the Honorable Roslyn O. Silver. All future pleadings or documents should bear the correct case number: CV-08-1550-PHX-ROS. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (MHA) (Entered: 08/22/2008)
08/26/2008	10	ORDER – IT IS ORDERED Plaintiffs' Motion for a Temporary Restraining Order shall be filed with the Court and Defendants notified by 5:00 p.m., August 26, 2008. IT IS FURTHER ORDERED Defendants shall file a response by 8:00 a.m., August 28, 2008. IT IS FURTHER ORDERED a hearing on Plaintiffs Temporary Restraining Ordershall be held at 3:00pm, August 28, 2008 before Judge Roslyn O. Silver.

Signed by Judge Roslyn O Silver on 8/26/08. (CLB) (Entered: 08/26/2008)

08/26/2008 13 First MOTION for Temporary Restraining Order by Doug Sposito, John McComish, Nancy McLain, Kevin Gibbons, Frank Antenori, Tony Bouie. (Attachments: # 1 Appendix Table of Contents to Exhibits, # 2 Affidavit Declaration of Gibbons, # 3 Exhibit Gibbons Ex. A.1, # 4 Affidavit Bouie, # 5 Exhibit Bouie Ex. B.1, # 6 Exhibit Bouie Ex.B.2, # 7 Affidavit Sposito, # 8 Errata Sposito Ex. C.1, # 9 Exhibit Sposito Exhibit C.2, # 10 Exhibit Sposito Ex. C.3, # 11 Text of Proposed Order)(Bolick, Clint) (Entered: 08/26/2008)

08/26/2008 14 Additional Attachments to Main Document re 13 First MOTION for Temporary Restraining Order *Sposito Aff., Ex.C.1* by Plaintiffs Doug Sposito, John McComish, Nancy McLain, Kevin Gibbons, Frank Antenori, Tony Bouie. (Bolick, Clint) (Entered: 08/26/2008)

08/26/2008 15 NOTICE of Hearing on Motion 13 First MOTION for Temporary Restraining Order :Motion Hearing set for 8/28/2008 at 03:00PM before Judge Roslyn O Silver filed by John McComish, Nancy McLain, Kevin Gibbons, Frank Antenori, Tony Bouie, and Doug Sposito. (Bolick,

Clint) Modified on 8/27/2008 (TLJ). DOCKET TEXT MODIFIED TO IDENTIFY FILERS. (Entered: 08/26/2008)

08/26/2008 16 Additional Attachments to Main Document re 13 First MOTION for Temporary Restraining Order *Declaration of Andrea Woodmansee* by Plaintiffs Doug Sposito, John McComish, Nancy McLain, Kevin Gibbons, Frank Antenori, Tony Bouie. (Attachments: #1 Exhibit Woodmansee Ex. D.1, # 2 Exhibit Woodmansee Ex. D.2)(Bolick, Clint) (Entered: 08/26/2008)

08/26/2008 17 Additional Attachments to Main Document re 13 First MOTION for Temporary Restraining Order *Dranias Declaration* by Plaintiffs Doug Sposito, John McComish, Nancy McLain, Kevin Gibbons, Frank Antenori, Tony Bouie. (Attachments: # 1 Exhibit Dranias Aff., Ex. E.1, # 2 Exhibit Dranias Aff., Ex. E.2, # 3 Exhibit Dranias Ex. E.3)(Bolick, Clint) (Entered: 08/26/2008)

08/27/2008 19 Notice re of Filing Motion to Transfer and Consolidate by Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels (Attachments: # 1 Exhibit A)(O'Grady, Mary) (Entered: 08/27/2008)

08/28/2008	22	Notice re Notice of Filing of Objection and Alternative Response to Motion to Transfer and Consolidate in Martin v. Brewer, 04-cv-0200 by Doug Sposito, John McComish, Nancy McLain, Kevin Gibbons, Frank Antenori, Tony Bouie (Dranias, Nicholas) (Entered: 08/28/2008)
08/28/2008	23	RESPONSE to Motion re 13 First MOTION for Temporary Restraining Order filed by Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (O'Grady, Mary) (Entered: 08/28/2008)
08/28/2008	24	DECLARATION of Declaration of Tanja Shipman re 23 Response to Motion *for Temporary Restraining Order* by Defendants Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (Attachments: # 1 Exhibit)(O'Grady, Mary) (Entered: 08/28/2008)
08/28/2008	25	DECLARATION of Jackie Thrasher re 23 Response to Motion *for Temporary Restraining Order* by Defendants Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (O'Grady, Mary) (Entered: 08/28/2008)
08/28/2008	26	DECLARATION of Kara Kelty re 23 Response to Motion *for Temporary*

		Restraining Order by Defendants Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (O'Grady, Mary) (Entered: 08/28/2008)
08/28/2008	27	DECLARATION of John Valdez re 23 Response to Motion *for Temporary Restraining Order* by Defendants Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (Attachments: # 1 Exhibit)(O'Grady, Mary) (Entered: 08/28/2008)
08/28/2008	28	DECLARATION of Todd Lang re 23 Response to Motion *for Temporary Restraining Order* by Defendants Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (Attachments: # 1 Exhibit)(O'Grady, Mary) (Entered: 08/28/2008)
08/28/2008	29	Minute Entry. Proceedings held before Judge Roslyn O Silver: Temporary Restraining Hearing held on 8/28/2008. Matter is taken under advisement. Order to issue. (Court Reporter Liz Lemke.)(CLB) (Entered: 08/28/2008)
08/29/2008	30	ORDER denying 13 Motion for a Temporary Restraining Order. IT IS FURTHER ORDERED a hearing will be held on September 3, 2008, 1:30 p.m. to determine whether a

preliminary injunction should be granted or, should the parties decide that discovery is necessary, the preliminary injunction hearing will be continued and a status hearing will be held in its place. Signed by Judge Roslyn O Silver on 8/29/08.(CLB) (Entered: 08/29/2008)

09/01/2008 31 First MOTION to Intervene *as Plaintiffs* by Dean Martin, Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee. (Attachments: # 1 Text of Proposed Order granting motion to intervene as plaintiffs, # 2 Exhibit Exhibits A-D)(Keller, Timothy) (Entered: 09/01/2008)

09/01/2008 32 LODGED Proposed Proposed Complaint In Intervention re: 31 First MOTION to Intervene *as Plaintiffs*. Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by Dean Martin, Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee. (Attachments: # 1 Exhibit Exhibits A-C)(Keller, Timothy) (Entered: 09/01/2008)

09/01/2008 33 MOTION for Preliminary Injunction by Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC. (Attachments:

		# 1 Text of Proposed Order granting preliminary injunction, #2 Exhibit Exhibits A-E)(Keller, Timothy) (Entered: 09/01/2008)
09/02/2008	34	ORDER denying 33 Motion for Preliminary Injunction. Signed by Judge Roslyn O Silver on 9/2/08. (DMT,) (Entered: 09/02/2008)
09/02/2008	36	RESPONSE to Motion re 31 First MOTION to Intervene *as Plaintiffs* filed by Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (O'Grady, Mary) (Entered: 09/02/2008)
09/02/2008	37	MOTION for Preliminary Injunction by Robert Burns, Rick Murphy, Arizona Taxpayers Action Committee. (Attachments: # 1 Text of Proposed Order granting preliminary injunction, # 2 Exhibit Exhibits A-E)(Keller, Timothy) (Entered: 09/02/2008)
09/02/2008	42	REPLY in Support re 31 First MOTION to Intervene *as Plaintiffs* filed by Dean Martin, Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee. (Attachments: # 1 Exhibit Attchment Declarations)(Keller, Timothy) (Entered: 09/02/2008)
09/02/2008	43	First MOTION for Preliminary Injunction *filed by Original Plaintiffs*

by Doug Sposito, John McComish, Nancy McLain, Kevin Gibbons, Frank Antenori, Tony Bouie. (Attachments: # 1 Appendix Index to Exhibits, # 2 Affidavit Dranias Supp. Declaration, # 3 Affidavit McComish Declaration, # 4 Affidavit McLain Declaration, # 5 Affidavit Gibbons Supplemental Declaration, # 6 Affidavit Bouie Supplemental Declaration, # 7 Affidavit Sposito Supplemental Declaration, #8 Text of Proposed Order Proposed Order for Preliminary Injunction)(Dranias, Nicholas) (Entered: 09/02/2008)

09/02/2008 44 NOTICE of Hearing on Motion 43 First MOTION for Preliminary Injunction *filed by Original Plaintiffs* :Motion Hearing set for 9/3/2008 at 01:30 PM in Courtroom 604, 401 West Washington Street, Phoenix, AZ 85003 before Judge Roslyn O Silver. (Dranias, Nicholas) (Entered: 09/02/2008)

09/02/2008 45 MOTION to Intervene by Clean Elections Institute, Inc.. (Attachments: # 1 [Proposed] Order)(Neubauer, Elisabeth) (Entered: 09/02/2008)

09/02/2008 46 REQUEST re: Request for Judicial Notice *in Support of Motion to Intervene* by Intervenor Defendant Clean Elections Institute, Inc.. (Neubauer, Elisabeth) (Entered: 09/02/2008)

09/03/2008	48	Notice re of Defendants' Proposed Preliminary Injunction Briefing and Discovery Schedule by Jan Brewer, Clean Elections Institute, Inc., Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels (O'Grady, Mary) (Entered: 09/03/2008)
09/03/2008	49	DECLARATION of Declaration re 37 MOTION for Preliminary Injunction *Declaration of Dennis Shane Wikfors* by Intervenor Parties Dean Martin, Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee. (Keller, Timothy) (Entered: 09/03/2008)
09/03/2008	52	Minute Entry. Proceedings held before Judge Roslyn O Silver: This is the time set for a Preliminary Injunction Hearing. Hearing is vacated and Status Hearing is held. IT IS ORDERED granting the Motion to Intervene by Clean Elections Institute, Inc. [doc. 45]. Order to issue. IT IS FURTHER ORDERED taking under advisement the Motion to Intervene by Dean Martin, Robert Burns, Rick Murphy, Arizona Free Enterprise Clubs Freedom Club PAC, Arizona Taxpayers Action Committee [doc. 31]. (Court Reporter Elaine Cropper.)(CLB) (Entered: 09/03/2008)

09/03/2008	53	ORDER granting 45 Motion to Intervene. CEI shall bepermitted to intervene as a defendant in this action.. Signed by Judge Roslyn O Silver on 9/3/08.(DMT,) (Entered: 09/03/2008)
09/03/2008	54	ORDER granting 31 Motion to Intervene. All intervenors shall be allowed to intervene as Plaintiffs. Parties shall submit a case management plan and, if necessary, request a status hearing by 9:00 a.m., Friday, Sep. 5, 2008.. Signed by Judge Roslyn O Silver on 9/3/08.(DMT,) (Entered: 09/03/2008)
09/03/2008	58	COMPLAINT IN INTERVENTION filed by Dean Martin, Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee against defendants.(DMT,) (Entered: 09/05/2008)
09/03/2008	59	Additional Attachments to Main Document re 58 Complaint by Intervenor Plaintiffs being exhibits. (DMT,) (Entered: 09/05/2008)
09/04/2008	56	AMENDED COMPLAINT *by Original Plaintiffs* against Jan Brewer, Clean Elections Institute, Inc., Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels, filed by Kirk Adams, Doug Sposito, John McComish,

Nancy McLain, Kevin Gibbons, Frank Antenori, Tony Bouie.(Dranias, Nicholas) (Entered: 09/04/2008)

09/09/2008 81 ORDER Preliminary Injunction Hearing set as to 37 MOTION for Preliminary Injunction, 43 First MOTION for Preliminary Injunction: Motion Hearing set for 10/9/2008 at 09:00AM before Judge Roslyn O Silver. The deadline for depositions shall be Friday, September 26, 2008. See PDF document for preliminary injunction briefing schedule. The parties shall submit a proposed hearing schedule by Monday, October 5, 2008. Signed by Judge Roslyn O Silver on 9/9/08. (LSP) (Entered: 09/09/2008)

09/09/2008 83 ORDER that a Preliminary Injunction Hearing is set for 10/9/2008 at 09:00 AM before Judge Roslyn O Silver. See attached pdf for full details and deadlines. Signed by Judge Roslyn O Silver on 09/09/08. (ESL,) (Entered: 09/09/2008)

09/10/2008 89 TRANSCRIPT of Proceedings re: Temporary Restraining Order Hearing held on 8/28/08 before Judge Roslyn O Silver. Court Reporter: Elizabeth A Lemke. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript

Restriction. After that date it may be obtained through PACER. Redaction Request due 10/1/2008. Redacted Transcript Deadline set for 10/14/2008. Release of Transcript Restriction set for 12/9/2008. (BAS,) (Entered: 09/10/2008)

09/23/2008 115 TRANSCRIPT of Proceedings re: Preliminary Injunction and Status Hearing held on 9/3/08 before Judge Roslyn O Silver. Court Reporter: Elaine Cropper. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 10/14/2008. Redacted Transcript Deadline set for 10/24/2008. Release of Transcript Restriction set for 12/22/2008. (BAS,) (Entered: 09/23/2008)

09/23/2008 120 RESPONSE in Opposition re 37 MOTION for Preliminary Injunction, 43 First MOTION for Preliminary Injunction *filed by Original Plaintiffs* filed by Clean Elections Institute, Inc.. (Davis-Denny, Grant) (Entered: 09/23/2008)

09/23/2008 121 DECLARATION of Declaration of Meg Burton Cahill in Support of Defendant-Intervenor Clean Elections Institute, Inc.'s Opposition to

Plaintiffs' and Plaintiff-Intervenors' Motions for Preliminary Injuction re 120 Response in Opposition to Motion by Intervenor Defendant Clean Elections Institute, Inc. filed by Clean Elections Institute, Inc.. (Davis-Denny, Grant) (Entered: 09/23/2008)

09/23/2008 122 DECLARATION of Grant A. Davis-Denny in Support of Defendant-Intervenor Clean Elections Institute, Inc.'s Opposition to Plaintiffs' and Plaintiff-Intervenors' Motions for a Preliminary Injunction re 120 Response in Opposition to Motion by Intervenor Defendant Clean Elections Institute, Inc. filed by Clean Elections Institute, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, #6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J)(Davis-Denny, Grant) (Entered: 09/23/2008)

09/23/2008 123 Additional Attachments to Main Document re 122 Declaration., *Exhibit K to Declaration of Grant A. Davis-Denny in Support of Defendant-Intervenor Clean Elections Institute, Inc.'s Opposition to Plaintiffs' and Plaintiff-Intervenors' Motions for Preliminary Injunction* by Intervenor Defendant Clean Elections Institute, Inc.. (Davis-Denny, Grant) (Entered: 09/23/2008)

09/23/2008 124 RESPONSE to Motion re 37 MOTION for Preliminary Injunction filed by Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (Shipman, Tanja) (Entered: 09/23/2008)

09/23/2008 125 DECLARATION of Tanja K. Shipman in Support of re 124 Response (Opposition) to Motion for Preliminary Injunction filed by Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2, # 3 Exhibit Exhibit 3, # 4 Exhibit Exhibit 4, # 5 Exhibit Exhibit 5, # 6 Exhibit Exhibit 6, # 7 Exhibit Exhibit 7, # 8 Exhibit Exhibit 8)(Shipman, Tanja) Modified on 9/24/2008 INCORRECT EVENT SELECTED. THIS ENTRY HAS BEEN MODIFIED FROM (Affidavit) TO (Declaration). DOCKET TEXT MODIFIED FOR DOCUMENT LINKAGE (KMG). (Entered: 09/23/2008)

09/23/2008 126 DELARATION of Todd F. Lang in Support of 124 Response (Opposition) to MOTION for Preliminary Injunction filed by Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (Attachments: # 1

Exhibit Exhibit 1, # 2 Exhibit Exhibit 2)(Shipman, Tanja) Modified on 9/24/2008 INCORRECT EVENT SELECTE. THIS ENTRY HAS BEEN MODIFIED FROM (Affidavit) TO (Declaration). DOCKET TEXT MODIFIED FOR CORRECT DOCUMENT LINKAGE (KMG). (Entered: 09/23/2008)

09/23/2008 127 DECLARATION of Daniel Patterson in Support of 124 Response (Opposition) to MOTION for Preliminary Injunction filed by Gary Scaramazzo, Royann J Parker, Donald Lindholm. (Shipman, Tanja) Modified on 9/24/2008 INCORRECT EVENT SELECTED. THIS ENTRY HAS BEEN MODIFIED FROM (Affidavit) TO (Declaration). DOCKET TEXT MODIFIED FOR CORRECT DOCUMENT LINKAGE (KMG). (Entered: 09/23/2008)

09/23/2008 128 DECLARATION of Paula Forster in Support of 124 Response (Opposition) to MOTION for Preliminary Injunction filed by Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (Shipman, Tanja) Modified on 9/24/2008 INCORRECT EVENT SELECTED. THIS ENTRY HAS BEEN MODIFIED FROM (Affidavit) TO (Declaration). DOCKET TEXT MODIFIED FOR CORRECT

DOCUMENT LINKAGE (KMG). (Entered: 09/23/2008)

09/23/2008 129 DECLARATION of Kathy Romano in Support of 124 Response (Opposition) to MOTION for Preliminary Injunction filed by Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (Shipman, Tanja) Modified on 9/24/2008 INCORRECT EVENT SELECTED. THIS ENTRY HAS BEEN MODIFIED FROM (Affidavit) TO (Declaration). DOCKET TEXT MODIFIED FOR CORRECT DOCUMENT LINKAGE (KMG). (Entered: 09/23/2008)

09/23/2008 130 DECLARATION OF MATT HEINZ in Support of 124 Response (Opposition) to MOTION for Preliminary Injunction filed by Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (Shipman, Tanja) Modified on 9/24/2008 INCORRECT EVENT SELECTED. THIS ENTRY HAS BEEN MODIFIED FROM (Affidavit) TO (Declaration). DOCKET TEXT MODIFIED FOR CORRECT DOCUMENT LINKAGE (KMG). (Entered: 09/23/2008)

09/23/2008 133 DECLARATION of Dr. Kenneth R. Mayer in Support of 124 Response (Opposition) to MOTION for Preliminary Injunction filed by Jan Brewer,

Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2, # 3 Exhibit Exhibit 3)(Shipman, Tanja) Modified on 9/24/2008 INCORRECT EVENT SELECTED. THIS ENTRY HAS BEEN MODIFIED FROM (Affidavit) TO (Declaration). DOCKET TEXT MODIFIED FOR CORRECT DOCUMENT LINKAGE (KMG,). (Entered: 09/23/2008)

09/23/2008 134 DECLARATION of Tammie Pursley in Support of 124 Response (Opposition) to MOTION for Preliminary Injunction filed by Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (Shipman, Tanja) Modified on 9/24/2008 INCORRECT EVENT SELECTED. THIS ENTRY HAS BEEN MODIFIED FROM (Affidavit) TO (Declaration). DOCKET TEXT MODIFIED FOR CORRECT DOCUMENT LINKAGE (KMG). (Entered: 09/23/2008)

09/23/2008 135 DECLARATION of David Schapira in Support of 124 Response (Opposition) to MOTION for Preliminary Injunction filed by Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (Shipman, Tanja) Modified

on 9/24/2008 INCORRECT EVENT SELECTED. THIS ENTRY HAS BEEN MODIFIED FROM (Affidavit) TO (Declaration). DOCKET TEXT MODIFIED FOR CORRECT DOCUMENT LINKAGE (KMG). (Entered: 09/23/2008)

09/23/2008 136 DECLARATION of Ed Ableser in Support of 124 Response (Opposition) to MOTION for Preliminary Injunction filed by Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (Shipman, Tanja) Modified on 9/24/2008 INCORRECT EVENT SELECTED. THIS ENTRY HAS BEEN MODIFIED FROM (Affidavit) TO (Declaration). DOCKET TEXT MODIFIED FOR CORRECT DOCUMENT LINKAGE (KMG). (Entered: 09/23/2008)

09/23/2008 137 DECLATION of Pamela Durbin in Support of 124 Response (Opposition) to MOTION for Preliminary Injunction filed by Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (Shipman, Tanja) Modified on 9/24/2008 INCORRECT EVENT SELECTED. THIS ENTRY HAS BEEN MODIFIED FROM (Affidavit) TO (Declaration). DOCKET TEXT MODIFIED FOR CORRECT

DOCUMENT LINKAGE(KMG). (Entered: 09/23/2008)

09/23/2008 138 DECLARATION of Phil Lopes in Support of 124 Response (Opposition) to MOTION for Preliminary Injunction filed by Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (Shipman, Tanja) Modified on 9/24/2008 INCORRECT EVENT SELECTED. THIS ENTRY HAS BEEN MODIFIED FROM (Affidavit) TO (Declaration). DOCKET TEXT MODIFIED FOR CORRECT DOCUMENT LINKAGE(KMG). (Entered: 09/23/2008)

09/23/2008 139 DECLARATION of Jorge Garcia in Support of 124 Response (Opposition) to MOTION for Preliminary Injunction filed by Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (Shipman, Tanja) Modified on 9/24/2008 INCORRECT EVENT SELECTED. THIS ENTRY HAS BEEN MODIFIED FROM (Affidavit) TO (Declaration). DOCKET TEXT MODIFIED FOR CORRECT DOCUMENT LINKAGE (KMG). (Entered: 09/23/2008)

09/25/2008 143 REPLY to Response to Motion re 43 First MOTION for Preliminary Injunction *filed by Original Plaintiffs* filed by John McComish, Nancy

McLain, Tony Bouie. (Attachments: # 1 Affidavit Moll Dec., # 2 Exhibit Moll Dec., Ex. F.1, # 3 Affidavit Osborn Dec., # 4 Exhibit Osborn Dec., Ex. G.1, # 5 Exhibit Osborn Dec., Ex. G.2, # 6 Exhibit Osborn Dec. Ex. G.3 p1, # 7 Exhibit Osborn Dec. Ex. G.3 p2, # 8 Exhibit Osborn Dec. Ex. G.3 p3, # 9 Exhibit Osborn Dec. Ex. G.3 p4)(Dranias, Nicholas) (Entered: 09/25/2008)

09/25/2008 144 Additional Attachments to Main Document re 43 First MOTION for Preliminary Injunction *filed by Original Plaintiffs Continuation Osborn Dec., Ex. G.3* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Attachments: # 1 Exhibit Osborn Dec. Ex. G.3 p6, # 2 Exhibit Osborn Dec. Ex. G.3 p7, # 3 Exhibit Osborn Dec. Ex. G.3 p8, # 4 Exhibit Osborn Dec. Ex. G.3 p9, # 5 Exhibit Osborn Dec. Ex. G.3 p10, # 6 Exhibit Osborn Dec. Ex. G.3 p11, # 7 Exhibit Osborn Dec. Ex. G.3 p12)(Dranias, Nicholas) (Entered: 09/25/2008)

09/25/2008 145 DECLARATION of Dranias Sec. Supp. Dec. re 43 First MOTION for Preliminary Injunction *filed by Original Plaintiffs* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Attachments: # 1 Exhibit Ex. H.1, Osborn Dep., # 2 Exhibit Ex.

H.2, Newman Dep, # 3 Exhibit Ex. H.3, Kennedy Dep, # 4 Exhibit Ex. H.4, Lang Dep, # 5 Exhibit Ex. H.5, McComish Dep., # 6 Exhibit Ex. H.6, George Dep., # 7 Exhibit Ex. H.7, Bouie Dep., # 8 Exhibit Ex. H.8, Becker Dep., # 9 Exhibit Ex. H.9, McLain Dep., # 10 Exhibit Ex. H.10, Def. Disc. Resp.)(Dranias, Nicholas) (Entered: 09/25/2008)

09/26/2008 147 Additional Attachments to Main Document re 143 Reply to Response to Motion,, *Elec. Signed Osborn Dec.* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 09/26/2008)

09/26/2008 149 REPLY in Support re 37 MOTION for Preliminary Injunction *to Defendants* filed by Dean Martin, Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee. (Keller, Timothy) (Entered: 09/26/2008)

09/26/2008 150 DECLARATION of Timothy D. Keller in Support of Reply to Defendants in Support of Motion for Preliminary Injunction re 149 Reply in Support of Motion by Intervenor Plaintiffs Dean Martin, Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee filed by Dean Martin,

Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee. (Attachments: # 1 Exhibit Exhibits A-H, # 2 Exhibit Exhibits I-R)(Keller, Timothy) (Entered: 09/26/2008)

09/26/2008 151 REPLY in Support re 37 MOTION for Preliminary Injunction *to Defendant-Intervenor* filed by Dean Martin, Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee. (Keller, Timothy) (Entered: 09/26/2008)

09/26/2008 152 DECLARATION of Timothy D. Keller in Support of Plaintiff-Intervenors' Reply to Defendant-Intervenor in Support of Motion for Preliminary Injunction re 151 Reply in Support of Motion by Intervenor Plaintiffs Dean Martin, Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee filed by Dean Martin, Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee. (Attachments: # 1 Exhibit Exhibits A-B)(Keller, Timothy) (Entered: 09/26/2008)

10/02/2008 157 MOTION to Strike re Plaintiffs' Reply to Briefs in Opposition to

Motion for Preliminary Injunction by Clean Elections Institute, Inc.. (Attachments: # 1 Text of Proposed Order)(Neubauer, Elisabeth) (Entered: 10/02/2008)

10/02/2008 158 AFFIDAVIT in Support re 157 MOTION to Strike re Plaintiffs' Reply to Briefs in Opposition to Motion for Preliminary Injunction *by Elisabeth J. Neubauer* filed by Clean Elections Institute, Inc.. (Neubauer, Elisabeth) (Entered: 10/02/2008)

10/03/2008 161 ORDER that Defendant-Intervenor's 157 Motion to Strike is granted in part and denied part. Defendant-Intervenor shall have until 5:00pm 10/06/08 to file a surreply to Plas' Reply. Signed by Judge Roslyn O Silver on 10/03/08.(ESL) (Entered: 10/03/2008)

10/06/2008 163 RESPONSE in Opposition re 43 First MOTION for Preliminary Injunction *filed by Original Plaintiffs* filed by Clean Elections Institute, Inc.. (Neubauer, Elisabeth) (Entered: 10/06/2008)

10/06/2008 164 AFFIDAVIT in Opposition re 43 First MOTION for Preliminary Injunction *filed by Original Plaintiffs In Support of Defendant Intervenor's Surreply* filed by Clean Elections Institute, Inc.. (Attachments: # 1 Exhibit Exhibit A to

Declaration of Elisabeth J. Neubauer In Support of Defendant-Intervenor Clean Elections Institute, Inc.'s Surreply In Opposition to Plaintiffs and Plaintiff-Intervenors' Motions for A Preliminary Injunction)(Neubauer, Elisabeth) (Entered: 10/06/2008)

10/09/2008 166 First MOTION to Amend/Correct re Plaintiffs' Motion for Leave to File Second Amended Complaint by John McComish, Nancy McLain, Tony Bouie. (Attachments: # 1 Appendix Exhibit List, # 2 Exhibit Redlined Proposed Complaint, # 3 Exhibit "Clean" Proposed Second Amended Complaint, # 4 Text of Proposed Order Proposed Order)(Dranias, Nicholas) Modified on 10/10/2008, ORIGINAL AMENDED PLEADING INCORRECTLY ATTACHED TO THE MOTION. ATTORNEY NOTICED. (LSP). (Entered: 10/09/2008)

10/09/2008 167 LODGED Proposed Second Amended Complaint re: 166 First MOTION to Amend/Correct re Plaintiffs' Motion for Leave to File Second Amended Complaint. Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) Modified on 10/10/2008, COVER SHEET MISSING. ATTORNEY NOTICED. (LSP). (Entered: 10/09/2008)

10/09/2008 168 ORDER – A Preliminary/Permanent Injunction Hearing is set for 10/9/2008 at 9:00 A.M. The new hearing start time is 9:30 A.M. in Courtroom 604, 401 West Washington Street, Phoenix, AZ 85003 before Judge Roslyn O Silver. THIS IS A TIME CHANGE ONLY!! Signed by Judge Roslyn O Silver on 10/09/2008. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (ROS,) (Entered: 10/09/2008)

10/09/2008 170 Minute Entry. Proceedings held before Judge Roslyn O Silver: Preliminary Injunction Hearing held on 10/9/2008. The court takes under advisement 37 Motion for Preliminary Injunction and 43 Motion for Preliminary Injunction. Order to issue. (Court Reporter Elaine Cropper.)(CLB) (Entered: 10/09/2008)

10/10/2008 171 SUPPLEMENT of Supplement Regarding Undisbursed Matching Funds, Related Declaration and Exhibits re 159 Exhibit List, 43 First MOTION for Preliminary Injunction *filed by Original Plaintiffs* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 10/10/2008)

10/10/2008 172 SUPPLEMENT of Parties Joint Submission of Supplemental Exhibit 149 re 154 Exhibit List by Defendants

Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels. (Attachments: # 1 Exhibit Supplemental Exhibit 149)(Shipman, Tanja) (Entered: 10/10/2008)

10/10/2008 175 AMENDED DOCUMENT by John McComish, Nancy McLain, Tony Bouie. Amendment to 171 Supplement, *regarding Undisbursed Matching Funds*. (Dranias, Nicholas) (Entered: 10/10/2008)

10/14/2008 180 ORDER Defendants and Defendant-Intervenors may file a response to Plaintiff's MOTION for Leave to File Second Amended Complaint within 10 days of this order. Signed by Judge Roslyn O Silver on 10/14/08. (LSP) (Entered: 10/14/2008)

10/14/2008 181 ORDER denying 43 Plaintiff's Motion for Preliminary Injunction. Findings of Fact and Conclusions of Law will follow this Order no later than 10/17/08. Signed by Judge Roslyn O Silver on 10/14/08.(LSP) (Entered: 10/14/2008)

10/17/2008 185 FINDINGS OF FACT AND CONCLUSIONS OF LAW – Plaintiffs have shown a very strong likelihood of success on the merits. However, given the extraordinary balance of the harms required in the context of an ongoing election, Plaintiffs have

not met their burden in showing that they are entitled to a preliminary injunction. For this reason, Plaintiffs' Motion 43 was denied. Signed by Judge Roslyn O Silver on 10/17/08. (LSP) (Entered: 10/17/2008)

10/28/2008 188 RESPONSE in Opposition re 166 First MOTION to Amend/Correct re Plaintiffs' Motion for Leave to File Second Amended Complaint filed by Clean Elections Institute, Inc.. (Neubauer, Elisabeth) (Entered: 10/28/2008)

10/30/2008 190 ORDER pursuant to 189 Stipulation For Extension of Time To Answer Complaint: Dfts and Dft-Intervenor shall not answer Pla's First or Second Amended Complaints or Pla-Intervenors' Proposed Complaint In Intervention before this Court enters its order on Plas' Ex Parte Motion for Leave to File Second Amended Complaint. FURTHER ORDERED the deadline for Dfts and Dft-Intervenor to answer or otherwise respond to Plas' First or Second Amended Complaint, and Pla-Intervenors' Proposed Complaint In Intervention, shall be suspended until ten (10) days from the date of the entry of the Court's order on Plas' Ex Parte Motion for Leave to File Second Amended Complaint. Signed by Judge Roslyn O Silver on

10/30/08. (KMG,) (Entered: 10/30/2008)

11/03/2008 191 REPLY in Support re 166 First MOTION to Amend/Correct re Plaintiffs' Motion for Leave to File Second Amended Complaint filed by John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 11/03/2008)

11/04/2008 192 TRANSCRIPT of Proceedings re: Preliminary Injunction Hearing held on 10/9/08 before Judge Roslyn O Silver. Court Reporter: Elaine Cropper. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 11/25/2008. Redacted Transcript Deadline set for 12/5/2008. Release of Transcript Restriction set for 2/2/2009. (BAS,) (Entered: 11/04/2008)

05/11/2009 239 ORDER granting in part and denying in part 166 Plaintiff's Motion to Amend. Plaintiffs may not amend their Complaint to include proposed 13-16. All other proposed amendments are allowable. Signed by Judge Roslyn O Silver on 5/11/09.(LSP) (Entered: 05/11/2009)

05/11/2009 260 AMENDED COMPLAINT *Second Amended Complaint* against Jan Brewer, Clean Elections Institute, Inc., Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels, filed by John McComish, Nancy McLain, Tony Bouie.(Dranias, Nicholas) (Entered: 05/11/2009)

05/19/2009 269 MOTION to File Amicus Curiae *Brief on Summary Judgment* by Center for Competitive Politics. (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order, # 3 Corporate Dsclosure Statement)(Cox, Reid) (Entered: 05/19/2009)

05/26/2009 271 *DEFENDANTS* ANSWER to 58 Complaint *IN INTERVENTION* by Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Lori S Daniels, Ken Bennett.(Shipman, Tanja) Modified on 5/27/2009 (DMT,). DOCKET TEXT MODIFIED TO IDENTIFY CORRECT FILER. (Entered: 05/26/2009)

05/26/2009 272 *Defendants* ANSWER to 260 Amended Complaint, *(Second Amended Complaint)* by Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Lori S Daniels, Ken Bennett.(Shipman, Tanja) Modified on 5/27/2009 (DMT,). DOCKET TEXT MODIFIED TO

IDENTIFY CORRECT FILER. (Entered: 05/26/2009)

05/26/2009 273 *Defendant-Intervenor Clean Elections Institute, Inc.'s* **ANSWER** to Complaint *(Second Amended)* by Clean Elections Institute, Inc..(Sandhu, Puneet) (Entered: 05/26/2009)

05/26/2009 274 *Defendant Intervenor's* **ANSWER** to Complaint *of Plaintiff Intervenors* by Clean Elections Institute, Inc..(Sandhu, Puneet) (Entered: 05/26/2009)

06/03/2009 280 RESPONSE in Opposition re 269 MOTION to File Amicus Curiae *Brief on Summary Judgment* filed by Clean Elections Institute, Inc.. (Sandhu, Puneet) (Entered: 06/03/2009)

06/08/2009 281 REPLY in Support re 269 MOTION to File Amicus Curiae *Brief on Summary Judgment* filed by Center for Competitive Politics. (Attachments: # 1 Exhibit)(Cox, Reid) (Entered: 06/08/2009)

06/10/2009 284 ORDER granting 269 Motion to File Amicus Curiae Brief on Summary Judgment, which shall be no longer than seventeen (17) pages, consistent with the page length for motions specified in the Local Rules of Civil Procedure for the District of Arizona; and shall be served and filed no later than seven (7) days (excluding intermediate Saturdays, Sundays, and legal holidays) after

the filing deadline for the parties' and intervenors' motions for summary judgment. Any party who wishes to may file a Response to the Center's brief, not to exceed seventeen (17) pages. Signed by Judge Roslyn O Silver on 6/10/09.(DMT,) (Entered: 06/10/2009)

06/12/2009 285 First MOTION for Summary Judgment by Clean Elections Institute, Inc.. (Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 286 MEMORANDUM re: iso Motion for Summary Judgment re 285 First MOTION for Summary Judgment by Intervenor Defendant Clean Elections Institute, Inc.. (Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 287 First MOTION for Summary Judgment by John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 06/12/2009)

06/12/2009 288 First MOTION for Summary Judgment by Dean Martin, Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee. (Attachments: # 1 Memo in support of Summary Judgment, # 2 Statement of Facts, # 3 Declaration in support of Motion for Summary Judgment, # 4 Exhibit Ex. 1-10, # 5 Exhibit Ex. 11-18, # 6 Exhibit Ex.

19-24, # 7 Exhibit Ex. 46-59, # 8 Exhibit Ex. 60-79)(Maurer, William) (Entered: 06/12/2009)

06/12/2009 290 STATEMENT of Separate Statement re 285 First MOTION for Summary Judgment by Intervenor Defendant Clean Elections Institute, Inc.. (Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 291 Additional Attachments to Main Document re 287 First MOTION for Summary Judgment *Proposed Order* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 06/12/2009)

06/12/2009 292 DECLARATION of Puneet Sandhu re 285 First MOTION for Summary Judgment by Intervenor Defendant Clean Elections Institute, Inc.. (Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 293 MOTION for Summary Judgment by Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels, Ken Bennett. (Shipman, Tanja) (Entered: 06/12/2009)

06/12/2009 294 Additional Attachments to Main Document re 288 First MOTION for Summary Judgment *Exhibits 80-184* by Intervenor Plaintiffs Dean Martin, Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee. (Attachments:

1 Exhibit Ex. 91-130, # 2 Exhibit Ex. 131-184)(Maurer, William) (Entered: 06/12/2009)

06/12/2009 295 DECLARATION re 293 MOTION for Summary Judgment *Declaration of Tanja K. Shipman* by Defendants Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels, Ken Bennett. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2, #3 Exhibit Exhibit 3, # 4 Exhibit Exhibit 4, # 5 Exhibit Exhibit 5, # 6 Exhibit Exhibit 6, # 7 Exhibit Exhibit 7, # 8 Exhibit Exhibit 8, # 9 Exhibit Exhibit 9, # 10 Exhibit Exhibit 10)(Shipman, Tanja) (Entered: 06/12/2009)

06/12/2009 296 DECLARATION of Declaration of Todd Lang re 293 MOTION for Summary Judgment by Defendants Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels, Ken Bennett. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2, # 3 Exhibit Exhibit 3, # 4 Exhibit Exhibit 4, # 5 Exhibit Exhibit 5)(Shipman, Tanja) (Entered: 06/12/2009)

06/12/2009 297 MEMORANDUM re: Memorandum of Law Supporting Pla MSJ re 287 First MOTION for Summary Judgment by Plaintiffs John McComish,

Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 06/12/2009)

06/12/2009 298 Additional Attachments to Main Document re 292 Declaration *Exhibit A (part 1 of 2)* by Intervenor Defendant Clean Elections Institute, Inc.. (Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 299 Additional Attachments to Main Document re 292 Declaration *Exhibit A (part 2 of 2)* by Intervenor Defendant Clean Elections Institute, Inc.. (Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 300 Additional Attachments to Main Document re 292 Declaration *Exhibit B* by Intervenor Defendant Clean Elections Institute, Inc.. (Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 301 Additional Attachments to Main Document re 292 Declaration *Exhibit C* by Intervenor Defendant Clean Elections Institute, Inc.. (Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 302 Additional Attachments to Main Document re 292 Declaration *Exhibit D* by Intervenor Defendant Clean Elections Institute, Inc.. (Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 303 Additional Attachments to Main Document re 292 Declaration *Exhibit E* by Intervenor Defendant Clean

Elections Institute, Inc.. (Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 304 Additional Attachments to Main Document re 292 Declaration *Exhibit F* by Intervenor Defendant Clean Elections Institute, Inc.. (Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 305 Additional Attachments to Main Document re 292 Declaration *Exhibit G* by Intervenor Defendant Clean Elections Institute, Inc.. (Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 306 Additional Attachments to Main Document re 292 Declaration *Exhibit H* by Intervenor Defendant Clean Elections Institute, Inc.. (Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 307 Additional Attachments to Main Document re 292 Declaration *Exhibit I* by Intervenor Defendant Clean Elections Institute, Inc.. (Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 308 Additional Attachments to Main Document re 292 Declaration *Exhibit J* by Intervenor Defendant Clean Elections Institute, Inc.. (Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 309 Additional Attachments to Main Document re 292 Declaration by Intervenor Defendant Clean Elections Institute, Inc.. (Attachments: # 1 Exhibit K, # 2 Exhibit L, # 3 Exhibit M, # 4 Exhibit N, # 5 Exhibit

O, # 6 Exhibit P, # 7 Exhibit Q, # 8 Exhibit R, # 9 Exhibit S, # 10 Exhibit T, # 11 Exhibit U, # 12 Exhibit V, # 13 Exhibit W, # 14 Exhibit X, # 15 Exhibit Y, # 16 Exhibit Z, # 17 Exhibit AA, # 18 Exhibit BB, # 19 Exhibit CC)(Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 310 DECLARATION of Donald Green re 285 First MOTION for Summary Judgment by Intervenor Defendant Clean Elections Institute, Inc.. (Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 311 Additional Attachments to Main Document re 310 Declaration by Intervenor Defendant Clean Elections Institute, Inc.. (Attachments: # 1 Exhibit A)(Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 312 DECLARATION of Angela Migally re 285 First MOTION for Summary Judgment by Intervenor Defendant Clean Elections Institute, Inc.. (Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 313 Additional Attachments to Main Document re 312 Declaration by Intervenor Defendant Clean Elections Institute, Inc.. (Attachments: # 1 Exhibit 1)(Sandhu, Puneet) (Entered: 06/12/2009)

06/12/2009 314 Additional Attachments to Main Document re 287 First MOTION for Summary Judgment *Separate Statement of Facts* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 06/12/2009)

06/12/2009 315 Additional Attachments to Main Document re 287 First MOTION for Summary Judgment *Exhibit List* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 06/12/2009)

06/12/2009 316 Additional Attachments to Main Document re 287 First MOTION for Summary Judgment *Exhibit 1 McComish Dec* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 06/12/2009)

06/12/2009 317 Additional Attachments to Main Document re 287 First MOTION for Summary Judgment *Ex. 2 McLain Dec* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 06/12/2009)

06/12/2009 318 Additional Attachments to Main Document *Pla Ex 3 (Bouie Dec)* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 06/12/2009)

06/12/2009 319 Additional Attachments to Main Document re 287 First MOTION for

Summary Judgment *Pla. Ex. 7 (Dranias Dec.)* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 06/12/2009)

06/12/2009 320 Additional Attachments to Main Document re 287 First MOTION for Summary Judgment *Plaintiffs Ex. 13 (Sinema Dep.)* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 06/12/2009)

06/12/2009 321 Additional Attachments to Main Document re 287 First MOTION for Summary Judgment *Pla Ex 16 (Green Dep)* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 06/12/2009)

06/12/2009 322 Additional Attachments to Main Document re 287 First MOTION for Summary Judgment *Pla Ex 17 (Mayer Dep)* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 06/12/2009)

06/12/2009 323 Additional Attachments to Main Document re 287 First MOTION for Summary Judgment *Pla Ex. 8 (Lujan Dep)* by Plaintiffs John McComish, Nancy McLain. (Attachments: # 1 Exhibit Lujan Ex. 1)(Dranias, Nicholas) (Entered: 06/12/2009)

06/12/2009 324 Additional Attachments to Main Document re 287 First MOTION for Summary Judgment *Pla Ex. 4 Osborn Dec* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Attachments: # 1 Exhibit Osborn Ex. 1, # 2 Exhibit Osborn Ex. 2, #3 Exhibit Osborn Ex. 3)(Dranias, Nicholas) (Entered: 06/12/2009)

06/12/2009 325 Additional Attachments to Main Document re 324 Additional Attachments to Main Document, *Osborn Exhibit 4* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Attachments: # 1 Exhibit Osborn Exhibit 5, #2 Exhibit Osborn Ex. 6, # 3 Exhibit Osborn Ex. 7, # 4 Exhibit Osborn Exhibit 8, # 5 Exhibit Osborn Exhibit 9, # 6 Exhibit Osborn Exhibit 10, # 7 Exhibit Osborn Exhibit 11, # 8 Exhibit Osborn Exhibit 12, # 9 Exhibit Osborn Exhibit 13, # 10 Exhibit Osborn Exhibit 14)(Dranias, Nicholas) (Entered: 06/13/2009)

06/13/2009 326 Additional Attachments to Main Document *Subach CCEC Dec* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Subach CCEC Exhibits 2-6, # 3 Exhibit Subach CCEC Exhibits 7-13)(Dranias, Nicholas) (Entered: 06/13/2009)

06/13/2009 327 Additional Attachments to Main Document re 287 First MOTION for Summary Judgment *Subach CEI Dec inc Ex1-9* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 06/13/2009)

06/13/2009 328 Additional Attachments to Main Document re 287 First MOTION for Summary Judgment *Plaintiffs MSJ Ex 9 Ehst Dep* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Attachments: # 1 Exhibit Ehst Ex 1, # 2 Exhibit Ehst Ex 2, # 3 Exhibit Ehst Ex 5, # 4 Exhibit Ehst Exhibit 6)(Dranias, Nicholas) (Entered: 06/13/2009)

06/13/2009 329 Additional Attachments to Main Document re 287 First MOTION for Summary Judgment *Plaintiffs MSJ Exhibit 10* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Attachments: # 1 Exhibit Ruiz Dep. Ex: 2, # 2 Exhibit Ruiz Ex. 3, # 3 Exhibit Ruiz Ex 4, # 4 Exhibit Ruiz Ex 5, # 5 Exhibit Ruiz Ex 6, # 6 Exhibit Ruiz # 7 Exhibit Ruiz Ex 9, # 8 Exhibit Ruiz Ex 10, # 9 Exhibit Ruiz Ex 11, # 10 Exhibit Ruiz Ex 13)(Dranias, Nicholas) (Entered: 06/13/2009)

06/13/2009 330 Additional Attachments to Main Document re 287 First MOTION for Summary Judgment *Pla MSJ Ex 11*

(*McGee Dep*) by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Attachments: # 1 Exhibit CCEC McGee Ex 17, # 2 Exhibit CCEC McGee Ex 22, #3 Exhibit CCEC McGee Ex 24, # 4 Exhibit CCEC McGee Ex 25, # 5 Exhibit CCEC McGee Ex 27)(Dranias, Nicholas) (Entered: 06/13/2009)

06/13/2009 331 Additional Attachments to Main Document re 287 First MOTION for Summary Judgment *Pla MSJ Ex 12 (Lang Dep)* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Attachments: # 1 Exhibit Lang Ex 30)(Dranias, Nicholas) (Entered: 06/13/2009)

06/13/2009 332 Additional Attachments to Main Document re 287 First MOTION for Summary Judgment *Pla MSJ Ex 14 (Daniels Dep)* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Attachments: # 1 Exhibit Daniels Ex. 7, # 2 Exhibit Daniels # 3 Exhibit Daniels Ex 10, # 4 Exhibit Daniels Ex 12, # 5 Exhibit Daniels Ex 13, #6 Exhibit Daniels Ex 15, #1 Exhibit Daniels Ex 16, # 8 Exhibit Daniels Ex 17)(Dranias, Nicholas) (Entered: 06/13/2009)

06/13/2009 333 Additional Attachments to Main Document re 287 First MOTION for Summary Judgment *Pla MSJ Ex 15 (Hoffman Dep)* by Plaintiffs John

McComish, Nancy McLain, Tony Bouie. (Attachments: #1 Exhibit Hoffman Ex 5, # 2 Exhibit Hoffman Ex 6, # 3 Exhibit Hoffman Ex 9, # 4 Exhibit Hoffman Ex 10)(Dranias, Nicholas) (Entered: 06/13/2009)

06/15/2009 334 Additional Attachments to Main Document re 292 Declaration by Intervenor Defendant Clean Elections Institute, Inc.. (Attachments: # 1 Exhibit F)(Sandhu, Puneet) (Entered: 06/15/2009)

06/15/2009 335 ERRATA re 285, First MOTION for Summary Judgment by Intervenor Defendant Clean Elections Institute, Inc.. (Sandhu, Puneet) (Entered: 06/15/2009)

06/23/2009 336 BRIEF re 288 First MOTION for Summary Judgment, 287 First MOTION for Summary Judgment, 285 First MOTION for Summary Judgment, 293 MOTION for Summary Judgment by Amicus Center for Competitive Politics. (Cox, Reid) (Entered: 06/23/2009)

07/02/2009 338 Additional Attachments to Main Document re 288 First MOTION for Summary Judgment *Exhibits 24-45* by Intervenor Plaintiffs Dean Martin, Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action

Committee. (Keller, Timothy) (Entered: 07/02/2009)

07/02/2009 339 ERRATA *regarding Exhibits 25-45* by Intervenor Plaintiffs Dean Martin, Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee. (Attachments: # 1 Exhibit Exhibit 25-45)(Keller, Timothy) (Entered: 07/02/2009)

07/17/2009 343 RESPONSE to Motion re 285 First MOTION for Summary Judgment *by Clean Elections Institute* filed by Dean Martin, Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee. (Maurer, William) (Entered: 07/17/2009)

07/17/2009 344 RESPONSE to Motion re 293 MOTION for Summary Judgment *by Ken Bennett, et al.* filed by Dean Martin, Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee. (Keller, Timothy) (Entered: 07/17/2009)

07/17/2009 345 RESPONSE re 290 Statement *Defendant &Defendant-Intervenor's Statement of Undisputed Facts* by Intervenor Plaintiffs Dean Martin, Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action

Committee (Attachments: # 1 Exhibit Ex. A-C, # 2 Exhibit Ex. D, # 3 Exhibit Ex. E-I, # 4 Exhibit Ex. J-M, # 5 Exhibit Ex. N Pt. 1, # 6 Exhibit Ex. N Pt. 2, # 7 Exhibit Ex. N Pt. 3, # 8 Exhibit Ex. O-U)(Keller, Timothy) (Entered: 07/17/2009)

07/17/2009 346 RESPONSE to Motion re 285 First MOTION for Summary Judgment, 293 MOTION for Summary Judgment filed by John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 07/17/2009)

07/17/2009 347 MEMORANDUM re: Plaintiffs' Combined Brief in Opposition to Defs/Def-Int MSJs re 346 Response to Motion by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 07/17/2009)

07/17/2009 348 STATEMENT of Response to Defs/Def-Int Joint Statement of Facts re 346 Response to Motion by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 07/17/2009)

07/17/2009 349 Exhibit List *for Pla. Response to Defs/Def-Int Motions for Summary Judgment* by John McComish, Nancy McLain, Tony Bouie.. (Dranias, Nicholas) (Entered: 07/17/2009)

07/17/2009 350 RESPONSE in Opposition re 288 First MOTION for Summary Judgment, 287 First MOTION for

Summary Judgment filed by Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels, Ken Bennett. (Shipman, Tanja) (Entered: 07/17/2009)

07/17/2009 351 DECLARATION of Ex. 18: Ober Dec. re 346 Response to Motion by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 07/17/2009)

07/17/2009 352 DECLARATION of Ex. 19: Tsontakis Dec. re 346 Response to Motion by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 07/17/2009)

07/17/2009 353 DECLARATION of Ex. 20: Dranias Dec re 346 Response to Motion by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 07/17/2009)

07/17/2009 354 RESPONSE in Opposition re 288 First MOTION for Summary Judgment filed by Clean Elections Institute, Inc.. (Neubauer, Elisabeth) (Entered: 07/17/2009)

07/17/2009 355 Additional Attachments to Main Document re 346 Response to Motion *Ex. 21: Bouie Dep. 82* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 07/17/2009)

07/17/2009 356 Additional Attachments to Main Document re 346 Response to Motion

Ex: 22: Daniels Dep. S2 by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 07/17/2009)

07/17/2009 357 Additional Attachments to Main Document re 346 Response to Motion *Ex. 23: Green Dep. S2* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 07/17/2009)

07/17/2009 358 DECLARATION of Declaration of Michael Valder in Support of Defendant-Intervenor Clean Elections Institute, Inc.'s Opposition to Plaintiffs' and Plaintiff-Intervenors' Motion for Summary Judgment re 354 Response in Opposition to Motion by Intervenor Defendant Clean Elections Institute, Inc.. (Neubauer, Elisabeth) (Entered: 07/17/2009)

07/17/2009 359 Additional Attachments to Main Document re 346 Response to Motion *Ex. 24: Osborn Dep. (2009) S2* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 07/17/2009)

07/17/2009 360 DECLARATION of Declaration of Donald Green in Support of Defendant-Intervenor Clean Elections Institute, Inc.'s Opposition to Plaintiffs' and Plaintiff-Intervenors' Motion for Summary Judgment re 354 Response in Opposition to

Motion by Intervenor Defendant Clean Elections Institute, Inc.. (Attachments: # 1 Exhibit 1-7 to Declaration of Donald Green)(Neubauer, Elisabeth) (Entered: 07/17/2009)

07/17/2009 361 Additional Attachments to Main Document re 346 Response to Motion *Ex. 25. Mayer Dep. S2* by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 07/17/2009)

07/17/2009 362 DECLARATION of Declaration of Elisabeth J. Neubauer in Support of Defendant-Intervenor Clean Elections Institute, Inc.'s Opposition to Plaintiffs' and Plaintiff-Intervenors' Motions for Summary Judgment re 354 Response in Opposition to Motion by Intervenor Defendant Clean Elections Institute, Inc.. (Attachments: # 1 Exhibit A-J to Declaration of Elisabeth J. Neubauer, # 2 Exhibit K-Y to Declaration of Elisabeth J. Neubauer)(Neubauer, Elisabeth) (Entered: 07/17/2009)

07/17/2009 363 STATEMENT of DEFENDANTS AND DEFENDANT-INTERVENORS JOINT RESPONSE TO PLAINTIFFS SEPARATE STATEMENT re 314 Additional Attachments to Main Document, 287 First MOTION for Summary Judgment, 297 Memorandum by Intervenor Defendant Clean Elections Institute, Inc., Defendants

Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels, Ken Bennett. (Shipman, Tanja) (Entered: 07/17/2009)

07/17/2009 364 STATEMENT of Defendants and Defendant-Intervenor's Joint Response to Plaintiff-Intervenors' Separate Statement re 288 First MOTION for Summary Judgment by Intervenor Defendant Clean Elections Institute, Inc., Defendants Gary Scaramazzo, Royann J Parker, Jeffrey L Fainnan, Donald Lindholm, Lori S Daniels, Ken Bennett. (Neubauer, Elisabeth) (Entered: 07/17/2009)

07/17/2009 365 RESPONSE in Opposition re 287 First MOTION for Summary Judgment filed by Clean Elections Institute, Inc.. (Neubauer, Elisabeth) (Entered: 07/17/2009)

07/17/2009 366 DECLARATION of COLLEEN MCGEE IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFFS' AND PLAINTIFFINTERVENORS' MOTIONS FOR SUMMARY JUDGMENT re 363 Statement, 350 Response in Opposition to Motion by Defendants Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels, Ken Bennett. (Shipman, Tanja) (Entered: 07/17/2009)

07/17/2009	367	DECLARATION of OF DANIEL RUIZ II IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFFS' AND PLAINTIFFINTERVENORS' MOTIONS FOR SUMMARY JUDGMENT re 363 Statement, 350 Response in Opposition to Motion by Defendants Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels, Ken Bennett. (Shipman, Tanja) (Entered: 07/17/2009)
07/17/2009	368	DECLARATION of DR. KENNETH R. MAYER IN SUPPORT OF DEFENDANTS RESPONSE TO PLAINTIFFS AND PLAINTIFF-INTERVENORS MOTIONS FOR SUMMARY JUDGMENT re 363 Statement, 350 Response in Opposition to Motion by Defendants Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels, Ken Bennett. (Attachments: # 1 Exhibit A)(Shipman, Tanja) (Entered: 07/17/2009)
07/17/2009	369	DECLARATION of TODD F. LANG IN SUPPORT OF DEFEDANTS' RESPONSE TO PLAINTIFFS' AND PLAINTIFF-INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT re 363 Statement, 350 Response in Opposition to Motion by Defendants Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald

Lindholm, Lori S Daniels, Ken Bennett. (Attachments: # 1 Exhibit A-F, # 2 Exhibit G Annual Reports 2000-2004 (part 1 of 2), # 3 Exhibit G Annual Reports 2005-2008 (part 2 of 2))(Shipman, Tanja) (Entered: 07/17/2009)

07/17/2009 370 DECLARATION of TANJA K. SHIPMAN IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFFS' AND PLAINTIFF-INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT re 363 Statement, 350 Response in Opposition to Motion by Defendants Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels, Ken Bennett. (Attachments: # 1 Exhibit 11-26, # 2 Exhibit 27-41, # 3 Exhibit 42-50)(Shipman, Tanja) (Entered: 07/17/2009)

07/24/2009 371 MOTION to File Amicus Curiae by Campaign Legal Center. (Attachments: # 1 Amicus Memorandum, # 2 Amicus Corporate Disclosure Statement, # 3 Amicus Proposed Order)(Ryan, Paul) (Entered: 07/24/2009)

07/24/2009 372 RESPONSE in Opposition re 371 MOTION to File Amicus Curiae filed by John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 07/24/2009)

07/28/2009 373 First MOTION for Leave to File Motion for Leave to File Separate Response to Defendants Joint Statement of Additional Facts by John McComish, Nancy McLain, Tony Bouie. (Attachments: # 1 Text of Proposed Order)(Dranias, Nicholas) (Entered: 07/28/2009)

07/31/2009 377 MEMORANDUM re: Memorandum of Law in Support of Motion for Leave to File re 373 First MOTION for Leave to File Motion for Leave to File Separate Response to Defendants Joint Statement of Additional Facts by Plaintiffs John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 07/31/2009)

07/31/2009 378 REPLY to Response to Motion re 288 First MOTION for Summary Judgment *Reply to Defendants' Response to Plaintiff-Intervenors' Motion for Summary Judgment* filed by Dean Martin, Robert Burns, Rick Murphy, Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee. (Maurer, William) (Entered: 07/31/2009)

07/31/2009 379 REPLY to Response to Motion re 288 First MOTION for Summary Judgment *Plaintiff-Intervenors' Reply to Defendant-Intervenor's Memo in Opposition to Motions for Summary Judgment* filed by Dean Martin, Robert Burns, Rick Murphy, Arizona

Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee. (Attachments: # 1 Attachment A, # 2 Attachment B, # 3 Attachment C, # 4 Exhibit Ex. 185-189, # 5 Exhibit Ex. 190-197)(Keller, Timothy) (Entered: 07/31/2009)

07/31/2009 380 REPLY in Support re 285 First MOTION for Summary Judgment filed by Clean Elections Institute, Inc.. (Neubauer, Elisabeth) (Entered: 07/31/2009)

07/31/2009 381 DECLARATION of Declaration of Bart Turner in Support of Defendant-Intervenor Clean Elections Institute, Inc.'s Reply in Support of Motion for Summary Judgment re 380 Reply in Support of Motion by Intervenor Defendant Clean Elections Institute, Inc. filed by Clean Elections Institute, Inc.. (Neubauer, Elisabeth) (Entered: 07/31/2009)

07/31/2009 382 REPLY in Support re 293 MOTION for Summary Judgment filed by Jan Brewer, Gary Scaramazzo, Royann J Parker, Jeffrey L Fairman, Donald Lindholm, Lori S Daniels, Ken Bennett. (Shipman, Tanja) (Entered: 07/31/2009)

07/31/2009 383 LODGED Proposed Separate Reply to Def Additional Facts re: 373 First MOTION for Leave to File Motion for Leave to File Separate Response

to Defendants Joint Statement of Additional Facts. Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 07/31/2009)

07/31/2009 384 REPLY in Support re 287 First MOTION for Summary Judgment *to CEI Response* filed by John McComish, Nancy McLain, Tony Bouie. (Attachments: #1 Affidavit)(Dranias, Nicholas) (Entered: 07/31/2009)

07/31/2009 385 REPLY in Support re 287 First MOTION for Summary Judgment *Reply to CCEC Response* filed by John McComish, Nancy McLain, Tony Bouie. (Dranias, Nicholas) (Entered: 07/31/2009)

08/03/2009 387 AMENDED DOCUMENT by Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee, Robert Burns, Dean Martin, Rick Murphy. *Praecipe to David Primo's Declaration in Support of Motion for Summary Judgment.* (Attachments: # 1 Corrected Page)(Maurer, William) (Entered: 08/03/2009)

08/11/2009 388 ORDER the Campaign Legal Center's Motion 371 is GRANTED and the Campaign Legal Center Amicus

Curiae Memorandum in Opposition to Plaintiffs' and Plaintiff-Intervenors' Motions for Summary Judgment shall be filed in this case. Signed by Judge Roslyn O Silver on 8/11/09. (KMG) (Entered: 08/11/2009)

08/11/2009 389 RESPONSE (Memorandum) in Opposition to Plas re 288 First MOTION for Summary Judgment and Plaintiff-Intervenors' 287 First MOTION for Summary Judgment filed by Campaign Legal Center. (KMG) (Entered: 08/11/2009)

08/14/2009 391 RESPONSE to Motion re 373 First MOTION for Leave to File Motion for Leave to File Separate Response to Defendants Joint Statement of Additional Facts filed by Ken Bennett, Jan Brewer, Clean Elections Institute, Inc., Lori S Daniels, Jeffrey L Fairman, Donald Lindholm, Royann J Parker, Gary Scaramazzo. (Shipman, Tanja) (Entered: 08/14/2009)

08/14/2009 392 REPLY to Response to Motion re 373 First MOTION for Leave to File Motion for Leave to File Separate Response to Defendants Joint Statement of Additional Facts filed by Tony Bouie, John McComish, Nancy McLain. (Dranias, Nicholas) (Entered: 08/14/2009)

08/28/2009 393 First MOTION to Supplement *the Record with New Persuasive Precedent*

by Tony Bouie, John McComish, Nancy McLain. (Dranias, Nicholas) (Entered: 08/28/2009)

08/28/2009 394 LODGED Proposed Decision in Green Party of Connecticut v. Garfield cv 3:06cv1030 re: 393 First MOTION to Supplement *the Record with New Persuasive Precedent*. Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by Tony Bouie, John McComish, Nancy McLain. (Dranias, Nicholas) (Entered: 08/28/2009)

08/28/2009 395 MEMORANDUM re: Memorandum in support of motion to supplement re 393 First MOTION to Supplement *the Record with New Persuasive Precedent* by Plaintiffs Tony Bouie, John McComish, Nancy McLain. (Attachments: # 1 Text of Proposed Order)(Dranias, Nicholas) (Entered: 08/28/2009)

08/28/2009 397 Notice re Notice of Supplemental Authority by Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee, Robert Burns, Dean Martin, Rick Murphy (Attachments: # 1 Attachment A)(Maurer, William) (Entered: 08/28/2009)

09/04/2009 398 RESPONSE to Motion re 393 First MOTION to Supplement *the Record with New Persuasive Precedent*

Defendants and Defendant-Intervenor's Joint Response to Plaintiffs' Motion to Supplement the Record filed by Ken Bennett, Clean Elections Institute, Inc., Lori S Daniels, Jeffrey L. Fairman, Royann J Parker, Gary Scaramazzo. (Davis-Denny, Grant) (Entered: 09/04/2009)

09/18/2009 399 Second MOTION for Leave to File *Supplemental Authority* by Tony Bouie, John McComish, Nancy McLain. (Attachments: # 1 Text of Proposed Order)(Dranias, Nicholas) (Entered: 09/18/2009)

09/18/2009 400 LODGED Proposed U.S. Court of Appeals Washington, D.C. Circuit re: 399 Second MOTION for Leave to File *Supplemental Authority*. Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by Tony Bouie, John McComish, Nancy McLain. (Dranias, Nicholas) (Entered: 09/18/2009)

09/18/2009 401 MEMORANDUM re 399 Second MOTION for Leave to File *Supplemental Authority* by Plaintiffs Tony Bouie, John McComish, Nancy McLain. (Dranias, Nicholas) (Entered: 09/18/2009)

09/28/2009 403 RESPONSE to Motion re 399 Second MOTION for Leave to File *Supplemental Authority Defendants and Defendant-Intervenor's Joint Response*

to Plaintiffs' Second Motion to Supplement the Record filed by Ken Bennett, Clean Elections Institute, Inc., Lori S Daniels, Jeffrey L Fairman, Royann J Parker, Gary Scaramazzo. (Davis-Denny, Grant) (Entered: 09/28/2009)

10/29/2009 406 ORDER. Dft Secretary of State shall submit a brief addressing the issues outlined above. That brief shall be filed no later than 11/12/09 and must not exceed ten pages in length. Dft Clean Elections Institute, Inc. may submit a brief under the same requirements. Pla John McComish shall file a responsive brief. That response shall be filed no later than 11/19/09 and shall not exceed ten pages in length. Plas represented by separate counsel may also submit responses under the same requirements. No replies shall be filed. Signed by Judge Roslyn O Silver on 10/29/09. (NOTE: See attached pdf for complete details) (ESL) (Entered: 10/29/2009)

11/12/2009 409 SUPPLEMENT of DEFENDANTS SUPPLEMENTAL BRIEF ADDRESSING ISSUES RAISED IN OCTOBER 29, 2009 COURT ORDER re 406 Order,, by Defendants Ken Bennett, Jan Brewer, Lori S Daniels, Jeffrey L Fairman, Donald Lindholm, Royann J Parker,

Gary Scaramazzo. (Shipman, Tanja) (Entered: 11/12/2009)

11/12/2009 410 SUPPLEMENT of Supplemental Brief in Support of Motion for Summary Judgment re 406 Order,, by Intervenor Defendant Clean Elections Institute, Inc.. (Neubauer, Elisabeth) Modified on 11/13/2009 (SAT). DOCUMENT NOT IN COMPLIANCE WITH LRCiv 7.1(c). ATTORNEY NOTICED. (Entered: 11/12/2009)

11/18/2009 411 RESPONSE re 406 Order,, *Supplemental Brief in Support of Cross-Motion for Summary Judgment* by Plaintiffs Tony Bouie, John McComish, Nancy McLain. (Dranias, Nicholas) (Entered: 11/18/2009)

11/19/2009 412 SUPPLEMENT of Response to Defendant and Defendant-Intervenor's Supplemental Briefs re 406 Order,, 410 Supplement, 409 Supplement, by Intervenor Plaintiffs Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee, Robert Burns, Dean Martin, Rick Murphy. (Keller, Timothy) (Entered: 11/19/2009)

11/30/2009 413 Notice re Notice of Supplemental Authority by Ken Bennett, Lori S Daniels, Jeffrey L Fairman, Donald Lindholm, Royann J Parker, Gary Scaramazzo (Attachments: # 1

Exhibit Attachment A)(Shipman, Tanja) (Entered: 11/30/2009)

12/02/2009 414 OBJECTION re 413 Other Notice filed by Tony Bouie, John McComish, Nancy McLain. (Dranias, Nicholas) (Entered: 12/02/2009)

12/09/2009 415 Joinder re 413 Other Notice *of Supplemental Authority and Response to Plaintiffs' Objection* by Intervenor Defendant Clean Elections Institute, Inc. filed by Clean Elections Institute, Inc.. (Neubauer, Elisabeth) (Entered: 12/09/2009)

01/05/2010 416 Second MOTION for Preliminary Injunction by Tony Bouie, John McComish, Nancy McLain. (Attachments: # 1 Text of Proposed Order)(Dranias, Nicholas) (Entered: 01/05/2010)

01/05/2010 417 MEMORANDUM re: Supporting Plaintiffs' Second Motion for Preliminary Injunction re 416 Second MOTION for Preliminary Injunction by Plaintiffs Tony Bouie, John McComish, Nancy McLain. (Dranias, Nicholas) (Entered: 01/05/2010)

01/06/2010 419 ORDER re Hearing set as to 288 First MOTION for Summary Judgment, 287 First MOTION for Summary Judgment, 285 First MOTION for Summary Judgment, 293 MOTION for Summary Judgment: Motion Hearing set for 1/15/2010 at

01:30PM before Judge Roslyn O Silver. FURTHER ORDERED dfts shall respond to the 2nd motion for preliminary injunction 416 no later than 1/11/10. Plas shall file a reply no later than 1/13/10. Signed by Judge Roslyn O Silver on 1/6/2010. (LAD) (Entered: 01/06/2010)

01/06/2010 420 Second MOTION for Preliminary Injunction by Rick Murphy. (Attachments: # 1 Memorandum in Support of 2nd Motion for Preliminary Injunction, #2 Affidavit Decl. Murphy in Support of 2nd Motion for Preliminary Injunction, # 3 Text of Proposed Order)(Keller, Timothy) (Entered: 01/06/2010)

01/11/2010 421 RESPONSE to Motion re 420 Second MOTION for Preliminary Injunction, 416 Second MOTION for Preliminary Injunction filed by Ken Bennett, Lori S Daniels, Jeffrey L Fairman, Donald Lindholm, Royann J Parker, Gary Scaramazzo. (Shipman, Tanja) (Entered: 01/11/2010)

01/11/2010 422 RESPONSE in Opposition re 416 Second MOTION for Preliminary Injunction and 420 Second Motion for Prelimary Injuction filed by Clean Elections Institute, Inc.. (Davis-Denny, Grant) Modified on 1/15/2010 (DMT,). DOCKET TEXT MODIFIED

TO CORRECT DOCUMENT LINKAGE. (Entered: 01/11/2010)

01/11/2010 423 DECLARATION of OF TODD F. LANG IN SUPPORT OF DEFENDANTS RESPONSE TO PLAINTIFFS AND PLAINTIFF-INTERVENOR RICK MURPHYS SECOND MOTIONS FOR PRELIMINARY INJUNCTION re 421 Response to Motion by Defendants Ken Bennett, Lori S Daniels, Jeffrey L Fairman, Donald Lindholm, Royann J Parker, Gary Scaramazzo. (Attachments: # 1 Exhibit 1)(Shipman, Tanja) (Entered: 01/11/2010)

01/11/2010 424 DECLARATION of OF TANJA K. SHIPMAN IN SUPPORT OF DEFENDANTS RESPONSE TO PLAINTIFFS AND PLAINTIFF-INTERVENOR RICK MURPHYS SECOND MOTIONS FOR PRELIMINARY INJUNCTION re 421 Response to Motion by Defendants Ken Bennett, Lori S Daniels, Jeffrey L Fairman, Donald Lindholm, Royann J Parker, Gary Scaramazzo. (Attachments: #1 Exhibit 1-15)(Shipman, Tanja) (Entered: 01/11/2010)

01/11/2010 425 DECLARATION of GOVERNOR JAN BREWER 2010 COMMITTEE re 421 Response to Motion by Defendants Ken Bennett, Lori S Daniels, Jeffrey L Fairman, Donald Lindholm, Royann J Parker, Gary

Scaramazzo. (Shipman, Tanja) (Entered: 01/11/2010)

01/12/2010 426 ORDER, the parties shall submit simultaneous briefing addressing the issues ntioned in this order no later than 5 p.m. on January 13, 2010; the parties hall submit responses no later than 5 p.m. on January 14, 2010; no replies shall be filed. Signed by Judge Roslyn O Silver on 1/12/10. (REW,) (Entered: 01/12/2010)

01/13/2010 429 Notice re Supplemental Authority by Ken Bennett, Jan Brewer, Lori S Daniels, Jeffrey L Fairman, Donald Lindholm, Royann J Parker, Gary Scaramazzo (Attachments: # 1 Exhibit Attachment A)(Shipman, Tanja) (Entered: 01/13/2010)

01/13/2010 430 REPLY in Support re 420 Second MOTION for Preliminary Injunction filed by Tony Bouie, John McComish, Nancy McLain. (Attachments: # 1 Affidavit Margaret Dugan, # 2 Affidavit Tony Bouie, # 3 Affidavit Marcus Osborn, # 4 Affidavit John Munger, # 5 Affidavit Buz Mills)(Dranias, Nicholas) (Entered: 01/13/2010)

01/13/2010 431 BRIEF re: Supplemental Brief Addressing Court Order re 426 Order, by Plaintiffs Tony Bouie, John McComish, Nancy McLain. (Dranias,

Nicholas) Modified on 1/14/2010 (TLJ). INCORRET EVENT SELECTED. ENTRY MODIFIED FROM MEMORANDUM TO BRIEF. (Entered: 01/13/2010)

01/13/2010 432 MEMORANDUM re: Plaintiff-Intervenors' supplemental briefing on scope of relief and reply in support of 2nd motion for summary judgment. re 420 Second MOTION for Preliminary Injunction, 426 Order, by Intervenor Plaintiffs Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee, Robert Burns, Dean Martin, Rick Murphy. (Attachments: # 1 Affidavit Declaraton of Dean Martin)(Maurer, William) (Entered: 01/13/2010)

01/13/2010 433 SUPPLEMENT of Defendant-Intervenor's Supplemental Briefing Regarding Possible Relief re 426 Order, by Intervenor Defendant Clean Elections Institute, Inc.. (Neubauer, Elisabeth) (Entered: 01/13/2010)

01/13/2010 434 BRIEF re DEFENDANTS BRIEF ADDRESSING ISSUES RAISED IN THE COURTS 1/12/10 ORDER re 426 Order, by Defendants Ken Bennett, Jan Brewer, Lori S Daniels, Jeffrey L Fairman, Donald Lindholm, Royann J Parker, Gary Scaramazzo. (Shipman, Tanja) Modified on

1/14/2010 (TLJ). INCORRECT EVENT SELECTED. ENTRY MODIFIED FROM SUPPLEMENT TO BRIEF. (Entered: 01/13/2010)

01/13/2010 435 DECLARATION of David Lujan re 434 Supplement by Defendants Ken Bennett, Jan Brewer, Lori S Daniels, Jeffrey L Fairman, Donald Lindholm, Royann J Parker, Gary Scaramazzo. (Shipman, Tanja) Modified on 1/14/2010 (TLJ). INCORRECT EVENT SELECTED. ENTRY MODIFIED FROM AFFIDAVIT TO DECLARATION. (Entered: 01/13/2010)

01/14/2010 436 RESPONSE re 433 Supplement, 434 Supplement, 426 Order, by Plaintiffs Tony Bouie, John McComish, Nancy McLain. (Dranias, Nicholas) (Entered: 01/14/2010)

01/14/2010 437 RESPONSE re 433 Supplement, 426 Order, *Re Possible Relief* by Intervenor Defendant Clean Elections Institute, Inc.. (Davis-Denny, Grant) (Entered: 01/14/2010)

01/14/2010 438 RESPONSE re 433 Supplement, 434 Supplement, *to Defendant and Defendant-Intervenor's briefing on scope of relief* by Intervenor Plaintiffs Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee, Robert Burns, Dean Martin, Rick Murphy. (Maurer, William) (Entered: 01/14/2010)

01/14/2010 439 RESPONSE re 436 Response 432 Memorandum, by Defendants Ken Bennett, Jan Brewer, Lori S Daniels, Jeffrey L Fairman, Donald Lindholm, Royann J Parker, Gary Scaramazzo. (Shipman, Tanja) (Entered: 01/14/2010)

01/14/2010 440 DECLARATION of Declaration of Tanja K. Shipman re 439 Response by Defendants Ken Bennett, Jan Brewer, Lori S Daniels, Jeffrey L Fairman, Donald Lindholm, Royann J Parker, Gary Scaramazzo. (Attachments: # 1 Exhibit Exhibit 1)(Shipman, Tanja) (Entered: 01/14/2010)

01/14/2010 441 DECLARATION of Declaration of Carl Seel re 439 Response by Defendants Ken Bennett, Jan Brewer, Lori S Daniels, Jeffrey L Fairman, Donald Lindholm, Royann J Parker, Gary Scaramazzo. (Shipman, Tanja) (Entered: 01/14/2010)

01/14/2010 442 PROPOSED ORDER from the Chambers of Judge Roslyn O Silver (REW,) (Entered: 01/14/2010)

01/15/2010 443 ORDER denying Plaintiffs' 420 Motion for Preliminary Injunction. Signed by Judge Roslyn O Silver on 1/15/10.(REW,) (Entered: 01/15/2010)

01/15/2010 444 Minute Entry. Proceedings held before Judge Roslyn O Silver: Motion Hearing held on 1/15/2010

regarding documents 285, 287, 288, 293, 373, 393, 399, 404, 416, and 418. IT IS ORDERED all documents are taken under advisement. Further briefing is ordered as set forth on the record. Order to issue. (Court Reporter Elaine Cropper.)(CLB) (Entered: 01/15/2010)

01/18/2010 445 SUPPLEMENT of DEFENDANTS SUPPLEMENTAL BRIEF REGARDING IMPLEMENTING INJUNCTION LIMITED TO PERSONAL MONIES by Defendants Ken Bennett, Jan Brewer, Lori S Daniels, Jeffrey L Fairman, Donald Lindholm, Royann J Parker, Gary Scaramazzo. (O'Grady, Mary) (Entered: 01/18/2010)

01/18/2010 446 DECLARATION of DECLARATION OF TODD F. LANG IN SUPPORT OF DEFENDANTS SUPPLEMENTAL BRIEF REGARDING IMPLEMENTING INJUNCTION LIMITED TO PERSONAL MONIES re 445 Supplement by Defendants Ken Bennett, Jan Brewer, Lori S Daniels, Jeffrey L Fairman, Donald Lindholm, Royann J Parker, Gary Scaramazzo. (Attachments: # 1 Exhibit Exhibit 1)(O'Grady, Mary) (Entered: 01/18/2010)

01/18/2010 447 RESPONSE to Defendants' Supplemental Brief Regarding Scope of

Proposed Injunction re 445 Supplement by Intervenor Plaintiffs Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee, Robert Burns, Dean Martin, Rick Murphy. (Maurer, William) Modified on 1/19/2010 (TLJ). INCORRECT EVENT SELECTED. ENTRY MODIFIED FROM SUPPLEMENT TO RESPONSE. (Entered: 01/18/2010)

01/18/2010 448 SUPPLEMENTAL BRIEF re: Responding to Defendants' Response to Jan 15 Order re 444 Order on Motion for Leave to File, Order on Motion to Supplement,, Order on Motion for Hearing or Conference, Order on Motion for Preliminary Injunction,, Order on Motion for Summary Judgment....Motion Hearing..... 445 Supplement by Plaintiffs Tony Bouie, John McComish, Nancy McLain. (Dranias, Nicholas) Modified on 1/19/2010 (TLJ). DOCKET TEXT MODIFIED FROM MEMORANDUM TO SUPPLEMENTAL BRIEF. (Entered: 01/18/2010)

01/18/2010 449 SUPPLEMENTAL DECLARATION of Marcus Osborn re 448 Memorandum, by Plaintiffs Tony Bouie, Kevin Gibbons, John McComish. (Dranias, Nicholas) Modified on 1/19/2010 (TLJ). INCORRECT EVENT SELECTED.

ENTRY MODIFIED FROM AFFIDAVIT TO SUPPLEMENTAL DECLARATION. (Entered: 01/18/2010)

01/19/2010 450 ORDER Defendants shall submit a reply addressing the issues outlined in this order and other matters raised by Plaintiffs no later than 10 a.m. on January 20, 2010. Signed by Judge Roslyn O Silver on 1/19/10. (LSP) (Entered: 01/19/2010)

01/20/2010 451 RESPONSE re 450 Order *Supplemental Briefing Regarding the Court's January 19, 2010 Order* by Intervenor Defendant Clean Elections Institute, Inc.. (Davis-Denny, Grant) (Entered: 01/20/2010)

01/20/2010 452 Reply re 450 Order, 445 Supplement by Defendants Ken Bennett, Jan Brewer, Lori S Daniels, Jeffrey L Fairman, Donald Lindholm, Royann J Parker, Gary Scaramazzo. (O'Grady, Mary) (Entered: 01/20/2010)

01/20/2010 454 ORDER granting the Motions for Summary Judgment 287 and 288. Arizona Revised Statutes section 16-952 may not be applied. IT IS FURTHER ORDERED denying the Motions for Summary Judgment 285 and 293. IT IS FURTHER ORDERED denying the Motion for Leave to File Separate Response 373. IT IS FURTHER ORDERED

granting the Motions to File Supplemental Authority 393 and 399. IT IS FURTHER ORDERED denying the Motion for Status Hearing 404. IT IS FURTHER ORDERED denying the Motion for Preliminary Injunction 416 and Motion for Hearing 418. IT IS FURTHER ORDERED the Clerk shall enter judgment in favor of Plaintiffs (See Order for further details). Signed by Judge Roslyn O Silver on 1/20/10.(CLB) (Entered: 01/20/2010)

01/20/2010 455 SUPPLEMENT to the Record with New Persuasive Precedent by Plaintiffs Tony Bouie, John McComish, Nancy McLain. NOTE: Filed pursuant to 454 Order. (LSP) (Entered: 01/21/2010)

01/20/2010 456 SUPPLEMENT to the record with US Court of Appeals Decision by Plaintiffs Tony Bouie, John McComish, Nancy McLain. NOTE: Filed pursuant to 454 Order. (LSP) (Entered: 01/21/2010)

01/21/2010 457 CLERK'S JUDGMENT it is ordered and adjudged that pursuant to the Court's order filed on January 20, 2010 and upon the Court's instruction therein, judgment is entered for the Plaintiffs and against Defendants. (LSP) (Entered: 01/21/2010)

01/22/2010	459	NOTICE OF APPEAL to 9th Circuit re 457 Judgment, by Clean Elections Institute, Inc.. Filing fee received: $ 455.00, receipt number 0970-3547290. (Attachments: # 1 Exhibit A and B)(Neubauer, Elisabeth) Modified on 1/22/2010 TO INCLUDE DOCUMENT LINKAGE(KMG) (Entered: 01/22/2010)
01/22/2010	461	NOTICE OF APPEAL to 9th Circuit re 457 Judgment, by Ken Bennett, Jan Brewer, Lori S Daniels, Donald Lindholm, Royann J Parker, Gary Scaramazzo. Filing fee received: $ 455.00, receipt number 0970-3548008. (O'Grady, Mary) Modified on 1/22/2010 TO INCLUDE DOCUMENT LINKAGE (KMG). (Entered: 01/22/2010)
01/26/2010	464	Ninth Circuit Case Number 10-15165 for 461 Notice of Appeal (filed by Bennett). (REW) (Entered: 01/26/2010)
01/26/2010	465	Ninth Circuit Case Number 10-15166 for 459 Notice of Appeal (filed by Clean Elections). (REW) (Entered: 01/26/2010)
01/27/2010	467	TRANSCRIPT filed for hearing on Motion Hearing for dates of 01/15/2010 before Judge Roslyn O Silver. Court Reporter: Elaine Cropper. Re 461 Notice of Appeal, Transcript may be viewed at the court

public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 2/17/2010. Redacted Transcript Deadline set for 3/1/2010. Release of Transcript Restriction set for 4/27/2010. (BAS) (Entered: 01/28/2010)

01/29/2010 470 ORDER of 9th Circuit, this court sua spente consolidates 10-15165 and 10-15166; the briefing schedule remains unchanged, re: 10-15165 and 10-15166 461, 459 Notices of Appeal (REW) (Entered: 01/29/2010)

02/03/2010 474 ORDER of 9th Circuit, that the stay issued by the district court on January 20, 2010 is extended pending further action by the panel assigned to hear the merits of these appeals. These consolidated appeals are expedited. The briefing schedule is reset as indicated in this order. This case shall be heard during the week of April 12-16, 2010 in San Francisco, California; appeal case number 10-15165; 10-15166, as to 461 Notice of Appeal, filed by Royann J Parker, Gary Scaramazzo, Ken Bennett, Jan Brewer, Lori S Daniels, Donald Lindholm, 459 Notice of Appeal, filed by Clean Elections Institute, Inc. (DMT) (Entered: 02/03/2010)

06/08/2010	488	ORDER of 9th Circuit as to 461 Notice of Appeal filed by Royann J Parker, Gary Scaramazzo, Ken Bennett, Jan Brewer, Lori S Daniels, Donald Lindholm, appeal case number 10-15165 re order from the Supreme court that the application to vacate the stay of the District Court's Injunction and to stay the Mandate of the US Court of Appeal is GRANTED pending the timely filing and disposition of a petition for writ of certiorari. (note: see attached pdf for complete details)(ESL) (Entered: 06/08/2010)

General Docket
United States Court of Appeals
for the Ninth Circuit

JOHN MCCOMISH; NANCY MCLAIN; TONY BOUIE,

Plaintiffs-Appellees,

ROBERT BURNS,

Plaintiff-intervenor-Appellee,

v.

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC; ARIZONA TAXPAYERS ACTION COMMITEE, agent of Taxpayers Action Committee; DEAN MARTIN; RICK MURPHY,

Plaintiff-intervenors-Appellees,

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; GARY SCARAMAZZO; ROYANN J. PARKER; JEFFREY L. FAIRMAN; LOUIS HOFFMAN; LORI S. DANIELS, in their official capacities as members of the Arizona Citizens Clean Elections Commission,

Defendants-Appellants,

and

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant-intervenor.

01/22/2010	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire

		due by Attorney Mary O'Grady due on 01/29/2010. Appellant Ken Bennett, Appellant Lori S. Daniels, Appellant Jeffrey L. Fairman, Appellant Louis Hoffman, Appellant Royann J. Parker and Appellant Gary Scaramazzo opening brief due 05/10/2010. Appellee Arizona Free Enterprise Club's Freedom Club PAC, Appellee Arizona Taxpayers Action Commitee, Appellee Tony Bouie, Appellee Robert Burns, Appellee Dean Martin, Appellee John McComish, Appellee Nancy McLain and Appellee Rick Murphy answering brief due 06/09/2010. Appellant's optional reply brief is due 14 days after service of the answering brief. [7205486] (GR)
01/29/2010	11	Filed order (BARRY G. SILVERMAN, RICHARD A. PAEZ, and CARLOS T. BEA) This court sua sponte consolidates appeal Nos. 10-15165 and 10-15166. All parties on a side are encouraged to join in a single brief to the greatest extent practicable. See 9th Cir. R. 28-4. The briefing schedule remains unchanged. Appellees' emergency motion to vacate the temporary appellate stay is denied. Appellants' emergency motions for a stay pending appeal will be addressed by separate order. BEA, dissenting. I would grant appellees' motion to

vacate the temporary appellate stay. [7213601] [10-15165, 10-15166] (DAF)

02/01/2010 16 Filed order (BARRY G. SILVERMAN, RICHARD A. PAEZ and CARLOS T. BEA) The stay issued by the district court on January 20, 2010 is extended pending further action by the panel assigned to hear the merits of these appeals. See California Pharmacists Ass'n v. Maxwell-Jolly, 563 F.3d 847, 850 (9th Cir. 2009). These consolidated appeals are expedited. The briefing schedule is reset as follows. The opening briefs and excerpts of record are due February 9, 2010; the answering brief is due February 16, 2010; and the optional reply briefs are due within 3 days after service of the last-served answering brief. All parties on a side are encouraged to join in a single brief to the greatest extent practicable. This case shall be heard during the week of April 12-16, 2010 in San Francisco, California. BEA, Circuit Judge, dissenting. (See order for full text of dissent) [7215926] [10-15165, 10-15166] – [Edited 02/02/2010 by JI] (DAF)

02/16/2010 27 Submitted (ECF) Opening brief for review. Submitted by – Clean Elections Institute, Inc. and Appellants Ken Bennett, Lori S. Daniels, Jeffrey

L. Fairman, Louis Hoffman, Royann J. Parker and Gary Scaramazzo in 10-15165, Appellant Clean Elections Institute, Inc. in 10-15166. Date of service: 02/16/2010. [7232574] [10-15165, 10-15166] (EJN)

02/16/2010 29 Received a copy of Supreme Court order regarding the application to vacate the stay presented to Justice Kennedy and by him referred to the Court is denied. (FYI panel) [7232842] [10-15165, 10-15166] (RL)

02/17/2010 30 Filed Appellants' excerpts of record in 26 volumes. Served on 02/16/2010. (FedEx to Panel) [7234234] [10-15165, 10-15166] (LA)

02/17/2010 31 Notice of Oral Argument on APRIL 12, 2010 Calendar. Please return ACKNOWLEDGMENT OF HEARING NOTICE form to: SAN FRANCISCO Office. Attention: The Notice of Docket Activity may not list your case number. Please open attached documents to view details about your case. [7234460] [10-15165, 10-15166] (AM)

02/25/2010 37 Received Supreme Court order dated 02/16/2010. The application to vacate the stay presented to Jusitce Kennedy and by him referred to the Court is denied. Denial is without prejudice to a renewed application on 6/1/2010, or when the Court of

Appeals has issued its decision on the merits of the case, whichever date is earlier. [7246884] [10-15165, 10-15166] (GV)

03/02/2010 38 Submitted (ECF) Answering brief for review. Submitted by Appellees Tony Bouie, John McComish and Nancy McLain in 10-15166. Date of service: 03/02/2010. [7248877] [10-15165, 10-15166] – [COURT UPDATE: Attached corrected version of Answering Brief. 03/02/2010 by RY] (NCD)

03/02/2010 40 Submitted (ECF) Answering brief for review. Submitted by Appellees Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Commitee, Robert Burns, Dean Martin and Rick Murphy in 10-15165. Date of service: 03/02/2010. [7250460] (10-15165, 10-15166] (WRM)

03/03/2010 42 Filed Plaintiffs-intervenors-Appellees Dean Martin, et al.'s supplemental excerpts of record on appeal in 1 volume. [7252578] [10-15165, 10-15166] (LA)

03/04/2010 44 Filed Plaintiffs-Appellees Tony Bouie, John McComish and Nancy McLain supplemental excerpts of record on appeal in 3 volumes. [7253752] [10-15165, 10-15166] (LA)

03/09/2010	46	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by Center for Competitive Politics. Date of service: 03/09/2010. [7258012] [10-15165, 10-15166] (SMH)
03/09/2010	48	Submitted (ECF) Reply brief for review. Submitted by – Clean Elections Institute, Inc. and Appellants Ken Bennett, Lori S. Daniels, Jeffrey L. Fairman, Louis Hoffman, Royann J. Parker and Gary Scaramazzo in 10-15165. Date of service: 03/09/2010. [7259093] [10-15165, 10-15166] (GD)
03/11/2010	51	Filed clerk order (Deputy Clerk:SC): The unopposed motion of the Center for Competitive Politics for leave to file brief of amicus curiae in support of appellees urging affirmance is granted, and the proposed amicus brief, lodged with the motion, is ordered filed. [7262720] [10-15165, 10-15166] (SC)
03/17/2010	53	Filed (ECF) – Clean Elections Institute, Inc. and Appellants Ken Bennett, Lori S. Daniels, Jeffrey L. Fairman, Louis Hoffman, Royann J. Parker and Gary Scaramazzo in 10-15165 Motion to file substitute or corrected brief. Date of service: 03/17/2010. [7269568] [10-15165, 10-15166] (GD)

03/18/2010	54	Filed (ECF) Appellees Tony Bouie, John McComish and Nancy McLain in 10-15166 citation of supplemental authorities. Date of service: 03/18/2010. [7271299] [10-15165, 10-15166] (NCD)
03/26/2010	55	Filed (ECF) Appellees Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Commitee, Robert Burns, Dean Martin and Rick Murphy in 10-15165 citation of supplemental authorities. Date of service: 03/26/2010. [7280327] [10-15165, 10-15166] (TDK)
03/26/2010	56	Filed (ECF) Appellees Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Commitee, Robert Burns, Dean Martin and Rick Murphy in 10-15165 citation of supplemental authorities. Date of service: 03/26/2010. [7280380] [10-15165, 10-15166] (TDK)
03/31/2010	58	Filed clerk order (Deputy Clerk:SC): Appellants' Motion to File Corrected Opening and Reply Briefs is granted and the corrected briefs appended to the motion are deemed filed. The Clerk shall inform appellants whether the separate electronic and/or paper filings of said briefs will be required. [7285346] [10-15165, 10-15166] (SC)
04/02/2010	60	Submitted (ECF) Opening brief for review. Submitted by – Clean Elections Institute, Inc. and Appellants

		Ken Bennett, Lori S. Daniels, Jeffrey L. Fairman, Louis Hoffman, Royann J. Parker and Gary Scaramazzo in 10-15165. Date of service: 04/02/2010. [7288135] [10-15165, 10-15166] (EJN)
04/02/2010	61	Submitted (ECF) Reply brief for review. Submitted by – Clean Elections Institute, Inc. and Appellants Ken Bennett, Lori S. Daniels, Jeffrey L. Fairman, Louis Hoffman, Royann J. Parker and Gary Scaramazzo in 10-15165. Date of service: 04/02/2010. [7288137] [10-15165, 10-15166] (EJN)
04/12/2010	65	ARGUED AND SUBMITTED TO ANDREW J. KLEINFELD, A. WALLACE TASHIMA and SIDNEY R. THOMAS. [7297591] [10-15165, 10-15166] (RS)
05/21/2010	66	FILED OPINION (ANDREW J. KLEINFELD, A. WALLACE TASHIMA and SIDNEY R. THOMAS) REVERSED AND REMANDED. Judge: AJK Concurring, Judge: AWT Authoring, Judge:. FILED AND ENTERED JUDGMENT. [7345699] [10-15165, 10-15166] (RP)
06/01/2010	67	Received letter from the Supreme Court dated 06/01/2010 re: The application to vacate stay is denied without prejudice. [7354997] [10-15165, 10-15166] (HH)

06/01/2010	68	Received letter dated 05/26/2010 re: . . . requests that the Court de-publish current opinion and reissue it without the language discussing Governor Symington's failed criminal prosecution. [7357336] [10-15165, 10-15166] (GV)
06/04/2010	73	Received Supreme Court order dated 06/01/2010. The application to vacate the stay presented to Justice Kennedy and by him referred to the Court is denied without prejudice to a renewal application if the parties represent that they intend to file a timely petition for a writ of certiorari before this Court. The motion of Buzz Whills for Governor Campaign for leave to file a brief as amicus curiae is granted. [7366578] [10-15165, 10-15166] (GV)
06/07/2010	71	Received letter dated 06/03/2010 from Attorney John Dowd re: continue to respecfully request that the Court de-publish its May 21, 2010 opinion. [7364164] [10-15165, 10-15166] (GV)
06/08/2010	70	Received letter from the Supreme Court dated 06/08/2010 re: The application to vacate the stay of the district court's injunction and to stay the mandate of the 9th Circuit is GRANTED pending the timely filing and disposition of a petition for a writ of certiorari. [7364057] [10-15165, 10-15166] (HH)

06/10/2010	74	Filed (ECF) Appellees Tony Bouie, John McComish and Nancy McLain in 10-15166 Motion to stay the mandate. Date of service: 06/10/2010. [7368477] [10-15165, 10-15166] (NCD)
06/17/2010	75	Filed order (ANDREW J. KLEINFELD, A. WALLACE TASHIMA and SIDNEY R. THOMAS) The motion of plaintiffs-appellees to stay issuance of the mandate is denied as moot, inasmuch as our mandate has already been stayed by the order of the Supreme Court, issued on June 8, 2010, in No. 09A1163. [7375354] [10-15165, 10-15166] (SC)
06/23/2010	77	Filed order and amended opinion (ANDREW J. KLEINFELD, A. WALLACE TASHIMA and SIDNEY R. THOMAS) Amending Disposition Opinion REVERSED AND REMANDED. [7381837] [10-15165, 10-15166] (PH)
08/23/2010	80	Received notice from the Supreme Court: petition for certiorari filed on 08/17/2010. Supreme Court Number 10-239. [7448136] [10-15165, 10-15166] (LC)
08/23/2010	81	Received notice from the Supreme Court: petition for certiorari filed on 08/17/2010. Supreme Court Number 10-238. [7448140] [10-15165, 10-15166] (LC)

11/30/2010	87	Received notice from the Supreme Court. Petition for certiorari GRANTED on 11/29/2010. Supreme Court Number 10-239. The petition for Cert in No. 10-238 is granted. The cases are consolidated and a total of 1 hour is alloted for oral argument. [7562224] [10-15165, 10-15166] (GV)

U.S. District Court for the District of Arizona

(Filed Jun. 13, 2009)

[Title Omitted In Printing]

25 factors guiding state policy

Who's got the 'juice,' when it comes Capitol influence?

{}

juice: *Slang* Political power or influence; clout – *The Free Dictionary*

When they overwhelmingly approved term limits in 1992, Arizona voters transferred a slice of influence on public policy from the elected to the non-elected.

"Lobbyists have more influence, and decisions are not always based on a historical mindset," Rep. Laura Knaperek, R-17, said.

In 1998, voters passed the Clean Elections Act, a controversy-laden initiative providing candidates for state office the option of public funding for their campaigns – a change in election law that some observers say has actually tilted the Legislature more to the right.

And voters through other ballot measures, including the Voter Protection Act and separate measures requiring a two-thirds "supermajority" to raise taxes and that a funding source be designated for new spending, continue to have "juice" when it comes to state law, policy and direction under which elected officials must govern.

Voters

For its significant influence on state government – albeit many voters may consider themselves powerless to change anything – the electorate is one of the 25 most influential factors guiding state policy, as selected by Arizona Capitol Times, based on research and a series of interviews with people in and close to state government.

Term limits

Many lawmakers who supported term limits at the time now rue the day because, they say, the result has been a diminution of institutional knowledge in the halls of the Legislature and a transfer of a good deal of influence to individual lobbyists, lobbying organizations and legislative staff, notably those that have been around for decades.

In an October 2004 report, The Morrison Institute on Public Policy at Arizona State University concluded the effects of term limits reform have been positive and negative.

"When it comes to policy, observers saw term limits hindering legislative efforts to deal with long-range problems . . . and with complicated matters such as the budget," the Institute stated.

"[T]erm limits have encouraged greater competition for legislative and other seats and have given voters a greater choice among candidates. At the same time, they have generally reduced the power of legislative

leaders and generally increased the influence of lobbyists, though not all lobbyists and staff have gained equally."

The Institute concluded from a series of interviews with legislators and lobbyists that new lawmakers might rely too heavily on lobbyists for information, "and some, no doubt, have been misled as a result." Morrison added that lobbyist influence is less in the Senate because many

A challenge by Rep. David Burnell Smith, R-7, to its constitutionality is the latest argument leveled against the Clean Elections Act, which, according to recent polling, is still supported by voters who approved the public financing of state campaigns seven years ago. Like term limits, the act had unintended consequences, say its opponents.

"The primary effect of public financing has been to increase the influence of social conservatives by enabling them to compete in Republican primaries with business-backed candidates, who tend to be more moderate, writes former legislator Greg Patterson on his Republican blog, "Espresso Pundit."

"Despite the availability of public funding, special interests exerted considerable influence," he wrote. "First they served as bagmen for the $5 contributions needed to quality for public funding. Labor unions were the most conspicuous players this time around, but in future elections we can expect environmentalist, the Religious Right, or even political parties to act as

power brokers by offering rosters of $5 donors to would-be candidates.

"Clean Elections didn't push the right wing to the margin of Arizona politics. Instead it freed them from having to go hat in hand to the more moderate chamber of commerce types and their liberal trophy wives."

For the same reasons, liberal candidates have benefited from the Clean Elections Act, observers say.

In the House, 12 of 16 ultra-conservatives ran publicly funded last year, and four of eight ultraconservatives in the Senate were Clean Elections candidates.

What lawmakers said

Arizona Capitol Times in a separate e-mail survey of legislators asked whom or what they would name as the number-one influencer of public policy. Their answers included:

Tim Hogan

The National Rifle Association

Clean Elections

Marty Shultz

"Business"

Kevin DeMenna

The Constitution

Top 25, influencers of state policy

(In alphabetical order)

Arizona Chamber of Commerce and Industry

Arizona Hospital and Healthcare Association

Arizona Medical Association

* * *

U.S. District Court for the District of Arizona

[Title Omitted In Printing]

(Filed Jun. 12, 2009)

CLEAN MONEY = CLEAN ELECTIONS

GIVE AVERAGE CITIZENS MORE PRESENTATION!
REDUCE AND LIMIT CAMPAIGN SPENDING!
STOP THE ENDLESS MONEY CHASE!
STOP SPECIAL INTEREST MONEY!
LEVEL THE PLAYING FIELD!

Recent polls found **voters wanted the all of the above**. True, various legislation is in the works that would address **some** of these issues. But, if we are really serious about meaningful reform, **all of these problems can and must be included**.

Currently, only wealthy or well-connected candidates run for office because they can raise the $$$. Abe and George wouldn't have stood a chance in our last election.

The cost of winning the average US House race has more than doubled in the last 10 years. In the 1996 elections, nearly $800 million was spent on congressional campaigns.

As soon as we elect our representatives, their primary concern is **how they will raise the money** necessary for their re-election. For some, they weigh their guaranteed retirement benefits with their alternative of grubbing for $$$ and choose the easier alternative.

And for those who choose to run for re-election, all the **time they spend raising money is time they are not spending tending to the business they were hired to manage**.

As it is now, the largest donors buy the ears of our elected representatives. Special favors and tax breaks are the paybacks expected (and delivered in far too many cases) for generous campaign contributions.

By limiting the candidates who are able to raise $$$ required to run for public office, we now eliminate people whose primary interests are those that represent our values.

By **reducing the ante** to get into the game, we **open the process** to a more **diverse pool of candidates representing broader interest**.

The guy who coined the phrase "Build a better mouse trap and you get a smarter mouse" could never had envisioned the ingenious loopholes our lobbyists have created.

While some in the beltway don't think anything is broken therefore nothing needs to be fixed, others are concerned with what may have been **illegal fund raising** in our last session.

Truth is, it is what is legal that makes voters crazy. If private business attempted to operate in this manner, they would immediately be visited by our alphabet soup of federal agencies empowered to "protect the citizens."

So, what is the alternative?

Our coalition, **Arizonans For Clean Elections**, has been working on a **solution** that would **address all the current corruptive practices** on a state level.

We have concluded that the only plan that deals with all the major problems of our current system is the **clean money solution** using ***total public financing***. A 10% surtax on all civil and criminal fines currently provided under state law could finance the clean elections fund.

It would **lower the cost and length of campaign** and **block special interests** from using their campaign contributions to promote their special interests that may not be in the interests of the man on the street.

Candidates who choose to use ***total public financing*** will have to **agree to the following conditions**:

* Gather a set number of $5 contributions from voters in their district.
* Accept no private financing (including special interests, rich relatives or their own piggy bank).
* Accept spending limits.
* Shorten campaign time.

This is not about giving money to politicians, it's about the public taking power – taking control over our elections.

Your choice. Keep the existing system where the rich and special interest have the control or join us and make **CLEAN MONEY = CLEAN ELECTIONS a reality**!

Marilou Stanley, State Director
United We Stand America-Arizona 602-972-2969
Member of **Arizonans For Clean Elections Coalition**

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

Clean Money, Clean Elections

Visit our website at: www.azclean.org

Limit campaign spending ➡	Clean Election candidates must agree to fixed spending limits.
Remove the influence of big money from politics ➡	Clean Election candidates may only raise a limited amount of private money.
Level the playing field for voters and candidates ➡	All Clean Election candidates who agree to spending limits and demonstrate a broad base of support received a fixed and equal amount of citizen funds for the primary and general elections.

"Issues from healthcare to the environment are not being decided on merit, but by campaign contribution. This abuse must stop."

Ida Schwartz, President
AZ League of Women Voters

"Senators and Representatives . . . weigh every decision against the question, 'How will this affect my fundraising prospects?' rather than 'How will this affect the national interest?'"

Former US senator Barry Goldwater (R-AZ)

To find out more, call:

Arizonans for Clean Elections

(602) 840-6633 or email: info@azclean.org

Paid for and authorized by
Arizonans for Clean Elections
Endorsed by: League of Women Voters
and The Sierra Club

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

"YEAH, BUT . . . "

For more information,
contact "Arizonans for Clean Elections"
3336 N. 32nd Street, Suite 106,
Phoenix, AZ 85018, (602) 840-6633
E-mail: info@azclean.org Fax: 602-2236

The Most Asked Questions About Arizona's Clean Money, Clean Elections Initiative

Q *What does the Arizona Clean Money, Clean Elections Initiative do?*

A The Initiative addresses the most serious problems that concern voters. It will

- limit campaign spending
- shorten the campaign period
- prohibit special-interest contributions to participating candidates
- eliminate the need for candidates & lawmakers to waste valuable time doing fund raising so they can instead focus full time on doing their jobs
- provide a level playing field, financially, so good people without money or connections to special interests have a fair chance to run for office

Q *How will the Initiative accomplish these goals?*

A Candidates would receive a set amount of money from the Arizona Clean Elections Fund if they voluntarily agree to reject all private special-interest contributions, to limit campaign spending, and to shorten their campaign season.

Before receiving money from the Fund, candidates would first have to demonstrate that they had public support by collecting a specific number of $5 "qualifying contributions" to be deposited into the Arizona Clean Elections Fund.

Candidates who choose to raise money by continuing to use the old system - accepting contributions from wealthy special interests - would be faced with various disincentives to raise more money than a Clean Elections opponent.

It toughens up election laws by providing more oversight of campaign finance reports and increasing fines for those who break the laws that govern our democratic elections.

Q *Is it constitutional?*

A Yes. According to the U.S. Supreme Court, public financing of election campaigns is constitutional as long as the system is voluntary. Candidates do not have to choose it; they are free to reject public financing and continue raising and spending private money, just as before.

Q *Is there really a need for Clean Money Campaign Reform in a state like Arizona?*

A Yes. Despite past reforms, special-interest money still dominates AZ elections. The majority of the

money comes from a very few wealthy individuals, corporations, and PACs. Only ¼ of 1% of the American public gives more than $200 in campaign donations to candidates. Most candidates have to get money to run their campaigns from somewhere to compete; if not from us, then where?

Here lies the problem. Who do you suppose has the ready cash for campaigns? Those very wealthy special interests who have an issue before the Legislature. The concentration of that much political power - or the ability to disproportionately effect who gets elected - by a very small number of Arizonans is inherently undemocratic. In short, money talks, especially in politics, and campaign money is coming from the same interests who will be lobbying in Phoenix when Election Day is over.

Q *Are you saying that big contributors buy lawmakers votes?*

A No candidate would say that a contribution from a special-interest lobbyist would buy a specific vote. But one does question whether special-interest groups would contribute as much as they do today, sometimes millions of dollars, if they didn't think they would benefit in some way.

If a baseball player were to give a thousand dollars to an umpire before the umpire called him "safe" or "out," we'd call it a bribe. Period. If a defense lawyer were to give a thousand dollars to each member of a jury and the judge before they reached a decision or ruled on a case, we'd want that lawyer disbarred and thrown in jail.

Yet we allow big business, the wealthy, and special-interest groups to make large contributions to the very people who will vote on legislation that effects their future business profits/ concerns. We are not saying that these contributions are buying influence or votes. However, one might question why corporate welfare blossoms in AZ. During the last few years, our politicians have doled out huge corporate welfare subsidies, predominantly to the largest and most powerful businesses. The Diamondbacks got $240 million for their stadium. Intel got about $180 million for their Chandler factory, and Sumitomo got about $165 million for their north Phoenix factory. Even Dial Corporation received $7 million when they downsized their workforce by 250 jobs and moved to Scottsdale.

Q *What makes you think candidates will choose to finance their campaigns with Clean Money?*

A There will be strong incentives for candidates. No elected official likes having to spend so much time raising money, year in and year out. No challenger looks forward to the task of trying to raise the huge sums of money being spent today. And what candidate or elected official enjoys the public perception, if not the reality, that they are compromised by their acceptance of large contributions from special interests?

Q *Won't the publicly-funded candidates still get buried by wealthy, self-financed candidates who do not need to fund raise and can spend as much money as they want - such as Steve Forbes & Ross Perot?*

A No. Under this Initiative, participating candidates will get a dollar-for-dollar match, up to a set limit. If a non-participating opponent spends more than the public financing limit, the Clean Money candidate is eligible for up to three times the set amount. In addition, under a system that offers public funding, candidates will have the "free-of-special-interest" leverage that a Clean Money campaign will provide. This benefits the image of *all* candidates that participate.

Q *How much will Clean Money Campaign Reform cost? How will it be paid for?*

A Assuming near total participation by candidates, we estimate this system would cost approximately $8 million a year from a state budget of $6 billion, or about $5 per year per tax paying family. Revenue for the Clean Money Fund will come from a combination of sources. Funding sources include a $5 check off on state income tax forms (a taxpayer that checks this box also receives a $5 reduction in the amount of tax owed), a $100 annual fee for lobbyists representing commercial or for-profit activities, a 10% surcharge on civil and criminal fines and penalties, plus taxpayers may redirect tax owed to the state to the Clean Elections Fund (up to 20% or $500 whichever is greater). All the $5 "qualifying contributions" candidates collect would also be put in the Fund. To put the cost of Clean Elections in perspective, if we simply repealed the 1997 legislature's tax cut giveaway to the 1,300 people who already make more than a million dollars a year, we would have enough money to pay for the whole proposal.

Q *What is "Arizonans for Clean Elections?"*

A Arizonans for Clean Elections is a growing, broad-based citizens' organization that is bringing energy, hope and concrete solutions to the campaign finance reform movement. It is a nonpartisan organization that is working toward putting a Clean Money, Clean Elections Initiative on the Arizona ballot in 1998. Supporters currently include the League of Women Voters of Arizona, Common Cause of Arizona, Arizona Sierra Club, National Organization for Women, National Association of Letter Carriers, United We Stand-Arizona, Arizona Citizens Action, several community leaders, and the list goes on.

Coalition members believe the way to end the corrupting relationship between special interests and politicians is to offer another way to finance campaigns. They believe if candidates choose Clean Money Campaign Reform, they can free themselves of big-money special interest & the conflict of interest that invariably follows. The coalition is offering citizens, candidates, & politicians a better way.

Citizens must get engaged, take responsibility for the problem, and solve it. Please join the team and help make democracy work in Arizona. Apathy translates Into approval of the current system.

Q *Won't the public see this as just another government spending program, or worse, a welfare program for politicians?*

A Clearly, the public distrusts politicians, and taxpayers are wary of new public expenditures. However, Clean Money Campaign Reform is very likely to save taxpayers money. Studies show that wealthy individuals and powerful corporations who supply most of the money for congressional campaigns are the recipients of billions of dollars of unnecessary tax breaks, subsidies, and regulatory exemptions. By eliminating candidates' dependence on these big-money donors, Clean Money reform will make it more likely that lawmakers will be able to say 'no' to these kinds of costly giveaways.

Q *Won't Clean Money enable "fringe candidates" to run for office with public money?*

A The public has a right to support whomever it wants, but qualifying requirements will be stiff enough to deter fringe candidates who lack public support from getting public financing. Some form of public financing already exists in 22 states and a number of municipalities. Where these systems are in place, the fears that opponents had raised about public money going to fringe candidates have not come to pass.

Q *What about the person who says, "I can't give time to help a candidate. Why shouldn't I be allowed to give money?"*

A People will still be able to give money after Clean Money reform. During the primary period, they can give a $5 "qualifying contribution" and a small amount in "seed money" to help their favorite candidate qualify for public financing. And, of course, they can still make a financial

contribution to a political party. It's important to point out that contributing money to political campaigns is not one of the principal ways most people participate in the political process. Studies show that 96% of the American people make no political contributions at all, & that most of the money in congressional races comes from less than ½ of 1% of the population.

Q *Why total public financing? Why not push for partial public financing, or a matching system like the one we have for presidential primaries.*

A This past round of presidential primaries, like the ones before it, made it abundantly clear that providing matching money does not solve the problems that the public is rightly concerned about. If candidates must solicit or use **any** special interest or private money, they have compromised their independent position.

Q *Is the passage of a Clean Money, Clean Elections Initiative a real possibility or just wishful thinking?*

A Clean Money Campaign Reform is more than a dream or wishful thinking. It's already state law in Maine, where it was approved by voters in Nov. by a 56 to 44 percent victory. A grassroots movement is gaining momentum across the U.S., and nearly two dozen other states are working on similar items.

A system similar to this has worked successfully in Tucson for years for their city elections. As a result, candidates for mayor spend less now in real dollars than they did ten years ago ~ a

statement that is not true of any other major city in the country.

Q *What's the long-term strategy/goal?*

A The national strategy is to focus on the state level first. Maine's passage of full public financing for candidates was the first step in the journey toward the end goal of passage of such legislation on the federal level. It is hoped that 3 or 4 more states will pass similar legislation in 1998 ~ the leaders of this movement are looking to Arizona to be one of those states. Once the public has demonstrated broad support for this idea across the nation, we will then demand that Congress pass a similar system for all federal elections, including Congress & the presidency. Senators Paul Wellstone, John Kerry, and John Glenn have introduced a Clean Money, Clean Elections bill in the Senate. But they need the grassroots support from across the country to make our congressional representatives listen. After all, the majority of the elected officials aren't going to upset the system that got them where they are. The system worked for them, so obviously, in their eyes, the system isn't broken, so why fix it? We need to help enlighten them and push for change . . . change that makes $ense!

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

Difficult questions about Clean Elections:

We must be prepared to answer difficult questions on our initiative. Initiatives are susceptible to attack because generally the public knows little about their details and is more apprehensive about "the devil they don't know" than "the devil they know." Here are some responses to the most difficult questions.

Will this increase my taxes?

No, it won't. Taxpayers may direct a portion of their tax obligation to the Clean Elections Fund, but they do not have to pay more than before. In fact, it's just the opposite of a tax increase. Clean Elections will result in savings. Under our current system, special interests get tax breaks and subsidies as a result of currying favor with elected officials. Clean Elections severs the link between special interests and the politicians we elect and will help eliminate the "pork" projects that cost taxpayers millions every year.

How much will this cost?

Very little. To get big money out of state elections and to reduce campaign spending, Clean Elections will cost less than 2 percent of the current *budget surplus*. It amounts to approximately $5 for each Arizona household. Compared to the special favors and tax

breaks that wealthy individuals and special interests get in return for their contributions, Clean Elections should result in a savings of tax dollars. The annual appropriation for the fund would be capped, and any extra funds allocated would roll back to the general fund.

Where will the money come from?

We think the money should come from savings in tax breaks and subsidies that corporate special interests now get for their campaign contributions. If voters pass Clean Elections, money will come from an increased fee on lobbyists, a $5 voluntary tax check-off that features a $5 rebate, a 10% surcharge on civil and criminal fees and fines. Taxpayers may also direct up to 20% or $500 of their tax obligation to the Clean Elections Fund.

Who would administer the Clean Elections fund?

The Clean Elections Commission will administer and oversee the system. The committee would be picked from a pool of candidates nominated by the judiciary nomination board. The highest ranking official from each party would choose from the candidates sequentially.

Will this create a new, larger bureaucracy?

No. Voters need an enforcement agency that has the power and the teeth to oversee elections, and to identify and correct violations of the law when they happen – not after the election is won or lost. Today, Arizona has some of the strictest election laws in the country, but they are not enforced. Many legislators do not file complete reports and they are not on time. We should be proud that here in Arizona we will have an independent and effective agency set up to administer disclosure. We learned in 1994 that tinkering with the current system – through lower contribution limits alone – won't fix the problem. We need both spending and contribution limits. Providing free or reduced media time to candidates who agree to spending limits and to reject big money from special interests should be an important piece of federal reform. But free TV time alone won't eliminate the influence of special interest money on candidates and elected officials. Instead, it simply subsidizes the private financing of public officials. It's throwing good money – or resources -- after bad. The airwaves do belong to the public, but so does our government. Let's not have one without the other.

I'm all for campaign finance reform, but not this.

Let's go back to basics: reform must get rid of special interest money; make elections more competitive; level the playing field; return to the principle of one

person, one vote; and give average people a fair shot to run and win elective office. Clean Elections is the only reform proposed in this state that accomplishes these goals. The *"I'm for reform but not this"* argument is a classic dodge that defenders of the status quo on Beacon Hill and Capitol Hill use to criticize proposals that challenge their power. It allows them to say they support something while doing nothing. Lets not fall into that trap. Clean Elections is the best alternative to get the kinds of results voters are looking for reducing the influence of big money in politics, setting reasonable spending limits, leveling the playing field, ending the money chase, and shortening campaigns for all candidates and voters alike. It is the only proposal endorsed by leading Republicans and Democrats in Arizona, major newspapers, many citizen organizations, and leading public figures. Citizens are working feverishly to collect the signatures to get on the ballot. If you want campaign finance reform now, Clean Elections is the answer.

The initiative is unnecessarily complicated.

It's actually quite straightforward. I've read it. Campaign finance reform is an inherently complicated problem and no *comprehensive* reform is simple. Arizona voters are more than smart enough to read and understand the importance of the Clean Elections Law. They certainly understand the current special interest-controlled system doesn't work for them. Clean Elections sets spending limits, contribution limits, and provides a fixed amount of money for

qualified candidates. It ends the money chase and shortens campaigns. It's as simple as that.

Isn't it ironic that you're going to raise large contributions and spend lots of money to win campaign finance reform?

It takes money to get big money out of politics. We're talking about far-reaching, but common sense reform. We have our work cut out for us. Do you think opponents of reform will think twice about doing what they always do – spending lots of money on negative distorting TV ads to defeat this? We can't tie our hands behind our back. Our democracy is too important.

U.S. District Court for the District of Arizona

(Filed Jun. 13, 2009)

[Title Omitted In Printing]

Justification for Clean Elections Matching Funds

There are two main reasons for matching funds: fairness and limiting overall campaign spending.

Fairness

Currently, legislative candidates receive $28,300 in base funding ($11,320 primary, $16,980 general) For governor, $950,000 ($380,000 primary, $570,000 general)

Obviously, if an opponent raises two or three times that amount, Clean Elections candidates will be vastly outspent and will most likely defeated. Matching funds promote fairness, and elections are decided by who has the best ideas, not the most money.

Some have proposed eliminating matching funds and giving each Clean Elections candidate a higher base amount. Again this leaves CE candidates at the mercy of a good traditional fundraiser, who knows up front how much to raise in order to outspend the CE candidate.

A higher base amount is wasteful in situations where the CE candidate is running unopposed. And there may come a day when a higher initial grant would cause a shortfall in the Clean Elections Fund.

Matching funds limit spending.

A traditional candidate may think twice about raising additional funds in a race against a Clean Elections candidate. For every dollar raised above the base amount, the CE candidate is matched. There is no incentive for the traditional candidate to raise and spend more, unless that candidate intends to outspend the CE candidate by going beyond three times the initial grant.

The initial grant amount sets the tone for the race. In a race with two or more CE candidates, all must abide by the initial amount.

Without matching funds, many contests will simply become bidding wars. It's becoming more commonplace for nonparticipating state senate candidates to exceed $100,000 in spending (Jim Weiers and Barbara Leff in 2002, Jake Flake, Bill Konopnicki and Slade Mead in 2004).

With the Clean Elections matching funds system, it can be argued that millions of dollars in spending never takes place. That money should come back to consumers in lower prices and fewer favors for the special interests who otherwise would be donating.

U.S. District Court for the District of Arizona

(Filed Jul. 17, 2009)

[Title Omitted In Printing]

ELECTION REFORM STUDY COMMITTEE

FINAL REPORT

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ELECTION REFORM STUDY COMMITTEE
FINAL REPORT

INTRODUCTION

PURPOSE

The Election Reform Study Committee was established by Laws 1991, Chapter 241. The purpose of the study committee, as stated in the promulgating legislation, is to develop specific recommendations for both statutory and constitutional changes needed to enact positive ethics and election reforms including at least the following areas:

1. Campaign finance
2. Lobbyist registration and financial disclosure
3. Laws governing elected officials
4. Laws regarding the initiative and referendum process
5. Voter registration laws
6. Absentee voting process
7. Campaign ethics
8. Enforcement of election laws

MEMBERSHIP

The following members were appointed by the Governor:

1. Susan Bitter Smith
2. Mark Dioguardi
3. Eugene Hughes
4. Henry Kenski
5. Billy Shields

The following members were appointed by the President of the Senate:

1. Senator Alan Stephens, cochair
2. Senator Manuel "Lito" Pena
3. Senator Lester Pearce
4. Senator Ann Day
5. Bruce Burke
6. Tim Delaney

The following members were appointed by the Speaker of the House of Representatives:

1. Representative Patti Noland, cochair
2. Representative Bev Hermon
3. Representative Peter Goudinoff
4. Representative Benjamin Hanley
5. Steve Betts
6. Robert Matthews

* * *

ELECTION REFORM STUDY COMMITTEE RECOMMENDATIONS ON CAMPAIGN FINANCE

PURPOSE

The Election Reform Study Committee was directed to develop specific recommendations for statutory and constitutional changes regarding campaign finance laws. To ensure that this area was thoroughly reviewed, the Study Committee created the Subcommittee on Campaign Finance. The subcommittee was requested to examine the following general subject matters along with other issues the subcommittee deemed appropriate:

1. Fund raising activities during the legislative session
2. Disclosure of funding and reporting requirements for independent campaign committees
3. Public financing of campaigns
4. Proposition 200 limits and technical corrections

MEMBERSHIP

The following persons were appointed as subcommittee members at the first meeting of the Election Reform Study Committee:

1. Representative Peter Goudinoff, chair
2. Representative Bev Hermon
3. Bruce Burke
4. Mark Dioguardi
5. Henry Kenski
6. Robert Matthews
7. Billy Shields

MEETINGS

The Subcommittee on Campaign Finance met on July 11 and August 1, 1991. A joint subcommittee meeting of the Elections Laws, Personal Disclosure Requirements and Enforcement Subcommittee and the Campaign Finance Subcommittee was held on September 5, 1991.

ISSUES AND RECOMMENDATIONS

Below are the recommendations relating to campaign finance that were adopted by the Election Reform Study Committee. A copy of the proposed legislation is included in Appendix F.

I. Independent Campaign Committees

The Election Reform Study Committee recommends that independent campaign committees be subject to further disclosure and reporting. Specific language is included in Appendix B of this report.

II. Proposition 200 Technical Corrections

The Election Reform Study Committee recommends the technical corrections to the campaign finance statutes contained in Appendix B of this report. The draft contains the following provisions:

- Eliminates the confusion resulting from the current use of the term "campaign committee" by replacing it with the more descriptive term "political committee" to cover all organizations who must register and report. Candidate campaign committees are under the umbrella of political committees. The current use of the term "campaign committee" has caused confusion among noncandidate committees concerning their need to comply because they believe the term applies only to candidate committees.

- Provides new definitions for the following terms:

  Agent
  Anonymous contribution
  Candidate
  Candidate's campaign committee
  Clearly identified candidate
  Contribution
  Earmarked
  Election
  Expenditure
  Identification
  Independent expenditure
  In-kind contribution
  Itemized
  Personal funds
  Political committee
  Political party
  Sponsoring organization
  Statewide office
  Surplus funds

- Changes the name of the initial registration statement for political committees to "Statement of Organization" to conform to existing practice and common understanding and usage.

- Requires political committees to register within 10 days of their designation or organization. This is more realistic than the current requirement that committees register before having any financial activity since there usually are some expenditures that must be made in connection with organizing a committee.

- Requires political committees to include in their registration the name of any sponsoring organization.
- Requires political committees to have at least one bank account and to disclose where their accounts are maintained.
- Requires certain out-of-state or federal political committees to file certain campaign finance reports from other jurisdictions when registering in Arizona.
- Allows a candidate to designate only one campaign committee for each election. All filing of finance reports will be done by the candidate's committee. The current system is confusing because reporting obligations exist for both the candidate and the committee. There would no longer be a question concerning whether the candidate is required to file a Contributions and Expenditures Statement or simply a Statement of Exemption.
- Prescribes that a candidate who receives contributions and makes disbursements is an agent of his campaign committee.
- Provides that the mere designation of a candidate's committee would not invoke Arizona's resign-to-run law.
- Provides more detailed duties for the treasurer of a political committee.
- Proscribes giving false information to the campaign treasurer regarding receipts and disbursements.

- Clarifies what occurs when a candidate contributes the threshold amount of personal funds.
- Provides that a committee's qualification and certification to make contributions at the higher committee limits is valid for two years.
- Clarifies that only unemancipated minors are not entitled to have their own contribution limits.
- Provides methods for designating how contributions are to be applied to various elections.
- Sets forth how an endorsement, guarantee or repayment of a loan is treated.
- Proscribes certain methods of making contributions, including earmarked contributions.
- Provides that contributions from partnership funds be made as individual contributions.
- Provides for regular reporting of independent expenditures by political committees and for reporting of independent expenditures within 24 hours if the expenditure is made 20 days before the election.
- Provides for more than the reporting of only contributions and expenditures by requiring that all receipts and disbursements be included. The current statements of contributions and expenditures are replaced with campaign finance statements, which more accurately describe the content.
- Requires political committees to file periodic campaign finance reports, regardless of whether

any receipts or disbursements occur, according to a new schedule:

  - In an election year, reports would be filed before each election, after any non-primary election and quarterly.

  - In a non-election year, a report for the period ending June 30 and a report for the period ending December 31 would be filed.

- Exempts judges who are candidates for retention from filing a campaign finance report if the judge has no campaign committee and does not receive contributions or make expenditures.

- Provides for the formal ending of a political committee by the filing of a termination statement, and prescribes the conditions that must be met for termination.

- Details more accurately the information to be required on each campaign finance report. This also reflects the intent to capture all receipts and disbursements and not just traditional contributions and expenditures.

- Amends the section pertaining to disposal of surplus campaign funds by eliminating duplications and unnecessary distinctions that currently exist while retaining the recently enacted prohibition against converting surplus funds to a candidate's personal use.

- Clarifies when a required report or statement is deemed to be filed.

- Requires that a political committee that makes independent expenditures aggregating $500 made

less than 20 days before an election must report the expenditure within 24 hours.

- Allows campaign committees to incorporate only for liability purposes without prohibiting them from influencing candidate elections.

Additional Items Discussed by the Election Reform Study Committee But Not Adopted:

I. Voluntary Expenditure Limitations

The Election Reform Study Committee considered the issue of voluntary campaign expenditure limitations. A motion to recommend the adoption of voluntary campaign expenditure limits was withdrawn.

II. Public Financing

The Election Reform Study Committee discussed the issue of public financing and recommended that it not be pursued.

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

Arizona Daily Star

February 8, 1991

Videotapes show payoffs

Ariz. legislators, lobbyists appear at sting meetings

Mary K. Reinhart; The Arizona Daily Star

Arizona legislators were immortalized on videotape taking stacks of money from a man they knew as J. Anthony Vincent in exchange for their votes.

Phoenix police released the tapes and transcripts yesterday of meetings between the undercover police agent and lawmakers and lobbyists as they mapped out strategies to legalize gambling and get rich from the 500-room casinos that would result.

The investigation by the department's organized crime bureau and the Maricopa County Attorney's Office produced 22,000 pages of transcripts, 600 audio cassettes and 300 videotapes.

Authorities used former FBI informant Joseph Stedino to set up an elaborate sting operation in which Stedino posed as Vincent, a fast-talking, free-spending Reno, Nev., gaming consultant who wanted to buy votes to set up gambling operations in Arizona.

Lawmakers and lobbyists were taped during meetings with Vincent at his plush Phoenix office and apartment, the Ritz-Carlton Hotel, and in cars and restaurants. Telephone conversations also were taped.

On Sept. 18, Sen. Carolyn Walker, D-Phoenix, met Vincent at his office and accepted $15,000 in cash – 15 $100 bills – telling Vincent: "We all have our prices."

She tells Vincent she will support casino-gambling legislation, as well as bills to allow private firms to construct prisons and the election of judges.

The color videotapes show a relaxed Walker wearing a lime-green shirt and Indian-print skirt sitting in an armchair across from Vincent, who is seated behind a desk. She sips Diet Coke, laughs and talks about using the money to finish paying her daughter's college tuition.

A month later, Walker met Vincent and asked for a loan of $500,000 to $750,000 to launch a recording company. Vincent told Walker he would let his friends in the recording industry know that Walker was "with him."

"Well, that's one of the reasons why I came to you 'cause I figured that I would have some of your protection," Walker said, according to court records. "I'm on board with ya, let me tell ya."

Another video, made Sept. 18, shows Sen. Jesus "Chuy" Higuera, D-Tucson, sitting across the desk

from Vincent in Vincent's office, eating sandwiches and discussing Higuera's running the shrimp concessions at casinos that Vincent would open once casino gambling was legalized.

"I'd like to own a business that supplies your shrimp. That's what I'd like to do," Higuera said on the videotape.

Higuera agreed to support casino gambling legislation. Vincent gave Higuera $1,540 in money orders and $1,000 cash.

A video made at Vincent's office April 30 shows Rep. Don Kenney, R-Phoenix, lobbyist Ron Tapp and Vincent discussing the legislation. Kenney agreed to "quarterback" the operation, and was handed a stack of bills that an indictment alleges was $55,000. He put the money into a gym bag that he brought to the meeting, according to court records.

Other new developments in what could be the biggest political scandal in Arizona history:

-- The indictment of Gary Bartlett, a Phoenix private investigator hired by Vincent to drum up support among legislators for the gambling legislation.

Bartlett was among 16 people indicted by a Maricopa County grand jury Tuesday on charges that include bribery and money laundering. But was not served with the indictment until yesterday.

The charges against Bartlett, who introduced Vincent to Kenney, include bribery, money laundering and

leading an organized crime. The Class 2 and 3 felonies carry penalties of 10 to 14 years in prison.

– The Senate hired Phoenix attorney Ed Hendricks as special counsel to investigate the allegations against three Democratic members – Higuera, Majority Whip Walker and Majority Leader Alan Stephens of Phoenix.

Hendricks is a partner with the firm of Meyer, Hendricks, Victor, Osborn and Maledon, joining the firm in 1971. He earned his law degree from the University of Arizona in 1969.

Stephens and Walker have been placed on "inactive" status from their roles in the Senate leadership, and Higuera voluntarily stepped aside as chairman of the Government and Public Safety Committee.

Higuera and Walker are among seven legislators charged in a 103-count indictment alleging they took money in exchange for their support of casino gambling legislation. A total of 16 people have been indicted in the case, but one person has yet to be served.

Stephens, Higuera, Walker and those charged in the criminal indictment are named in a civil racketeering suit seeking about $2.5 million in damages and to cover the cost of the 16-month-long investigation.

Also charged in the indictment and racketeering suit are Kenney, chairman of the Judiciary Committee and House parliamentarian; Rep. Jim Meredith, R-Phoenix, Rules Committee chairman and former

House majority leader; Rep. Jim Hartdegen, R-Casa Grande, chairman of the Natural Resources and Agriculture Committee; and Democratic Reps. Bobby Raymond and Sue Laybe, both of Phoenix.

Lobbyists Ernie Hoffman of Tucson, Rich Scheffel and David Horwitz also were indicted. Scheffel has entered a plea agreement to one count of conspiracy to commit bribery and is cooperating with authorities in the ongoing investigation.

Also charged were George Stragalas, an unsuccessful Democratic candidate for state treasurer last year; Shiree Foster, a representative with the Arizona Chamber of Commerce; David Manley, a Maricopa County Democratic Party official and also an aide to state schools Superintendent C. Diane Bishop; and Tapp.

In announcing the hiring of Hendricks as special counsel, Senate President Peter Rios, D-Hayden, said the investigation is intended to "get to the bottom of these circumstances," but should not be viewed "as reflecting upon the guilt or innocence of any individual."

Unlike House Speaker Jane Dee Hull, R-Phoenix, Rios has not asked his members to resign.

"A fair and impartial review by the (legislative) Ethics Committee is essential to determine if any illegal or unethical behavior has, in fact, occurred which impairs the ability of individual legislators, and the Senate as a whole, to carry out their official

duties in an honest and ethical manner so that the integrity of the legislative process can be maintained," Rios said.

Sen. Jaime Gutierrez, D-Tucson, chairman of the five-member ethics panel, helped choose Hendricks as the special counsel. Hendricks fee is $200 an hour, not including the cost of paralegals and other staff.

"His law firm is not known as a Democratic or Republican law firm," Gutierrez said. "He is knowledgeable, he has credibility, he has the temperament and demeanor for the job."

Gutierrez estimated that it would take Hendricks several weeks to complete his investigation and report back to the Senate.

Meanwhile, the House will decide Monday how to proceed with its investigation. The House also plans to hire a special counsel from a private firm.

U.S. District Court of the District of Arizona

(Filed Jun. 12, 2009)

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Los Angeles Times
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February 9, 1991

Section: MN – Main News

Indictment of Lawmakers Another Blow to Arizona Ethics: Sting follows Mecham, King controversies. Case is one of series involving legislators around nation.

L FELDMANTIMES STAFF WRITER
TIMES STAFF WRITER

PHOENIX Nine minutes before stuffing what police say was $55,000 in cash into a gym bag, Arizona State Rep. Don Kenney sounded a bit nervous.

"You sure there isn't a camera?" Kenney asked J. Anthony Vincent, purportedly a deep-pocketed Las Vegas lobbyist seeking legalized casino gambling in Arizona. " . . . I remember those videotapes of the Abscam trial."

Kenney, chairman of the House Judiciary Committee, had greater intuition than he imagined.

Vincent was actually an ex-con named Joseph C. Stedino who was serving as a sting man for the Phoenix Police Department. And, despite Vincent's repeated denials, a hidden camera was indeed recording the action as Vincent counted and doled out the

cash during a nearly two-hour meeting in his posh northeast Phoenix office last April.

In all, more than 200 video and 600 audiotapes of a yearlong series of sordid sessions are at the heart of a 102-count **bribery** and money-laundering indictment handed up this week against Kenney, six other **Arizona** state **legislators** and 10 lobbyists and political activists.

The Maricopa County grand jury action accuses the lawmakers of agreeing – often in B movie-style language – to support casino gambling legislation in return for cash bribes. An accompanying civil racketeering suit seeks more than $2.5 million in damages from 18 defendants, including two additional state legislators.

The sting, dubbed Operation Desert Shame by the Phoenix media, is but the latest in a series of eye-catching episodes that have brought unwanted national attention to Arizona.

In 1988, it was the impeachment and removal from office of conservative Republican Gov. Evan Mecham. Last fall, it was voters' rejection in referendums of measures establishing a paid state holiday honoring Dr. Martin Luther King Jr.

Now, nearly one-tenth of the entire Arizona Legislature faces criminal or civil charges.

"We've had a lot of bad luck here in the state of Arizona – there's absolutely no question," said County Atty. Richard M. Romley, who is prosecuting the

current case. "But you can't turn your back on this. . . . Public corruption is one of the most serious of all accusations."

And the emerging scandal is only the latest in a nationwide string of stings in which state legislators have been implicated in wrongdoing:

– In South Carolina, nine state lawmakers were indicted late last year after they accepted cash from a federal undercover agent to support a bill to allow parimutuel betting on horse and dog races.

– In California, former Sens. Paul Carpenter and Joseph P. Montoya were sentenced to federal prison last year for crimes that included extorting money to push legislation benefiting companies – bogus companies set up by the FBI.

– Since 1985, 10 New York state legislators, including Assembly Speaker Mel Miller, have been charged with criminal conduct – more than have lost their seats in general elections, according to one watchdog group.

– And, in Texas, House Speaker Gib Lewis was indicted last December on a charge of failing to report a gift from a law firm that holds contracts to collect delinquent taxes.

"Over the last few years, the public has been building up a negative perception of politicians in general, and this reinforces it," said Tommy Neal, a policy associate for the Denver-based National Conference of State Legislatures.

Some experts on legal ethics, such as UCLA School of Law Prof. Daniel Lowenstein, say the scandals may stem from staggering increases in the cost of running for state office.

"Legislative candidates now feel the same pressure to raise campaign funds as has been true for people in Congress," Lowenstein said.

Thomas Puccio, who prosecuted the seminal Abscam case – which brought down a U.S. senator, six congressmen and the mayor of Camden, N. J., a decade ago – takes a different tack.

"Corruption in state and local and federal government is something that's always with us," said Puccio, now a private New York attorney. "(But) the state may not have been policed as much (in the past).

"The federal government has now passed on a lot of its (investigative) techniques to state and local governments, and they employ these procedures.

"It's sort of become a little like McDonald's – a franchise. It's done all over the place now, and it's a very successful technique."

In the Abscam probe, lawmakers, including New Jersey Sen. Harrison A. Williams Jr., were taken in by hustler Mel Weinberg, who posed for the FBI as, of all things, an Arab businessman.

The Arizona case has brought to the forefront the glib, good-looking Stedino, a onetime Las Vegas TV personality who was sentenced to a year in federal

prison in 1984 after pleading guilty to a scam involving $150,000 in stolen traveler's checks.

Initially, Stedino, who had been a police informant in Nevada, was hired by the Phoenix police to assist in an undercover investigation of gambling scams in Phoenix-area bars. But Stedino quickly learned, authorities say, that state legislators would be willing to support legalized casino gambling in Arizona in exchange for cash.

"At first, I was very skeptical, but the evidence kept accumulating," 10-year Phoenix Police Chief Ruben Ortega said. "We had come upon a system of corruptiveness that we felt could not be ignored."

In meetings with lawmakers in a third-floor office of a glass-and-granite office building kitty-corner from the Ritz-Carlton Phoenix, Stedino portrayed himself as Vincent, a Vegas hustler with mob ties, who planned to open a casino in Arizona if gambling were legalized.

During the April meeting with Kenney, court documents state, Vincent agreed to give the lawmaker $55,000 in cash in exchange for his vote and sponsorship of casino gambling legislation. "I understand that exactly," Kenney is quoted as responding.

In the following months, operatives, including Kenney, who was labeled the "quarterback" of the scheme, steered additional lawmakers to Vincent.

Of the legislators indicted, three, including Kenney, are Republicans. The other four, including state Sen. Carolyn Walker, are Democrats.

Majority Whip Walker, who cast what turned out to be the deciding vote on Mecham's impeachment almost three years ago, met with Vincent on Sept. 18. Court documents state that she accepted $15,000 after telling the sting man, "We all have our prices."

In another meeting that month, state Sen. Jesus (Chuy) Higuera, chairman of the Senate Government Committee, asked Vincent for the shrimp and fax machine concessions at the casino he would eventually open.

The next month, in another session recorded on video, state Rep. Bobby Raymond told Vincent that there was "not an issue in the world that he gives (an expletive) about," according to the indictment. Later, Raymond informed the sting man that his favorite line was: "What's in it for me?"

The scope of the indictments and the graphic content of the fuzzy color videotapes have left Arizona reeling.

Leaders of the state Senate and House have called for the creation of ethics committees. And most of the legislators named in the criminal and civil actions have stepped down, at least temporarily, from their leadership posts.

Last Thursday night, the local CBS-TV affiliate broadcast more than 90 minutes of the videotapes, showing

meetings between Vincent and legislators, including Kenney, Walker and Raymond.

And even Mecham, the pariah of Arizona politics, is back in the news, telling reporters that the indictments are "a small tip of a small little piece of ice in a great big pond of corruption."

Arraignments are scheduled for Valentine's Day, but already one defendant, lobbyist Richard Scheffel, has pleaded guilty to bribery conspiracy and agreed to cooperate with prosecutors.

County Atty. Romley said that the investigation is continuing, and insiders say the scandal could eventually taint several additional leading Arizona state lawmakers.

The indictments and the videotapes have stirred negative reaction from several Arizona law professors and officers of the American Civil Liberties Union.

"The job of the police should be to discourage crime, not create it," said Louis Rhodes, executive director of Arizona's ACLU chapter, at a Phoenix press conference.

However, Ortega strongly defends the investigation, noting that it did not start out as an effort to target lawmakers. Moreover, Ortega emphasized, Vincent was carefully monitored to avoid accusations of entrapment: He made no initial contacts of his own with the legislators and made no initial monetary offers to them.

"All comments or requests or demands for monies or goods would initially come from the suspect himself or herself," Ortega said. "And that was exactly what happened with every one of them."

Both Ortega and Romley say they had many sleepless nights during the investigation, worrying, in particular, about whether cash given to the legislators might help them win elections they would otherwise have lost.

"There is a possibility (that happened), absolutely," Romley acknowledged in an interview with The Times.

"That is one of the difficult issues I had to address. I knew that, and, you know, it's kind of a Catch-22 situation. If you don't give them the money, even though all indications are they want to take a bribe, well, they could still win and be in office for 10 years. Or, if you give them the bribe, you go forward and you aggressively pursue it and you convict them and they're barred from office for life."

"There's one bottom line," Romley added. "I mean we can play all the games we want. But I'm going to show the tapes (in court). And the tapes will speak for themselves.

"They don't lie."

U.S. District Court for the District of Arizona

(Filed Jun. 15, 2009)

[Title Omitted In Printing]

Arizona Daily Star

February 10, 1991

Excerpts from indictment tell tale of political deals

The Arizona Daily Star culled excerpts from a Feb. 5 Maricopa County Grand Jury indictment of state legislators, lobbyists and their associates.

The indictment charges seven legislators and nine other Arizonans with bribery, money laundering, campaign finance law violations and other offenses.

On Jan. 19, 1990, former Democratic Party executive director George Stragalas III was introduced to police undercover agent Joseph Stedino, known during the sting operation as "J. Anthony Vincent."

Vincent told Stragalas, who last fall lost a bid for state treasurer to former Republican legislator Tony West, that he wanted to seek legislators' support for legalized gambling. Stragalas told Vincent that legislators were "whores."

In eight payments between March 26 and Oct. 30, Stragalas would accept $27,450 from Vincent.

On Feb. 5, 1990, Vincent had a telephone conversation with Gary L. Bartlett, a Phoenix private

investigator Vincent had hired, in which Bartlett described Rep. Don Kenney, R-Phoenix, as a "crook."

Bartlett was a securities salesman in 1978 when he ran as a Democrat for state treasurer, losing badly to Republican Clark Dierks.

During that campaign, Bartlett lost the support of then-Gov. Bruce Babbitt and other Democratic Party stalwarts when his record of securities-sales irregularities in other states came to light.

On Valentine's Day last year, Bartlett told Vincent that he knew a 19-year-old prostitute he believed could influence Kenney.

A week later, Bartlett told Vincent he planned to get to legislators with "cash, booze" and sex.

On April 16, Ronald G. Tapp of Phoenix, then-president of the Arizona Bail Bonds Association, who had been enlisted to help Vincent, told Vincent that Kenney had ambitions to be House speaker.

To attain that post Kenney would need money to contribute to other House Republicans on a loan basis, but with no repayment, Tapp said.

On April 25, Tapp told Vincent: "Kenney's budget will be 45 grand." He said the money would make Kenney chairman of the House Judiciary Committee, through which a bill to legalize gambling would go.

On April 30, in Vincent's office, Kenney laid out what had become a $55,000 plan to Vincent.

Kenney said he would need the support of Democrats – among them then-Senate Minority Leader Alan Stephens of Phoenix (who was not indicted, but who faces a civil racketeering lawsuit), and Rep. Bobby Raymond, also of Phoenix – as well as Republicans.

Kenney agreed to "quarterback" the effort. He put $55,000 in cash from Vincent into a gym bag and left.

On July 2, Tapp told Vincent that Rep. Jim Hartdegen, R-Casa Grande, had agreed to sponsor a bill to legalize gambling, but had said he could not be bought. Kenney said Hartdegen accepted $220, the legal limit, from Vincent.

A week later, Kenney told Vincent that House Speaker Jane Dee Hull, R-Phoenix, had promised him the Judiciary Committee chairmanship in return for his vote on the 1990 tax increase and budget package.

Rep. Sue Laybe, D-Phoenix, met with Vincent in his office on Aug. 2 and told him she needed $10,000, and that what the two discussed would stay with them "to the grave."

Later that day, Vincent paid Arizona Chamber of Commerce representative Shiree Foster $200 to become a chamber member.

On Aug. 7, Vincent handed $10,000 in cash to Laybe, and she counted it in his office. Laybe agreed to co-sponsor the bill to legalize gambling.

Foster went to Vincent's office the next day and told him she knew several legislators, including Sen. Jesus "Chuy" Higuera, D-Tucson.

"All I can do is charm them and, you know, get them in here, and then you can take care of the rest," Foster told Vincent.

A busy Vincent talked on Aug. 9 with David Horwitz, lobbyist for the American Federation of State, County and Municipal Employees union, whom he had met on July 25. Horwitz told Vincent that he had ways to shuffle money.

Higuera met with Vincent on Aug. 17 and told the gambling proponent he could work with him on many fronts. Higuera said he wanted the shrimp concession in the casinos Vincent would build.

Three days later, Stephens went to Vincent's office and advised Vincent not to make the legalized gambling plan public before the November election. Stephens asked for $440 in campaign contributions from Vincent and Vincent's wife.

Lobbyist Ernest Hoffman met with Vincent on Aug. 23. Hoffman advised Vincent to commission an economic study and a research poll on legalized gambling. He said a poll could be disguised to influence voters.

Hoffman said he used his daughters to distribute campaign money to candidates in excess of legal limits.

He told Vincent: "It's a dirty shame to have Proposition 200 (which set the campaign-finance limits); it's a whore's dream."

Sen. Carolyn Walker, D-Phoenix, met with Vincent on Sept. 6 and told him she needed $5,000 for her campaign. They discussed Walker's getting the "gift shop" business at Vincent's planned casinos on the "back end."

Walker said, "I like the good life, and I'm trying to position myself (so) that I can live the good life and have more money." She picked up a packet of money and put it in her purse.

On Sept. 13, Vincent met with Tapp, Hoffman and then-Rep. Bill English, R-Sierra Vista, at a Phoenix hotel. English said he needed "$15,000 to $20,000 additional" for what would prove to be a losing campaign.

Hoffman said he often floated loans to English and bought materials for his campaign. English said he and Hoffman "obviously have a very serendipity type of relationship." Hoffman put $18,000 from Vincent into his briefcase.

On Sept. 14, Laybe asked for another $10,000, and Vincent handed her that sum in cash.

Vincent and Higuera met again the next day. "Do you want the shrimp?" Vincent asked. "Sure I do," Higuera replied. They also discussed Higuera's having a fax machine business in Vincent's casinos.

Vincent gave Higuera $1,540 in $220 money orders and $1,000 in cash. Before leaving Vincent's office, Higuera said: "Keep me in mind on . . . the fax."

Walker met with Vincent in his office on Sept. 18 and told him she at least wanted to "die rich." Vincent said she would get the gift shop business in his casinos, and she said: "We all have our prices."

Vincent asked Walker to support bills calling for election of judges and allowing private companies to operate prisons. She asked for and took $15,000 in cash from Vincent. On Oct. 3, Vincent gave Walker an additional $1,200.

Kenney told Vincent in an Oct. 3 conversation that 20 percent or 30 percent of the Legislature's members probably would come to Vincent and "just take a bag out."

House Majority Leader Jim Meredith, R-Phoenix, met with Vincent the next day, and Vincent gave him $2,200 in cash for tickets to a dinner for Fife Symington, the Republican candidate for governor.

Meredith produced a list of Republican House members he needed to support his leadership position and arrived at $7,040 to contribute to their campaigns. Vincent gave Meredith $7,100 more in cash.

Rep. Bobby Raymond, D-Phoenix, called Vincent on Oct. 6 and said he wanted to "talk business" that day. Raymond said he and English "did a lot of deals together."

Raymond went to Vincent's office later and told Vincent there was "not an issue in the world that I give a shit about. I do deals. I like the deals of the Legislature." Raymond asked for and took $10,000 in cash.

At an Oct. 10 meeting, Raymond told Vincent that Arizona legislators "are a bunch of unsophisticated whores."

Vincent met with lobbyist Rich Scheffel on Oct. 11. Scheffel said, "You can give funds, but I think you have to be discreet. You have to have a plan."

Raymond told Vincent the next day that he and Scheffel had worked "deals" together, that Sheffel "can deliver."

He added: "Rich Scheffel and I have done enough business together to land both of us in jail for a long, long time."

On Oct. 24, Vincent paid Scheffel $22,000 in cash for Scheffel's services as a lobbyist.

Vincent met with Stephens at a Phoenix restaurant on Oct. 30 and gave Stephens $4,180 in postal money orders in an envelope.

On Nov. 13 at Vincent's apartment, Vincent paid Hoffman $24,600 in cash for an economic survey and Scheffel $7,500 in cash for a video presentation.

Laybe went to Vincent's office on Nov. 15 and took $3,000 in cash from him for what she said was a campaign deficit problem.

On Nov. 18, Hartdegen told Vincent over the telephone that he appreciated the $660 that Scheffel had told him was from Vincent. Vincent confirmed that he had given Hartdegen the money through Scheffel.

Walker asked for and accepted $4,000 in cash from Vincent on Nov. 19.

On Dec. 20, Higuera returned to Vincent and asked him to help him raise $1,500 to buy some "raffle tickets." Vincent gave Higuera $1,500.

After several meetings between Vincent and new Maricopa County Democratic Party Chairman David Manley, Manley suggested on Jan. 3, 1991, that Vincent put him on a retainer of $1,000 a month.

Vincent paid Manley $3,000 as an advance for a three-month retainer.

Manley had told Vincent that Manley could launder money through the party to candidates of Vincent's choice, and could find "friendly" candidates to oppose legislators who were opposed to Vincent's project.

U.S. District Court for the District of Arizona

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February 11, 1991

Section: A

Civics 101 on Tape in Arizona, Or, 'We All Have Our Prices'

SETH **MYDANS**, Special to The New York Times

PHOENIX, Feb. 9 "Are you sure there are no hidden cameras up there?" joked State Representative Don Kenney moments before accepting what the police say was a $55,000 bribe and zipping it into a gym bag.

"Wave to the cameras," replied a smooth-talking, chain-smoking man who called himself J. Anthony Vincent and said he was a casino operator out to trade money for votes to legalize gambling in Arizona.

There was indeed a hidden camera, and "Mr. Vincent" was in fact a convicted con man, working for the police in a 16-month operation that resulted in the indictments over the past few days of seven state legislators and 11 other people. More indictments are expected.

Lobbyist Pleads Guilty

Nervous jokes about hidden cameras are a theme running through nearly 500 hours of police videotape, portions of which have been broadcast nightly on television. The public display of legislators and lobbyists accepting wads of money comes three years after the impeachment of Gov. Evan Mecham on corruption charges and while an ethics investigation of both of Arizona's United States Senators is still going on.

One of those indicted in the operation carried out by the Phoenix Police Department and the Maricopa County Attorney's Office, a lobbyist named Rich Schefel, pleaded guilty to conspiring to bribe legislators and has been cooperating with investigators. Some of those indicted have declared that they broke no laws in accepting money and have complained about what they see as entrapment, while others have declined public comment.

The widening scandal, in which one legislator after another can be seen on video-tape exchanging pleasantries while pocketing what the police say was thousands of dollars, has paralyzed the State Legislature and raised calls for political reforms, including changes in campaign finance laws and an increase in the salary of state legislators, now just $15,000 a year. The Democratic-controlled Senate has 30 members and the Republican-controlled House 60.

The legislators who have been implicated have relinquished or been asked to give up any leadership posts they hold. Political analysts say internal ethics

proceedings could result in the removal from the Legislature of more members than are actually indicted.

The scandal has raised a host of issues, including the concern that the more than $380,000 used by the police as bribes went to support the election campaigns of some legislators and possibly affected the outcome of the races.

Cynicism on Display

But the most damaging effect could be a lasting disillusionment that has grown out of the nightly broadcasts of the videotapes. The taped conversations are filled with easy talk about money laundering, blackmail and bribery and a cynicism about public life that seems to accept shady back-room deals as a way of doing business.

Most of the legislators are shown in the police transcripts of the tapes to have paid several visits and received repeated payments from the con man, whose real name is Joseph C. Stedino. "What do you need?" he sometimes asked them, or, "What can I do for you?"

One after another, the transcripts show them confiding their political fears and private ambitions.

"I like the good life, and I'm trying to position myself that I can live the good life and have more money," Senator Carolyn Walker, a Phoenix Democrat, said on

one tape, adding that it was her ambition to "die rich."

"We all have our prices," she said before leaning across a table to accept what the police say was some of the $25,880 she received from "Mr. Vincent."

'What's in it for Me?'

Another legislator, State Representative Bobby Raymond, also a Democrat, is described in the transcripts as saying, "I don't give a (expletive) about issues." and adding, "There is not an issue in this world that I give a (expletive) about."

He adds, "My favorite line is, 'What's in it for me?'"

The indictment charges that Mr. Raymond received a total of $12,105. When he learns of a larger payment to another legislator, he is described as saying, "I sold way too cheap."

In addition to payoffs, one legislator asked to be assured of getting the shrimp concessions at any casinos run by "Mr. Vincent." Another sought the gift shop concessions as well as help in setting up a recording company.

Mr. Kenney, a Republican who until a few days ago was chairman of the House Judiciary Committee, appeared to be a central figure, naming other legislators and suggesting ways to "fish them in." For those who could not be bribed, he proposed using "a sledgehammer." He is shown providing details of what he

says are the sexual and financial foibles of his colleagues.

'Check Her Sex Life'

The transcripts quote him as saying of one of them: "I'd check her sex life, check her finances. 'Cause she's just a real loudmouth that you just need to shut up."

In addition to the payments from "Mr. Vincent," the videotapes show Mr. Kenney receiving cash from a lobbyist named Ronald Tapp, who was indicted Friday on bribery charges stemming from his actions in helping "Mr. Vincent."

Other public figures have expressed disgust with the picture of political life displayed on the videotapes. They said it compounded a perception of corruption in the state that includes the 1988 impeachment of Governor Mecham for concealing a $350,000 campaign loan and lying about it, and the fact that both Arizona Senators, Dennis DeConcini, a Democrat, and John McCain, a Republican, are under investigation by the Senate Ethics Committee in connection with Charles H. Keating Jr. and his Lincoln Savings and Loan Association.

"It is a story of sickening proportions," said Alfredo Gutierrez, a former Democratic State Senator who served as both majority and minority leader. "We are all in shock. In terms of confidence, it will take years to rebuild."

Babbitt Is Dismayed

Speaking to a convention of civic planners, a former Governor, Bruce Babbitt, said: "Sometimes, around public servants and political officials, you get the feeling that you almost want to deny that you're in public service. It's looked upon as such a low-down, inadequate occupation for misfits and for people who can't go out and be real estate developers."

The transcripts show that some targets of the investigation indignantly rejected bribes. "Nobody can commit my vote," says Senator John Dougherty, a Democrat. The police said that in the course of their operation three people reported to them the apparent attempts at bribery.

Representative Stan Barnes, Republican of Mesa, said he spurned advances by "Mr. Vincent" because, with his open shirt and heavy medallion and with his overly smooth manner, "he was really a laughable character."

"With his appearance straight out of central casting for a Mafia movie, I'm surprised anyone took him seriously," Mr. Barnes said.

And yet they did, with Senator Walker, for one, asking him for business advice and saying: "I don't know why I trust you. I just trust you."

A Shadowy History

Mr. Stedino, who was host of his own late-night television show in Las Vegas in the 1970's, pleaded guilty in 1984 in a scam involving $150,000 in stolen travelers' checks and was sentenced to one year and a day in Federal prison.

His recent history is hazy. There are unconfirmed reports that he has participated in at least one other sting operation, in Nevada.

The Arizona operation has recent models in California and South Carolina, where undercover agents posed as lobbyists pushing for legislation involving, respectively, a fictitious shrimp-processing plant and legalized racetrack betting.

In California, State Senator Joseph Montoya and former state Sen. Paul Carpenter were convicted last year of accepting bribes. Both convictions are under appeal. In a current case in South Carolina, 11 state legislators were indicted last year for accepting bribes. Six have pleaded guilty.

Were Campaigns Affected?

One notable aspect of the Arizona sting is that much of the money distributed to lawmakers was in the form of contributions to campaigns last fall and could have changed their outcome.

For example, Judith Connell, a candidate in West Phoenix, narrowly lost to the incumbent Mr. Raymond, whose gift from "Mr. Vincent" was almost double the $6,800 she raised for her campaign.

Louis Rhodes, executive director of the Arizona chapter of the American Civil Liberties Union, said the outcome of several races could have been affected by the tribes. He accused the police of violating state campaign spending laws.

The A.C.L.U. also questioned the tactics of the investigation, in which it said the police appeared to have created a crime that would not have existed otherwise.

But most analysts here said the evils displayed on the videotapes far overshadowed those of any entrapment that was used to elicit them.

Mr. Mecham himself said he took this view. "I realize that the A.C.L.U. and these bleeding hearts are worrying about the fact that these people were invited to break the law," the former Governor told The Phoenix Gazette. "But you know that's a little bit ludicrous. If they didn't break the law, they wouldn't be in trouble, would they?"

Photo: A 16-month police operation resulted in the indictments of seven state legislators in Arizona, including Representative Don Kenney. In a video released by the Phoenix police, Mr. Kenney is shown at left, allegedly accepting a bribe from Ronald Tapp, who was indicted on bribery charges. (Associated Press) (pg. B9)

U.S. District Court for the District of Arizona

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February 13, 1991

Section: NEWS

NEW TARNISH ON ARIZONA'S IMAGE
BRIBE CASE HAS STATE 'IN SHOCK'
LAWMAKERS ON VIDEOTAPE

Sally Ann Stewart

PHOENIX Disc jockeys are calling it Operation Desert Shame. Phoenix police have dubbed it **AzScam**. Whatever the name, the **bribery** indictments against seven state senators and representatives are the hottest scandal to rock **Arizona** since its governor was impeached.

Almost 10% of the state's **legislators** have been indicted on criminal or civil **bribery** or racketeering charges. Altogether, 19 current and former legislators and lobbyists can be viewed – on more than 200 videotapes – stuffing money into envelopes and gym bags. The charge: They took more than $370,000 after pledging to vote for legalized gambling.

And since last week, when Phoenix police announced results of their 18-month sting operation, rumors of more indictments have flown through the capital. Even Police Chief Ruben Ortega has said he

stopped the probe because he thought it eventually would encompass most of the state's leadership.

"They got their hands caught in the cookie jar," says retired Phoenix TV store owner Donald Emery, while he toured the Capitol this week. "Now they should be gentlemen and ladies and step down."

The scandal even threatens the gubernatorial campaign. Prosecutors say both candidates – Republican Fife Symington and Democrat Terry Goddard – got campaign contributions from the sting but had no reason to be suspicious. They returned the money when the scandal broke; neither has been charged. The election is Feb. 26.

So far none of the indictees has made a move to bow out, but all have been stripped of committee chairmanships.

"This is still America where we are innocent until proven guilty," Sen. Carolyn Walker said on the Senate floor. "I shall be vindicated."

Residents, meanwhile, are glued to their TVs, watching grainy police videos. Walker is accused of 10 felonies, receiving $25,880 in bribes, and filing false campaign finance statements. On video, she says: "We all have our prices."

A video of Rep. Don Kenney shows the northwest Phoenix representative apparently stuffing $55,000 into a gym bag.

He got the money from a man he thought was named J. Anthony Vincent. But Vincent – a one-time Las Vegas TV personality sentenced to a year in federal prison for his part in a stolen-traveler's-check scam – was really police informant Joseph Stedino.

It's just the latest controversy in the Grand Canyon State.

Gov. Evan Mecham was removed from office in 1988 for improperly spending campaign contributions. The state has been devastated by the savings and loan scandal, and both of Arizona's U.S. senators have been lumped in with the Keating Five. The National Football League is threatening to move next year's Super Bowl from Tempe because the state doesn't have an official Martin Luther King Jr. holiday.

"Even with everything that's happened in Arizona, nobody would ever dream something like this was going on," says Phoenix construction worker L.P. Perkins. "It kind of makes you wonder what's going to happen next."

Says radio talk show host John Dayl: "Everyone's still in shock. I guess there's sort of a 'there we go again' attitude."

That's what worries Bruce Merrill, director of research for the Walter Cronkite School of Journalism at Arizona State University in Tempe. "We have simply got to change Arizona's image as a bunch of shoot-em-up cowboys," he says.

But there's not much hope for an image change – or much-needed legislation – this year, says Merrill, who has worked in and around state politics for more than 20 years. "Around the Legislature, the consensus is to pass a budget and then adjourn."

CUTLINE: "I sold way too cheap." – Rep. Bobby Raymond, D-Phoenix, accused of accepting $12,105 and of helping to bribe three other legislators.

CUTLINE: "We all have our prices." – Sen. Carolyn Walker, D-Phoenix, accused of 10 felonies, taking $25,880 in bribes and filing false campaign finance forms. She later proclaimed her innocence, saying: "I shall be vindicated."

CUTLINE: "Ten (grand) is enough." – Rep. Sue Laybe, D-Phoenix, after being asked how much she needed for her campaign. Laybe, accused of accepting $24,960, jokes she has "tacky fingers" after bills stick to her hands.

CUTLINE: "You sure there isn't a camera? I remember those videotapes of the Abscam trial." – Rep. Don Kenney, R-Phoenix, accused of accepting $60,250.

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February 25, 1991

Section: NATIONAL

FOR ARIZONA, THE SCANDALS JUST KEEP ON COMING

John **Woestendiek**, Inquirer Staff Writer

PHOENIX Jack B. Jewett, a clean-cut state representative, sat in a Phoenix steakhouse one day last fall, sipping milk with his lunch as a cigarette-smoking, gold-chained Las Vegas lobbyist flashed wads of money and asked him to support casino gambling in Arizona.

The lobbyist, it turned out, was an imposter, planted by police in the "Azscam" investigation that led to indictments this month of seven Arizona legislators on charges of bribery and money laundering.

Today, reporters seek out Jewett almost daily for interviews – not because he took money in exchange for promising to vote for legalized casino gambling in Arizona. But because he didn't.

Maybe that qualifies as news here these days – this just in: honest lawmaker discovered – or maybe, after three years in a cloud of scandal and turmoil,

Arizonans have become more adept at finding silver linings.

Either way, the attention Jewett has received as the only lawmaker to report the Las Vegas lobbyist's suspicious behavior to authorities is puzzling even to him. "I certainly didn't do anything of any heroic proportions," he said last week.

NOT SURPRISED

Indeed, what might be most surprising about the indictments – returned Feb. 5 against seven lawmakers and 11 lobbyists and political activists – is how unsurprised a lot of voters were.

"I moved here from Ohio. I think all politics is corrupt," said Phoenix resident Alexis Johnson, who works for an employment agency. "They just got caught." Then, with the same sigh that can be heard around the state, she went on to lament the latest sullying of Arizona's tarnished image.

Since the loose-tongued Evan Mecham was impeached as governor in 1988 on grounds of obstructing justice and misusing public funds, Arizona's woes have only mounted.

Both of its U.S. senators have been enmeshed in the scandal surrounding Charles Keating's Phoenix-based Lincoln Savings & Loan Association. It has reeled from a recession that has sent property values plummeting and dried up jobs. And dozens of conventions, and the Super Bowl, have withdrawn because

of the state's failure to pass a holiday honoring the Rev. Dr. Martin Luther King Jr.

Now, even the previously staid runoff election for governor this week has turned dirty, as Democrat Terry Goddard and Republican Fife Symington accuse each other of assorted financial improprieties. Both of them received legal campaign contributions from the phony lobbyist.

'ANOTHER BLEMISH'

"You're damn right this is another blemish," said Charles T. Stevens, a lawyer and longtime lobbyist. "Here we are, already with a black eye in the rest of the country, already suffering economically, and people just keep throwing mud on us – or maybe we're throwing it on ourselves. Azscam doesn't help at all. We're becoming the laughingstock of the nation."

The scandal – much of which voters have been able to watch on videotape – has cast a paranoidal pall over the state Capitol, dashing what little faith citizens had left in their elected officials.

"The **public confidence in** the Legislature before the scandal was at an all-time low," said Jewett, a Republican from Tucson. "Because of the scandal, it's nonexistent."

Azscam grew out of an investigation of back-room gambling in Phoenix. Local police hired Joseph Stedino, a veteran informant, ex-con and bit-part actor who once was host of a local television show

called Vegas Nite Life, to infiltrate those operations. Early last year, posing as J. Anthony Vincent, a deep-pocketed front man for Las Vegas gambling interests, Stedino began contacting lobbyists and legislators.

Among the first was State Rep. Don Kenney, a real estate broker and lawyer from Mesa. A videotape made by police on April 30 shows Kenney accepting $55,000 from Vincent and stuffing it in a gym bag.

"You're sure there's not a camera up there? Wave to the camera," Kenney says at one point, pointing to the ceiling. "I remember those videotapes from the Abscam trial."

Kenney, a Republican, was chairman of the House Judiciary Committee, but, like the other indicted House members, he was stripped of his leadership position shortly after the indictment was returned. House and Senate Ethics Committees are investigating the charges to determine what further action to take against the lawmakers.

One of the seven legislators, State Rep. Bobby Raymond, a Phoenix Democrat, resigned last week as part of a plea agreement in which some of his charges were dismissed. Raymond, whose sentencing is scheduled for April, said in his letter of resignation that he was "deeply ashamed of his actions" and apologized for "defiling" the "trust and respect of voters." The letter's contrite tone was in stark contrast to remarks he makes on the videotapes.

"I don't give a . . . about issues," he tells Vincent at one meeting " . . . There is not an issue in this world that I give a s- about. . . . I do deals. . . . My favorite line is what's in it for me."

Raymond, who according to the indictment received $10,000 from Vincent, tells him at other times that his fellow legislators are "unsophisticated whores" and calls Kenney "as big a . . . sleaze bag as I am – or bigger." At another point, he suggests Vincent hire private investigators to take photographs of two representatives who were having extramarital affairs and use those photographs to secure their votes.

Buried within the 212 videotapes, 300 audiotapes and 40 hard-bound volumes of transcripts that are available to the public at the Phoenix Police Department is plenty of fodder for Capitol gossip.

The scandal has amused and titillated some, saddened and revolted others. Some voters say they are shocked. Others say corruption is simply part of politics, or part of human nature.

Sam Steiger, a wry but unsuccessful candidate for governor, pointed to recent legislative corruption scandals in California and South Carolina.

RENEWED DEBATE

"It goes on everywhere," he said. "I don't know of any profession that's immune from it. They (police) spent a million bucks on this. . . . Give me a million bucks and send me to The Philadelphia Inquirer and

I'll find 18. Give me a million bucks and send me to Vatican City and I'll bring down 18 cardinals."

The investigation also has renewed debate about the salary legislators receive, comparatively low nationally at $15,000 a session.

At least three of the indicted legislators had pushed for pay increases. Arguing for an increase in expense money, State Sen. Jesus "Chuy" Higuera, a Democrat from Tucson accused of accepting more than $4,000 in the sting, once held up a coffee cup with a dead cockroach inside – illustrative, he said, of the rundown Phoenix apartment he was forced to rent.

"You can't imagine people being so stupid," said Joyce Downey, a Phoenix political consultant who is heading a campaign to limit the terms of elected state officials. The campaign began in November and, in light of the indictments, appears more likely to succeed.

"We rest our case," she said last week.

PHOTO (1)

1. Evan Mecham; Impeached in 1988

U.S. District Court for the District of Arizona

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May 10, 1991

Section: METRO

TRYING TO REPAIR A DAMAGED STATE

David Broder

PHOENIX It was the kind of day that would leave political reporters in most states gasping. The biggest teachers' union was threatening a strike to protest cutbacks in school funding. A state legislator, indicted on 15 counts of bribery, was plea-bargaining. The wife of a county official committed suicide less than two weeks after her husband had taken his own life. And the state superintendent of public instruction, who had been in the papers for summoning police to settle domestic disputes, announced that she was filing for divorce.

In Arizona, that made it kind of a dull Monday.

This state has been living a soap-opera civic life. It has endured a series of shocks that, in the words of a prominent local businessman, "leave me and a lot of others totally disillusioned and distrustful of politics and politicians."

It began three years ago with the impeachment of Republican Gov. Evan Mecham, an obstreperous

conservative who had, among other things, blocked Arizona's observation of the Martin Luther King Jr. holiday. The Republican state senate voted to oust him from office on charges of misuse of public funds and obstruction of justice.

The furor continued with the collapse of the **financial empire** of Arizona savings-and-loan tycoon Charles **Keating**, whose favors to politicians provoked a **Senate Ethics** Committee investigation of both Arizona senators and three of their colleagues. Although Sens. John McCain and Dennis **DeConcini** were judged not deserving of censure, the controversy over their relationship to Keating has cast a shadow over both men's previously secure careers.

Then, last November, voters rejected a referendum authorizing a King holiday – a decision which cost the state the 1993 football Super Bowl and other major convention business in a swirl of bad publicity.

Next came "Azscam," the indictment last February of four lobbyists and seven state legislators in a "sting" operation featuring secretly videotaped scenes of them accepting bribes from an undercover agent ostensibly pushing a bill to legalize casino gambling.

And finally the state had to endure not one but two nasty campaigns for governor. The November election produced no result, because a write-in candidate denied the required absolute majority either to Republican developer Fife Symington or Democrat Terry Goddard, the mayor of Phoenix.

It was not until the end of February that Symington won the gubernatorial runoff – despite Goddard's charges that he had a conflict of interest in a $30 million loan from the failed Southwest Savings, of which he had been a director, to a Symington-controlled hotel shopping center development here.

After all that, the sandy-haired, 45-year-old Symington seems surprisingly serene as he looks out over Phoenix from the ninth-floor state capitol office he has occupied for the past two months.

Already he has fired one of his first senior appointees for ruffling too many feathers and has seen his austere budget assailed by state senate Democrats as insensitive to the needs of education and the mentally ill. But he is still in his honeymoon period with the voters, who are pleased that he is recommending neither a tax increase nor a cut in aid to cities. The resident press corps finds him "both accessible and rational," as one veteran puts it, "a luxury we have not enjoyed for some time."

Whether his cautious businessman's approach to repairing the damaged reputation of his magnificent state will work in the long run is anyone's guess. Symington is careful in his first elective position not to claim too much.

"There is no way to undo the fact that we turned down the Martin Luther King holiday," he told me. "But remember, we are the only state to have put it to referendum and it lost by 15,000 votes in a state that is only 3 percent African-American. Phoenix, Tucson,

Tempe – all the major cities – commemorate the holiday and so do most major businesses, including my own. So we're really talking about whether 36,000 state employees have the day off with pay."

Symbolically, he concedes, it is more than that – and he supports the legislature's decision to resubmit the issue to the voters in the 1992 election. Meantime, Arizona must live with the stigma of its rejection.

As for the scandals that have rocked the state, Symington sounds almost – if not quite – nonchalant. "We'll have a session of the legislature this fall to look at reform proposals," he said, instantly adding that he wants to be sure that any changes are useful and not cosmetic. "We already have very strict campaign laws," he said, "and I'm not sure you can engineer corruption out. Ultimately, it has to depend on voter scrutiny."

Symington says the surest sign that the civic spirit has survived the shocks to Arizona's pride is the number of able, highly credentialed men and women who sought appointment to the legislative seats vacated by the indicted members. That view is echoed by prominent Democrats, including former Gov. Bruce Babbitt.

The main hope Babbitt and others express for Symington's governorship is that there be no aftershocks. Strong as the frontier tradition of toughness may be, Arizona has endured about as much as it can stand.

David Broder is a syndicated columnist.

Gov. Fife Symington – Accessible and rational
PHOTO

COLUMN NAME: DAVID BRODER

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

Arizona Daily Star

June 24, 1991

AzScam fallout is far from over, politicians say

Mary K. Reinhart; The Arizona Daily Star

Years from now, folks looking back on the 40th Legislature's first session probably won't recall the landmark water bills or the hazardous waste measure.

They will remember AzScam.

The political-corruption scandal that rocked the Capitol and sent former legislators to jail has been seared into the minds of voters, and some political observers are concerned that the damage will be difficult to undo.

Still, as June began melting into July and lawmakers immersed themselves in end-of-session deal-making, the specter of AzScam seemed far away.

Perhaps it's because the Legislature moved rather quickly to force the resignations of six indicted lawmakers and expel the seventh that the February indictments seemed so long ago. County supervisors wasted little time naming replacements and the Legislature was back at full strength by the end of March.

But the reverberations of AzScam have yet to be felt, say some political observers and lawmakers, who point to the 1992 elections and predict voter apathy, lots of retiring lawmakers and the regurgitation of sordid AzScam details.

"The tragedy of this more than anything else is it reinforces the view people have about politicians," said pollster Bruce Merrill, a professor at Arizona State University. "Down deep in their hearts, people think politicians are a bunch of crooks."

Word of AzScam leaked Saturday, Feb. 2, as legislators were wrapping up a special session to balance a midyear budget deficit. On Feb. 5, Phoenix police and the Maricopa County Attorney's Office announced that 18 people – seven legislators, one former legislator, four lobbyists and six others – had been indicted by a county grand jury on charges that included campaign-law violations, bribery, money laundering and extortion.

The legislators indicted were Sue Laybe, Bobby Raymond, Jim Meredith, Don Kenney and Carolyn Walker, all of Phoenix, and Jim Hartdegen of Casa Grande and Jesus "Chuy" Higuera of Tucson.

The indictments culminated a $1 million yearlong undercover sting operation during which police agent Joseph Stedino portrayed a flashy Nevada gaming consultant looking to buy votes to legalize casino gambling. Stedino, posing as "J. Anthony Vincent," doled out more than $370,000 during the 1990 campaign season to legislators and lobbyists in secretly

recorded meetings at his Phoenix office and apartment.

Within days of the indictments, police released nearly 20,000 pages of transcripts and 300 videotapes showing lawmakers stuffing huge stacks of cash into purses and gym bags in exchange for their votes. The videotapes made national news and excerpts from the transcripts were printed in newspapers coast-to-coast.

By late June, 10 people – including six of the seven indicted legislators – had pleaded guilty. Two former lawmakers got jail time, including Higuera, two received probation and two are scheduled for sentencing later this summer.

House Speaker Jane Dee Hull, R-Phoenix, said the fallout from AzScam isn't over; it's just taken a break until the 1992 elections.

"Everybody in the world has bought the transcripts. Members of the public who have not read the transcripts yet, they will be able to read them in every (election) brochure," Hull said.

"It's certainly not the end when you look at the elections."

If former Gov. Evan Mecham has his way, AzScam will be back in the headlines this fall with the first edition of his daily newspaper, Arizona Newsday. Mecham, who has purchased the transcripts, said the real story of AzScam has yet to be printed.

"They have worked very diligently to put a lid on it and to keep all their insiders intact," Mecham said, referring to the same "power brokers" he believes orchestrated his impeachment and ouster from office in 1988.

"I for one am going to see that the voters keep being reminded that this was the tip of the iceberg and it was covered up," Mecham said. "They think they've got it contained, but it's going to have reverberations for a long way down the line."

That's assuming anyone goes to the polls to vote. Merrill said he's afraid AzScam will cause voter turnout to drop even lower and make potential political leaders change their minds about participating in the process.

"Alienation and cynicism about the system is very high," Merrill said, which means people "don't get involved in the process and they clearly don't vote."

House Majority Whip Jack B. Jewett, R-Tucson, agreed, saying AzScam may coax veteran legislators into retirement or lead to incumbents' defeat.

"I would suspect that you'll see major turnover in the next Legislature, and part of that in response to AzScam," Jewett said. "Some will just be fed up and decide not to run, and others will run and possibly get defeated."

Jewett said the "silver lining" in the state's biggest political scandal is that the appointed legislators are "exceptionally good."

Paul Bender, professor and former dean of the Arizona State University College of Law, said he was heartened to see how many people were interested in the job.

"It suggests to me that there are people who would like to serve in the Legislature if some of the impediments are removed," Bender said.

Salaries should be raised, additional staff hired and the campaign-finance laws reworked to allow higher contribution limits, he said.

"You can't have a set of rules that everybody's looking to get around," he said. "The problem is the amount is so low that it encourages evasion and bundling."

Bundling is the practice of combining many small donations to skirt campaign contribution limits.

Ethics rules also should be more clearly defined, said Ed Hendricks, a Phoenix attorney who served as special counsel to the Senate during Ethics Committee proceedings.

"I suppose the short-term impact that I'd like to see is that legislators will be more sensitive to ethical issues and the avoidance of even the appearance of impropriety," Hendricks said. "And I would be hopeful that it would lead to some meaningful legislative reform."

In a letter to Sen. Jaime Gutierrez, D-Tucson, Ethics Committee chairman, Hendricks outlined six suggestions to improve the process, including raising

legislative salaries, adopting a rule allowing suspension of members in certain cases, clarifying the ethics rule and campaign-finance reform.

Hendricks said the Senate began restoring public confidence by quickly dealing with its two indicted members. Higuera, a former Democratic senator from Tucson, resigned before the panel began deliberations on his case, and Walker, a Phoenix Democrat, was expelled by a unanimous vote of the Senate, following the recommendation of the Ethics Committee.

"I think we handled them as expeditiously as possible, considering the outcry of 'hang the folks,'" Gutierrez said. "I think we did a fair job, but I wish we had never seen it."

Lawmakers plan to grapple with ethics reform next session, including consideration of a rule to allow suspension of members. Already, legislators are policing themselves, he said.

"Unfortunately, I think it took this event to really beat us over the head with it," he said. "Not surprisingly, I think many members are being more cautious about their employment and how their voting may be perceived by the public. I think that's a good sign."

U.S. District Court for the District of Arizona

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Survey says opinions vary on state ethics

2nd 'AzScam is 'probable'

By Steve Yozwiak
The Arizona Republic

A $5,000 survey of Arizona lawmakers, their staffs, lobbyists and journalists has found that each group holds widely varying ideas about what is ethical and what isn't, and that another scandal like "AzScam" is "probable."

"If we allow everyone to be an ethical universe unto themselves, we have no standards," said Michael Josephson, president of the California-based Josephson Institute of Ethics, which conducted the survey for the state Legislature.

In an effort to get lawmakers all moving in an ethically correct direction, House Speaker Jane Hull said Friday that she will push for stepped-up ethical education of newly elected legislators, periodic ethics seminars for incumbents, a more complete ethics

manual for all lawmakers and a more active role for the House Ethics Committee.

In addition, Hull said an ethics seminar conducted Thursday by Josephson for the state's 90 legislators should boost momentum toward a special session on ethics and campaign reforms, which she expects will begin Oct. 15.

"I think this is a good beginning for that," she said. "It's got people thinking."

But Gov. Fife Symington has balked at committing himself to a special session unless it is limited to topics that won't embarrass GOP lawmakers. Democrats in the Senate say it would be ridiculous for Symington, a Republican, to exclude such issues as public-financing and campaign-spending limits from the debate.

It would appear lawmakers will have to work quickly next week to build a consensus in order to convene a special session.

Among the findings of the Josephson survey, legislators were most likely to disagree, and journalists were most likely to agree, that:

- Major campaign contributors get special attention from lawmakers.

- Lobbyists who assist in campaign fund raising improve their chances of advancing their clients' issues with lawmakers.

• Legislative fund raising should be prohibited during legislative sessions.

Josephson told lawmakers during his seminar that they should study the opinions held by the seven journalists who responded to the survey because they are good indicators of how the voting public feels.

According to the surveys returned by 54 of the 90 legislators, Josephson found that:

• 83 percent believe at least one in five lawmakers engages in vote trading.

• 70 percent believe at least one in five lawmakers provides special access to contributors.

• 43 percent believe at least one in five lawmakers accepts gifts or favors.

• 29 percent believe at least one in five lawmakers engages in legislative action when he or she has a financial conflict.

• 38 percent believe at least one in five lawmakers hires his or her staff for personal reasons.

The last finding was one that especially irritated Hull, who said legislators and staff already should know that such conduct is not allowed.

"It was disappointing . . . that some of the 'legislative' respondents were either that insensitive to public perceptions or that lacking in knowing what is right or wrong," Rep. Mile Palmer, D-Bisbee, said.

Earlier this year, the Legislature was rocked by the AzScam scandal, in which seven lawmakers were indicted in a bribery scheme. Six resigned and one was expelled.

In his summary, Josephson concluded that "many forms of conduct viewed to be improper by a majority of legislators occurs with great regularity."

"If at least 20 percent of the legislators engage in ethically questionable conduct," he said, "it is probable that new harmful scandals will arise."

ETHICS CENTER'S SURVEY RESULTS

Percentage of Arizona legislators, their staff, journalists and lobbyists that agree or strongly agree with the following statements.

"Most major campaign contributors do get special advantages if they need the aid of a legislator."

Respondents	Agree
Legislators	42%
Staff	66%
Journalists	100%
Lobbyists	43%

"Generally, lobbyists who give, direct or raise campaign funds substantially improve their chances of accomplishing their clients' goals by virtue of their contributions."

Respondents	Agree
Legislators	54%
Staff	73%
Journalists	100%
Lobbyists	72%

Source: Government Ethics Center

Contributing to this article was Mary Jo Pitzl of *The Arizona Republic*.

U.S. District Court for the District of Arizona

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[Title Omitted In Printing]

Hull relies on lobbyists she regulates for funding

By Michael Murphy
and Kris Mayes
Staff writers

Secretary of State Jane Dee Hull is in charge of regulating the state's 5,000 lobbyists, but she's also relying on many of them to raise money for her possible gubernatorial bid in 1998.

Not only are lobbyists donating, heavily to her "Hull '98" campaign, they're actively playing a role in raising thousands of dollars from others to help the secretary of state build a campaign war chest should she decide to seek higher office.

Although no one has questioned Hull's record since she took over the office in January 1995, some wonder whether it is appropriate for the secretary of state to have such close ties to members of a group she is supposed to regulate.

Hull, 61, has been put in the political spotlight recently because she is first in line to succeed Gov. Fife Symington, who is facing a March federal trial on 23 felony counts.

In an interview, Hull said her friendships with lobbyists have no effect on how she does her job as enforcer of the state's lobbying laws.

"I've looked at my own integrity for enough years to know they really aren't going to get anything from this office, nor have they ever asked for anything," said Hull, a longtime activist in Republican politics. "What this office can deliver is fairness."

She added, "We follow the law. . . . If we have problems, we report them to the (state) attorney general. There's no campaign contribution that would make me do anything differently."

But a political system that shrugs off such apparent conflicts – indeed, a system that appears to thrive on them – troubles some defenders of the public interest.

"That presents a conflict for her," said Tim Hogan, executive director of the Arizona Center for Law in the Public Interest. "It's not necessarily a legal conflict, but when you've got the regulator for the lobbyists taking donations from them, and I assume in substantial amounts, that presents a pretty big problem."

A recent Hull fund-raiser illustrates the close relationship between the secretary of state and the people she is in charge of monitoring.

Many of the state's top lobbyists played a key role in organizing a Dec. 4 fund-raiser for Hull at the Arizona Biltmore, which featured an appearance by former Vice President Dan Quayle. The lobbyists helped to turn out 600 guests who paid $125 each to

dine on pasta and cheesecake in one of the Biltmore's cavernous ballrooms.

The event was a virtual "who's who" of corporate influence peddlers, many of whom helped to sell tables by phoning their clients and asking them to buy tickets.

According to a program for the event, more than half – 92 of 178 – of the members of Hull's host committee were registered lobbyists, including Robert Fannin, who represents the Arizona Chamber of Commerce and health-maintenance organizations; Michael Preston Green, who lobbies for the Smokeless Tobacco Council; and Southwest Gas lobbyist Richard Foreman.

Oil-and-gas lobbyist Charlie Stevens was asked to sell four tickets to the luncheon, a task he did not find too laborious.

"I said, 'What the hell,'" Stevens said, adding that most of the state's other lobbyists were equally quick to comply. "They see certain things on the horizon. Like a criminal trial," he added, referring to the governor's legal troubles.

Another lobbyist, who requested anonymity, said most lobbyists are of the opinion that they need to begin building a friendship with Hull.

"There's an awful lot of lobbyists who have suddenly become very interested in the Secretary of State's Office," the lobbyist said. "It's a key office to us."

In any other year, Hull's record-keeping office would hardly be considered a political powerhouse and certainly would not be a magnet for corporate lobbyists' largess.

But all eyes are on Hull because of her role as Symington's successor if he is convicted.

Hull said she didn't directly ask lobbyists to sell tickets to her fund-raiser. That was left to her campaign-finance director, Lisa Danka.

Hull said she asked some people to serve on the host committee for the fund-raiser but said, "It wasn't lobbyists. It was what I call real people."

The luncheon grossed an estimated $70,000. Hull held another large fund-raiser last year at the Camelback Inn that raised $50,000.

Although there's nothing illegal about the high-profile role of lobbyists in Hull's fund-raising, their involvement underscores the extraordinary influence that special interests play in raising money for political candidates.

U.S. District Court for the District of Arizona

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Lobbyists bearing gifts solidify grip on Capitol

Lawmakers rely on fund-raising help

By Kris Mayes
and Michael Murphy
Staff writers

After Tucson political novice Sally Ann Gonzales won her first battle for the Legislature, she faced a new one: erasing a $3,000 campaign debt.

Then, her fellow Democrats let her in on a little secret: Lobbyists are always ready to help a lawmaker in need.

Indeed, the election results were barely in before some of the state's top lobbyists organized a $75-per-person fund-raiser for Gonzales in Phoenix. With one breakfast, her financial problems disappeared.

And she didn't even have to ask.

"I didn't talk to the lobbyists," she said. "Word got out, and they organized it for me."

Her experience is not unique.

A decade after voters decided to limit the influence of special interests in legislative campaigns, lobbyists wield more clout than ever.

They're the first people candidates turn to in order to raise more than $50,000 to win a job that pays $15,000 a year.

An *Arizona Republic* survey found that lobbyists played a significant role in the campaigns of 11 of the top 20 money raisers in the Legislature.

Lobbyists not only raised money for the 11, they served on their campaign-finance committees, allowing the lobbyists to tap their clients on behalf of the candidates.

Candidates are required to disclose the names of their campaign chairmen only and do not have to reveal the names of committee members. The *Republic* obtained the information for its analysis by surveying individual lawmakers.

Some lawmakers, and even some lobbyists, are beginning to question the intimate relationship between the two.

"I'm not sure it's appropriate for people who lobby to have that much of an intimate influence on the fund-raising for these campaigns," said Sen. Chris Cummiskey, D-central Phoenix.

Cummiskey, one of the leaders of campaign-finance reform in the Legislature, plans to introduce a bill next year that would require candidates to disclose all members of their finance committees – anyone who has been authorized to solicit money on their behalf. He also is considering an outright ban on lobbyists serving on campaign-finance committees, although that idea's chances are less likely.

Cummiskey said full disclosure is important.

"It gives you a better sense of who's involved in these campaigns and who's raising money for them. I think that's something the public has got to be aware of," he said.

Some top lobbyists agree.

Janice Goldstein, chief lobbyist for the Arizona Trial Lawyers Association, would support banning lobbyists from campaign-finance committees. She refuses to sit on such committees now.

She was asked five times to sit on Gonzales' host committee by a fellow lobbyist who was organizing the freshman lawmaker's fund-raiser. "I said, 'No, I don't do that.' I think it's tacky," Goldstein said. "I don't like registered lobbyists being on finance committees. It's inappropriate.

"I think there's a lot of pressure that comes with it (serving as fund-raisers). A lot is expected. Oftentimes, it's the legislators who expect the lobbyist to do this for them. Oftentimes, it becomes not a favor, but a matter of, 'You will do this.'"

Ironically, it was a campaign-finance reform measure passed by voters in 1986 that turned lobbyists into fund-raising machines. Proposition 200, aimed largely at political action committees, severely restricted the amount of money that candidates can raise from PACs. That sent them in search of individual contributors who previously sent their money to PACs.

Today, members of special-interest groups who once funneled their money into PACs give directly to candidates at the direction of their lobbyists. In order for a lobbyist to bundle the individual contributions legally, the lobbyist must be serving on the candidates campaign-finance committees.

"If I'm not on the finance committee, I can't bundle," said Charlie Stevens, a lobbyist for oil and gas companies and one of the harshest critics of lobbying excesses in Arizona.

Stevens says candidates should identify the lobbyists they use for fund-raising, but he believes banning them from contributing would be unconstitutional.

"I would love that. It would save me a lot of money. But you can't do that," Stevens said, noting the First Amendment's protection of free speech.

Stevens said he served on 10 to 13 campaign-finance committees in the last election cycle and felt uneasy each time.

"I have difficulty calling up a client or a friend and saying, 'Would you contribute to these candidates?' I hate it," he said.

"But very few of us have perfect jobs. It's part of the work, and I do it."

By all accounts, Stevens and his colleagues worked hard this year.

Newly elected Rep. Roberta Voss, a Republican from Glendale, held a $100-per-person fund-raiser at the downtown offices of the Streich Lang law firm on Dec. 18. Nine of the 13 members of her finance committee were lobbyists.

Her invitation read, "After the smoke has cleared . . . after the battle has been won . . . Help!"

Scott Bundgaard, one of the Legislature's most prodigious fund-raisers, got his start with the aid of top lobbyists. After his election in 1994, Bundgaard held a $100-per-person campaign debt-retirement party at Biltmore Fashion Park.

The event's host committee read like a "who's who" of prominent corporate lobbyists. Thirty-one of 34 members of the host committee were lobbyists, including tobacco industry representatives Don Isaacson, John Mangum and Phil MacDonnell, and healthcare lobbyist Kevin DeMenna.

The Legislature's most successful fund-raiser defends the practice of tapping lobbyists for campaign cash.

Sen. John Kaites, R-Glendale, who raised $84,763 in the past campaign cycle, said that by having lobbyists collect checks, candidates are able to spend their time governing.

"I don't think it's feasible to not authorize other people," said Kaites, who had 38 lobbyists on his committee. "That's what a campaign is all about. It's

about getting as much support as you can from other people."

Because no one lobbyist could ever raise enough money from his or her clients to finance an entire campaign, he argues, candidates are effectively prevented from becoming beholden to any one person.

"The situation requires you to have a broad base in order to raise the money," he said. "You can't do it with one lobbyist. You have to do it with a lot of lobbyists."

Sen. Tom Patterson, who is building a funding base for a 1998 gubernatorial bid, also said lobbyists are integral to modern campaigns.

"It's hard to raise the amounts of money needed to run a well-financed legislative campaign without lobbyists," he said. "That's sort of a fact of life."

Without lobbyists, Patterson added, "you would have a severe handicap in raising money."

Others respectfully disagree.

Newly elected Rep. Tom Horne had to raise more than $50,000 to get through a five-way GOP primary but said he took only a few thousand from lobbyists.

Horne said he purposely avoided having lobbyists play a major role in his fund-raising. Instead, he relied on friends and contacts developed during his 25 years of practicing law in the Valley.

"I really think there's a temptation for candidates who need lobbyists to raise money for them to take

premature positions on issues to please the lobbyists," Horne said. "I think that really has a very negative impact on the Legislature being seen as a rational public-policy institution."

Rep. Barry Wong, R-north-central Phoenix, spent hours each day calling old friends, members of the Asian-American business community and other non-lobbyists to drum up the $67,000 it took to retain his seat in the Legislature.

A former lobbyist, Wong, was perfectly positioned to cash in on the lobbying community. In the early 1990s, he worked for mega-lobbyist Don Isaacson, whose big-money clients include the Tobacco Institute and the State Bar Association. Wong attended a number of candidate fund-raisers on Isaacson's behalf, gaining an insider's view of buying access at the Legislature.

He didn't like what he saw.

"I could have done that if I'd wanted to," he said of using his lobbying contacts. "I could have called 10 lobbyists and said, 'I need you to raise $2,000 each.' But as a former lobbyist, I hated when legislators did that to me."

TOP 20

These are the top 20 fund-raisers at the Arizona Legislature for 1996, according to campaign-finance reports on file with the Secretary of State's Office. Legislators are paid $15,000 a year.

1. Sen. George Cunningham, D-Tucson, $89,828.
2. Sen. John Kaites, R-Glendale, $84,763.
3. Rep. Barry Wong, R-north central Phoenix, $76,123.
4. Sen. Marc Spitzer, R-north central Phoenix, $71,756.
5. Sen. Tom Patterson, R-east Phoenix, $71,430.
6. Rep. Sue Gerard, R-north central Phoenix, $69,390.
7. Rep. Tom Horne, R-northeast Phoenix, $57,249.
8. Rep. Ken Cheuvront, D-central Phoenix, $52,239.
9. Rep. Andy Nichols, D-Tucson, $50,787.
10. Rep. Herschella Horton, D-Tucson, $50,566.
11. Sen. Chris Cummiskey, D-central Phoenix, $48,566.
12. Sen. Ruth Solomon, D-Tucson, $46,087.
13. Sen. Brenda Burns, R-Glendale, $44,702.
14. Rep. Jeff Groscost, R-Mesa, $38,525.
15. Sen. Sue Grace, R-northeast Phoenix, $35,859.
16. Sen. Randall Gnant, R-Scottsdale, $34,823.
17. Rep. Freddy Hershberger, R-Tucson, $32,954.
18. Rep. Barbara Leff, R-northeast Phoenix, $32,154.
19. Sen. Scott Bundgaard, R-Glendale, $32,040.
20. Rep. Jim Weiers, R-northwest Phoenix, $30,699.

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Special interests funnel funds to key lawmakers

Up to 80% of money comes from PACs, lobbyists

By Michael Murphy
and Kris Mayes
Staff writers

Glendale Republican Rep. Jean McGrath isn't shy when it comes to showing affection for her favorite lobbyists.

She once led a packed House committee hearing in a rousing verse of *Happy Birthday to You* for a well-known lobbyist. It was an act of fealty that stunned even longtime lawmakers, including committee chairman, Republican Speaker-elect Don Aldridge. He reprimanded McGrath afterward.

Campaign-finance records show that McGrath has good reason to be grateful to lobbyists and political-action committees, the special-interest groups that funnel thousands of dollars into lawmakers' campaign coffers each year.

McGrath, who sits on the influential House Environment Committee, received 80 percent of her total campaign contributions from lobbyists and PACs in 1995-1996.

She wasn't alone. The committee's chairman, Russell "Rusty" Bowers, R-Mesa, also received 80

percent of his total campaign contributions from lobbyists and PACs.

In fact, five of the 10 Environment Committee members, whose records were analyzed by *The Arizona Republic*, received more campaign funds from special-interest groups and their representatives than from individual donors.

The environment panel is just one example of how lobbyists and special interests routinely dole out campaign contributions to members of powerful legislative committees.

Critics of the Environment Committee say the money trail supports their contention that the panel's title is a misnomer. They say it should be called the "Deregulate and Do Whatever You Want Committee" because of its reputation for rubber-stamping legislation that provides regulatory relief to big business, industry and agriculture.

"Since Representative Bowers has chaired that committee, it has not been the Environment Committee," said Sandy Bahr of the Arizona Audubon Council.

According to Sierra Club lobbyist Raena Honan, generous spending by industry and business on committee members' campaigns has given corporate lobbyists extraordinary access and influence.

"The fact they (members) tend to call upon the industry lobbyists," Honan said. "Not only do they know them well, they also funded their campaigns.

You can essentially buy the podium. That sort of access goes to the people with the most clout and the most money."

Bowers bristles at such criticism, dismissing it as talk that "the Sky is falling." He says he has taken a reasonable approach to balancing environmental protection with the needs of business.

Still, the committee's record for providing a helping hand to industry is clear. In the 1996 legislative session, it approved the Environmental Audit Measure, which would have allowed businesses to report pollution to the Arizona Department of Environmental Quality in exchange for secrecy about the incident and immunity from civil and criminal prosecution. The measure did not make it to a vote of the whole House.

Another bill that found favor with the committee was a measure designed to weaken the state's Groundwater Protection Act by offering businesses a year-long moratorium on a strong groundwater clean-up enforcement provision.

Perhaps the most notorious measure promoted by the committee was one that exempts the state from a world-wide ban on Freon production. McGrath led the fight to defy accepted scientific thinking that chlorofluorocarbons contribute to the erosion of ozone in the atmosphere.

The bill was signed into law but has no practical effect because it conflicts with federal law.

Members of the panel say they are not influenced by the flow of contributions into their campaign coffers from industry and business groups, which range from the mining industry to chambers of commerce.

They say they pay little attention to the groups that fund their campaigns and would never allow their votes to be purchased with a political contribution.

"I'm insulted that you could even think that I could be bought with a contribution," McGrath said. "I have no problem with the way that campaigns are funded, and I certainly don't want the alternative, which is public financing."

In McGrath's case, she had a 4-1 ratio of special-interest funds to individual contributions, according to an analysis of campaign-finance reports from Jan. 1, 1995, to Sept. 30.

Many of the PACs that gave to her re-election effort; including Phelps Dodge, Motorola and the Salt River Project, have business before the Environment Committee.

McGrath is "the most blatant" booster of businesses and industries seeking relief from the committee, Bahr said.

"They think she will do what they want her to do," Bahr said.

McGrath said she didn't solicit the contributions and said she believes it is typical for an incumbent

lawmaker to receive a larger share of donations from PACs and lobbyists than from individual donors.

"Isn't that normal with incumbents! I'm not surprised," McGrath said.

Another Republican on the panel, Rep. Jim Weiers of Phoenix, doesn't share McGrath's view.

Weiers deliberately avoids accepting large numbers of PAC and lobbyist contributions, preferring to accept support from residents of his west Phoenix community. Individual donations outnumbered PAC and lobbyist contributions to Weiers Campaign kitty by a ratio of 2-1.

"I think it's wrong to chase PAC contributions," Weiers said, adding that he makes it clear to those PACs that do contribute that their checks buy them nothing.

"There's no strings attached, and I made that very clear four years ago," Weiers said. "My vote is my vote."

Bowers scoffs at the idea that the groups gain access through contributions. He calls PACs "nothing more than a conglomeration of lots of citizens" and views lobbyists as valuable sources of information. In the next legislative session, Bowers will serve in the Senate.

One lobbyist supporter of Bowers, Richard Foreman, once took the lawmaker and his wife out for an

expensive meal on their wedding anniversary, courtesy of Foreman's employer, Southwest Gas.

Bowers, though, is steadfast in saying that no contributors gain special favors through their contributions. He even sends a letter to each telling them that "your donation buys you absolutely nothing but my desires for good government."

Another Republican on the panel, Rep. Scott Bundgaard of Glendale, said contributions from business and industry flow naturally to his campaign because he supports bills for cutting government red tape and regulations.

"The people that contribute to me do not drive my vote," he said. "However, once you establish a voting record, people who agree with you are more likely to contribute to your campaign.

"My politics and philosophy are more anti-regulation and more personal responsibility."

Corporations also say that their money follows legislators who are supportive of their issues.

The Grand Canyon State Electric Cooperative Association found a number of friends on the House Environment Committee, contributing to nine of the 10 members.

Tom Jones, CEO of the rural utility group, said the contributions were meant as a reward for lawmakers who voted to slash regulations that were hamstringing local utilities. Among the bills the

utilities successfully pushed through the Legislature in the past four years was one exempting consumer-owned cooperatives from oversight by the Residential Utility Consumer Office.

"We had some specific pieces of legislation that we were interested in, and I would suspect that they were supportive of those," Jones said of the lawmakers to whom the Grand Canyon co-op contributes through its PAC. He estimated that the PAC gave to as many as 70 lawmakers last year.

Environmental activists contend that they and other grass-roots groups are effectively sidelined by the heavy spending of PACs and lobbyists on the Environment Committee. The result is that those groups, and not ordinary citizens, have the upper hand when it comes to lawmaking.

"We don't have big contributors," said Bahr, who noted that the Sierra Club's PAC has handed out $50 contributions to a handful of lawmakers.

Honan said environmentalists can't compete with corporate lobbyists who are paid to be at the Legislature representing industry interests.

"Most of our members are working and can't come down there and sit all day, and the industry lobbyists are paid to sit there all day," she said. "They're all paid to be there.

"So money is the key."

U.S. District Court for the District of Arizona

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Section: News (National and Foreign)

ARIZONA PONDERS ITS HIGH-OFFICE HEADACHES; GOVERNOR'S FRAUD TRIAL JOINS CORRUPTION CASES AMONG OFFICIALS SINCE 1988

ASSOCIATED PRESS

David Ureno just shrugs at the prospect of a second Arizona governor in a decade being driven from office under a legal cloud.

Arizona isn't any more corrupt than anywhere else – its public officials just have the misfortune of getting caught, Ureno said.

"Politics is politics," the 46-year-old truck driver said as a federal jury in Phoenix deliberated in the bank fraud case against Gov. Fife Symington. "People do crooked things, and sometimes they get caught and sometimes they don't. He can't be completely honest or else he'd be God's sidekick."

The 12-member jury received the Symington case late Friday afternoon in U.S. District Court and met for about an hour before recessing for the weekend.

Yesterday, before recessing for the night, the jurors spent their first full day deliberating whether Symington deceived banks and other lenders to get millions in loans when he was a real estate developer.

For other Arizonans, Symington is the latest reason to be ashamed of a state that has the dubious distinction of having elected – in succession – two of the 11 U.S. governors indicted this century.

"We can't seem to find a governor who is not corrupt," said Katie Edwards, a sociology student at Arizona State University in Tempe.

Margot Childers, co-owner of a Western clothing store and a service station in Flagstaff, said friends from out of state always ask: "What's wrong with Arizona?"

"It's like, don't we have any decent people in Arizona?" Childers said. "It's always embarrassing to talk about our governor."

Arizona's latest string of scandals began in 1988, when Republican Gov. Evan Mecham was indicted in court and later impeached by the state Senate. A jury later acquitted Mecham of fraud and perjury charges for allegedly hiding a campaign loan.

Symington was the first Republican businessman to publicly back a recall drive against Mecham after the 1988 indictment. Symington later beat Mecham in the 1990 GOP primary.

The next scandal hit shortly after Symington was elected in 1991; 20 state lawmakers and lobbyists were indicted in a bribery case known as AzScam. Seven legislators were convicted on charges connected to the sting operation, in which lawmakers were offered cash in exchange for votes to legalize casino gambling.

Symington is on trial on 21 charges of bank fraud, attempted extortion and perjury. He is accused of misrepresenting his shaky financial condition to get millions of dollars in loans to prop up his real estate business.

"I think Symington is kind of getting crucified," said Richard Blomberg, 79, of Kingman. "You have people any place in the world that are bad apples. You have to be broad-minded about that kind of stuff."

The fact that Symington's 13-week trial has not caused chaos is something to be proud of, said Bob Aprahamiam.

"The judicial process is reaching a decision," said Aprahamiam, 57, of Phoenix. "I think Arizona should be proud that it has a process that works."

Pub Date: 8/12/97

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

Los Angeles Times
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September 4, 1997

Section: Main News

Arizona Governor Guilty of Fraud, Forced to Resign
Law: Federal jury finds Fife Symington lied to lenders in order to save his real estate empire. He is state's second chief to be ousted from office in less than a decade.

LOUIS SAHAGUN
TIMES STAFF WRITER

A federal jury in Phoenix on Wednesday convicted Arizona Gov. Fife Symington of lying to lenders to get millions of dollars for his failing real estate ventures, making him the state's second governor to be ousted in less than a decade.

The great-grandson of steel baron Henry Clay Frick stared downward as the five-woman, seven-man jury – which had deliberated 54 hours – returned the verdict that stripped him of the office he had held since 1991 and may send him to prison for years.

The 52-year-old Republican, now bankrupt, is scheduled for sentencing on Nov. 10.

At a news conference, Symington tearfully said he plans to relinquish his office on Friday to Arizona's

Republican secretary of state, Jane Hull – an experienced, assertive and highly regarded former state legislator who many believe will be anything but a caretaker governor.

"Every once in awhile there is salvation in surrender," he said. "I am returning to private life with my head up, spirits high and my heart full of gratitude."

Symington was indicted last summer after a five-year probe by the U.S. attorney's office in Los Angeles. He was charged with 19 counts of inflating his assets on financial documents when he wanted money, and understating his wealth when he wanted to get out of loan guarantees; and one count each of attempted extortion and perjury.

The jury found him guilty of seven counts of filing false financial statements to banks. He was acquitted of three counts, including the inflammatory charge of trying to use his power of office to extort concessions from a pension fund he owed $10 million. U.S. District Judge Roger Strand declared a mistrial on the rest of the counts – on all of which the jury had deadlocked.

"Today," said Melodee Jackson, executive director of the Arizona Democratic Party, "a jury of peers, in a very complicated case, decided that everyone must play by the same rules and no one is above the law."

John Dowd, Symington's lead attorney and a specialist in white-collar crime, promised to appeal the convictions, in part because of the dismissal and

replacement of a juror seven days after the start of deliberations.

Dowd has argued that 74-year-old Mary Jane Cotey, who reportedly wanted to acquit Symington on all charges, was improperly dismissed from the panel after other jurors accused her of being incapable of or unwilling to participate in deliberations.

"We tried a hell of a case; I'm sorry Fife has to take the consequences," he said. "But we'll win this case eventually. We've got to take it one inning at a time."

During the 16-week trial, prosecutors portrayed Symington as a real estate con artist who swindled lenders into giving him $200 million in loans between 1986 and 1991 – and who did not make good on financial guarantees when his construction projects failed.

After reviewing 1,400 documents and three months worth of tedious, technical and often conflicting testimony from nearly 40 witnesses, the jury agreed.

In his final argument, Assistant U.S. Atty. David Schindler said that Symington deceived lenders to keep his real estate empire of gleaming office buildings and shopping centers afloat by creating the impression he was successful, creditworthy and worth millions of dollars.

"He liked the prestige that came with the illusion that he was a big real estate developer," Schindler told the jury. "And, ladies and gentlemen, he parlayed that illusion . . . into the job he holds today."

Ultimately, Symington watched all but one of his two dozen projects collapse like dominoes when the real estate market went into a free-fall here in the early 1990s.

Symington – both in testimony and through his attorney – asserted during the trial that he never profited from the "unintentional" errors and omissions in his financial statements, that his accountants should have caught the blunders and that no one ever complained.

Moreover, Symington said, his lenders did not rely on the questionable information to make a decision when they gave him hefty development loans. Instead, he said, he received the loans on the basis of his reputation and track record as a developer.

In effect, he seemed to argue, he was too busy reshaping Arizona society and creating jobs to pay attention to details in his financial statements.

"In hindsight, it's easy to say that Mr. Symington should have done a better job with his financial statements," Dowd told the jury. But "he guaranteed and delivered what they [lenders] paid for with their money."

Not so, argued Schindler, who used Symington's own testimony and financial records to establish a pattern of deceit.

Between 1986 and 1991, Schindler said, Symington prepared numerous sets of false personal statements – bearing the same "as of" dates but reporting

different net worths – for various lenders, including First Interstate Bank and Valley National Bank.

For example, Symington fabricated three versions of his financial condition as of Dec. 31, 1989. One, submitted to a bank from which he needed money, showed a net worth of $5.3 million. Another, supplied to a bank from which he sought loan concessions, showed he was $4.1 million in debt. A third submission said that he had not prepared a statement for that period.

Now Symington, a Harvard-educated, son of a wealthy East Coast family whom critics refer to as "the only man in Arizona who doesn't own a T-shirt," joins the state's growing list of notorious politicos and shady business owners who made their mark during the 1980s – and then ran afoul of the law.

In 1988, then-Gov. Evan Mecham was impeached for diverting inaugural ball donations into a loan for his ailing Pontiac dealership. Symington was among the first prominent businessmen to publicly support Mecham's recall.

In 1990, eight state legislators were captured on videotape accepting wads of cash from an undercover agent in a sting operation known as AzScam. Then came the "Keating Five," a group of federal lawmakers with personal ties to savings-and-loan swindler Charles H. Keating Jr.

Back then, the antidote to the parade of scandals seemed to be Symington, who promised to attract

industry, boost tourism, restore political stability and clean up the state's image. Arizona Trend magazine even called him a man with the "credentials of an East Coast dandy, but a Westerner's love for land deals and brawls."

"It's been like an epidemic that has tragically obliterated our former favorable record," said former Phoenix Mayor Terry Goddard. "Once, we were known as a small state that produced great national leaders and presidential candidates – people like Barry Goldwater and the Udalls."

Supporters praised Symington's record of cutting state income taxes by 30%, overhauling the state justice system, fighting federal intrusion into state affairs and cutting regulations to make Arizona more friendly to business. But even those who lionize the conservative leader have grown weary of his intense personal struggles and the turmoil wreaked on the state.

"Regardless of what happens to Fife Symington," said Jess Yescalis, a spokesman for the Arizona Republican Party, in an earlier interview, "there is a definite yearning for political stability in Arizona. People here are tired of having our governor being in court and taking fire."

Special correspondent Camille Kimball in Phoenix contributed to this story.

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

The Arizona Republic Sunday, December 14, 1997

Holiday premium on fund-raising

Reforms fell by wayside

Arizona lawmakers going for broke before Jan. 12 end to soliciting season

By Michael Murphy
The Arizona Republic

Arizona lawmakers are on a frantic holiday dash for campaign cash, and they're turning to a familiar ally: the state's top lobbyists.

"'Tis the season," groaned Janice Goldstein, lobbyist for Arizona trial lawyers, contemplating a hectic schedule of wine-and-cheese "meet and greet" receptions and broiled chicken lunches.

The race to raise money is spurred by a looming deadline: Once the Legislature convenes Jan. 12, lawmakers and the governor will be barred from soliciting funds from lobbyists while they're crafting laws. The ban was passed by the Legislature in 1992 in the wake of the AzScam political corruption scandal.

Today, lobbyists are helping lawmakers beat the deadline by finding donors, mostly clients, willing to dole out hundreds of dollars each for 1998 political campaigns at a time when most people are trying to scrape up cash to buy Christmas presents.

The pace is so frenzied that lawmakers are tripping over each other with three to four fund-raising events a night.

"Hang on to your knickers for that week before Jan. 12. I guarantee you it will be like hell's a-poppin'," Goldstein said.

The scramble for cash comes a year after *The Republic* revealed the powerful role of special interests at the Legislature in "The Invisible Legislature" series. It showed how lobbyists help to get candidates elected by gathering signatures and raising money for them and then, once in office, by helping them write and circulate legislation.

Several lawmakers early this year introduced legislation designed to curb the influence of lobbyists, but the bills, including a gift ban endorsed by then-Gov. Fife Symington, died.

Today, the tango between lawmakers and lobbyists continues unabated and the Legislature's few reformers are promising another attempt at changing the system.

"We're going to start that drill again," said Sen. Tom Patterson, R-Phoenix, who last year hammered out a lobbyist gift-ban bill. The measure won support but failed after then House Speaker Don Aldridge, R-Lake Havasu, refused to hear it.

Democrats are drafting bills that would go even further, prohibiting lobbyists from serving on candidates' campaign finance committees and curbing their ability to "bundle" contributions from clients.

Sen. Chris Cummiskey, D-Phoenix, said the pre-session holiday rush for campaign dollars by lawmakers illustrates the problem.

The intent of the ban on fund-raising during the legislative session was to diminish the financial influence of lobbyists and special interests while issues affecting them were before the Legislature or the governor. It was enacted after the Legislature was rocked by seamy revelations resulting from a Phoenix Police sting. AzScam led to the indictment of seven lawmakers.

Loopholes, loopholes

To get around the ban, many lawmakers take the path of least resistance by asking lobbyists to help them organize fund-raisers before the Legislature convenes.

"It's like shooting fish in a barrel for many members because they go to the same lobbyists time and time again," Cummiskey said.

Reforms passed by voters in 1986 were supposed to prevent the practice known as bundling contributions, but candidates and lobbyists have found a loophole in the law.

Bundling occurs when an individual collects a number of checks from individuals and then presents them to one candidate.

Lawmakers get around that prohibition by appointing lobbyists to their campaign finance committees, a role that allows them to gather checks from others.

The politician knows the checks were collected by one special interest, but the public rarely learns the role that lobbyists play because candidates are not required to disclose the names of their finance committee members.

"Of course we allow bundling. You just have to be on the finance committee," Patterson said.

Consider a fund-raising luncheon last week for House Speaker Jeff Groscost that raised between $65,000 and $70,000 for the Mesa Republican.

A program for the event showed that Groscost's finance committee is a who's who of Arizona lobbyists. Forty-five of the 55 members were registered lobbyists, including tobacco industry representatives Phil MacDonnell and Mike Williams, utility lobbyists Martin Shultz and Russell Smoldon, and Alan Immerman, who represents chiropractors.

Most of the lobbyists served as "table sponsors," selling 10 tickets at $200 each, for a total of $2,000 in contributions.

Under Arizona law, an individual can give $300 to a state legislator every two years.

Groscost's luncheon, while larger than most, was hardly an aberration in Arizona politics.

Part of the job

Lobbyist Kevin DeMenna, one of Groscost's table sponsors, serves on a "couple dozen" other candidate campaign finance committees.

DeMenna, whose clients range from the American Cancer Society to Sumitomo Sitix of Phoenix, acknowledged that the rush by lawmakers to raise funds before the session begins, combined with the increasing campaign costs, has "amplified the role lobbyists play in fund-raising."

But DeMenna said his campaign work on behalf of lawmakers doesn't grant him any special political favors at the Legislature, just greater access.

Another prominent lobbyist who "hates" the pre-session scramble by lawmakers to raise funds said few lobbyists have the luxury of saying no.

"How can you refuse? The reality is we have to do it," said the lobbyist, who spoke only on condition of anonymity.

"I think most lobbyists would prefer not be involved, but the only way you can do that is to not permit lobbyists to serve on campaign committees because it doesn't look proper."

Of the more than 5,000 lobbyists registered in Arizona, only a handful, including Goldstein and Chris Herstam, refuse to sit on political finance committees.

"I've never quite understood why a legislator would want a bevy of registered lobbyists as their fund-raisers," Goldstein said.

But many politicians view lobbyists as a necessary part of raising funds.

"People that aren't involved in government don't want to give money," said Gov. Jane Hull, who relied heavily on lobbyists to help her raise more than $500,000 at a Nov. 18 event.

And Groscost said the influence of lobbyists has been overplayed.

Sen. Carol Springer, R-Prescott, has a "bunch of lobbyists" on the finance committee for her exploratory campaign for state treasurer.

What's the answer?

But Springer, like Groscost, said the answer to reforming the system is not excluding lobbyists from campaigns.

The lawmakers favor full and immediate disclosure of campaign donations.

"The real bottom line is, these laws that we have don't work the way I think the public thinks they

should work," Springer said. "There's always a loophole."

For members of the minority and those without Groscost-like clout, the current system can be frustrating.

Rep. Ken Cheuvront, D-Phoenix, staged a fundraiser at a downtown Phoenix restaurant on the same night this month that three other lawmakers were out raising money.

"I can tell you, I wasn't the first choice of some of the lobbyists," he said.

Cheuvront doesn't rely heavily on lobbyists for his campaign and said that whatever reforms are enacted, they first must address the checkbook power that special interests have at the Legislature.

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

State of Campaign CONFIDENTIAL
From: Josh Silver April 6, 1998

* * *

MEDIA

Still quiet on the media front. I am working of preliminary press releases in anticipation of any unexpected coverage. We must always remember three primary points:

1) Our message is about the problem in Arizona politics. The system is broken, politicians are sold out to special interests, and as a result, the issues near and dear to us are left unaddressed.

2) Clean Elections is NOT about public funding. It's about spending limits, getting rid of special interests, and leveling the playing field.

3) Clean Elections is a REFORM issue. It is not a tax issue, it is not a liberal issue.

* * *

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

FINAL EDITION

THE ARIZONA REPUBLIC

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Thursday, August 20, 1998 109th year, No. 94

GOP drafts lobbyists for help in crucial races

Senate chief reputedly warns them not to raise funds for Democrats

By Chris Moeser
The Arizona Republic

Senate President Brenda Burns has assigned the state's most powerful lobbyists to raise money for specific candidates in races Republicans must win this fall to retain control of the Senate.

Burns also warned the lobbyists that they will suffer political retribution in the next session of the Legislature if they raise money for Democrats, according to sources.

The Arizona Republic obtained a memo that shows lobbyists were assigned to help raise money for GOP candidates Larry Nelson in Yuma, Darden Hamilton in Glendale, and Senate Majority Whip Gary Richardson in Tempe. All are considered vulnerable in this election.

Burns said coordinating lobbyists' fund-raising efforts was "absolutely appropriate."

But critics say the memo confirms what many voters suspected: that special interests have a stranglehold on the legislative process in Arizona.

"This is the smoking gun that reveals the quid pro quo of the current system," said Kaia Lenhart, political director of Arizonans for Clean Elections. The group is supporting a ballot measure that would provide public funding for state elections in exchange for strict limits on campaign contributions.

"Public officials should not be bought by the highest bidder. Arizonans want and deserve elections not auctions," Lenhart said.

The influence of lobbyists on the Arizona Legislature has been controversial since a law-enforcement probe in 1991, nicknamed AzScam, revealed that lawmakers had taken bribes from a lobbyist, actually a police agent, who wanted them to legalize gambling. Since then, citizen-inspired initiatives have attempted to curb the influence of lobbyists, with limited success, and bills to impose new limits on lobbyists' gifts and entertainment have been repeatedly turned down by lawmakers. The influence of lobbyists has been the subject of an occasional *Republic* series, "The Invisible Legislature," since 1996.

The goal of the Burns strategy, according to the memo and sources familiar with the discussions, was to name "champions" in the corps of corporate

lobbyists who could direct campaign donations from both lobbyists and political action committees from the industries they represent.

Campaign champions

In notes in the margin of the memo, someone wrote, "Need champion for each campaign."

Democrats are making a strong bid to pick up three seats in the state Senate, which would deadlock the chamber at 15-15. That would make it difficult for Burns to hang on to her power and could severely hamper the conservative agenda at the Capitol.

The three-page memo came from a meeting July 15 at Republican Party headquarters in Phoenix. It includes four columns of information. The first is titled "Industry" and contains a list of 13 major Arizona industries, such as agriculture, mining and real estate.

Under each entry is a handwritten list of lobbyists who represent those industries in contacting state lawmakers.

The next three columns are headed by the candidates' names. Two lobbyists' names were written in the corresponding boxes in the form, which was not completed in the version obtained by *The Republic*.

The meeting was attended by a number of high-profile lobbyists, including John Mangum, Wendy

Briggs, Jim Klinker, Connie Wilheim-Garcia, Chuck Coughlin, Sidney Hoff Hay and Mike Williams.

Burns, who made the pitch to lobbyists for their support at the meeting, said nothing out of the ordinary occurred. The point was not to get lobbyists involved in campaigns, but to reach the groups they represent.

The meeting was an opportunity to get the word out about the GOP candidates in those races, to let people know about their philosophies and ideals, and find people willing to help with the campaigns.

The idea was to provide industry officials with the information so they can match their own beliefs with candidates.

'Funnel' for hopefuls

It's "absolutely appropriate," Burns said, to "suggest to a lobbyist that they inform the people they represent who the candidates are." Burns said the purpose of the memo was to provide candidates a "funnel," that is, a way to tap information and resources at the beginning of a campaign without making "thousands of calls."

The lobbyist-coordinators named for each campaign, as suggested by the memo, would be a starting point for candidates.

And she added that the list is so encompassing – including everything from firefighters to farmers – that virtually all public interests were represented.

"It would actually be extremely difficult to find groups who were left out," Burns said. "Those groups represent the public.

"When you campaign, people choose who they're going to give their funding for the campaign that is closest to their philosophies. I make no apologies. There's absolutely nothing wrong with that. That's exactly what people should be doing. They need to be as informed as they can about the candidates, and the only way a candidate can get their message out is typically by things that cost money."

But according to several people familiar with the discussions, Burns' sales job included discouraging lobbyists from "hedging their bets" in the three races by giving money to other parties than the GOP, a common practice.

The message to lobbyists was that donations to Democrats would be remembered in next year's legislative session, according to one lobbyist, who characterized the meeting as receiving "marching orders."

"It was a subtle message, but it wasn't so subtle," said another source, who attended one of the discussions. "It was along the lines of, 'We need you guys to stand up for Republican candidate.'"

Stan Furman, Darden Hamilton's Democratic opponent in District 16, said several lobbyists have

told him that prominent Republicans have warned them that if they support Furman, "They can forget about then bills being heard next year."

According to another source familiar with the discussions, Burns was paraphrased as saying, "We've been very pro-business," and to keep it that way, "we need your help."

The source added, "What she's doing is exactly what a Democratic or Republican leader should be doing. . . . She's putting together an effort to helping candidates out."

Not like Burns

Dennis Burke, executive director of Arizona Common Cause, said he doubted the veracity of the claim that lobbyists were warned against giving to Democrats.

"It doesn't sound like Brenda Burns," he said, adding that she has a "good government reputation."

In fact, Burns said she doesn't remember encouraging lobbyists to avoid giving to Democrats. But she acknowledges the business angle.

"We are a pro-business Legislature. The message is, if you want this philosophy to prevail, support the candidates who hold those philosophical values," she said.

Burns added that she didn't put the July meeting together. Party officials arranged it, she said. But

state GOP chairman Mike Hellon said the party didn't sponsor the event, although he said retaining the three Senate seats is a top priority.

"I was not at that meeting. I know what you're talking about," Hellon said. "That was not something that we put together. That was done by the people themselves. I think the intent was to sort of go around the table of interested parties and say, 'These are races that are crucial. Who's interested in helping whom?'"

Hellon, like Burns, worried about the perception that the GOP's campaign efforts are too closely tied to lobbyists.

There are so many interests, Hellon said, "they basically neutralize each other." Everyone is at the table. As long as there is full disclosure about who is supporting whom, he added, it's fine.

'Get involved'

And that's one of the reasons for the meeting, he said. It gave competing interests a chance to sort out which candidates to back.

"We're not trying to control it through the party. We're saying, 'Here are our guys, for those of you interested in the election — you know, get involved,'" Hellon said.

"As long as everyone participates, then I don't think you have inordinate influence on the part of one

select interest group or another. As long as everybody is involved, then they balance each other out."

Two of the three Republican candidates, Hamilton and Larry Nelson, said they were aware of party efforts to help them. Gary Richardson said he was getting a lot of assistance, but he wasn't aware of any specific aid.

Hamilton said Burns was being extremely helpful.

"I know there's an effort out there," he said. "As far as her strategy and how she picked people to pull the campaign and the lobbying effort together, I'm not clued into that.

"But when I meet with (lobbyists), it's clear they've talked with her. The rails have obviously been greased by the time I get there."

Nelson, of Yuma, said Burns had been very supportive, writing letters of endorsement to lobbyists and business leaders. But he said he's not heard of any heavy-handed "thou shalt support" approach.

But Nelson's District 5 opponent, former House member Herb Guenther, says he's convinced that some lobbyists are being persuaded to avoid his campaign.

"Some people have been a little timid to offer financial support and that might be one of the reasons," Guenther said of the GOP effort. "These are people who have historically contributed to me."

'Laid down the law'

Former Tempe Mayor Harry Mitchell, Richardson's opponent in District 27, said he had been warned by a lobbyist that Burns had "laid down the law" about contributing to the three Democrats.

That angers Sen. Chris Cummiskey, D-central Phoenix, who calls the efforts by Burns and others a blatant attempt to use the influence of special interests to win the election.

The result, Cummiskey says, is a Legislature in which lawmakers are beholden to groups that raise money for them.

"This is a snapshot of what's going on in these campaigns. It's a litany of lobbyists that are tapped to maintain the status quo," Cummiskey said. "In this case, it sounds like just about every primary interest that does business at the Capitol."

Not going to China

Burns responded that Democrats would do the same thing if they had the majority.

"I suspect they're doing all that they can in the minority," she said. "I know they are. You would expect them to."

She added a shot at the national Democratic party, which has been beset by a fund-raising scandal.

"By the way, we're not going to Red China," she said.

Burke says both parties live off lobbyists and special interest money. According to Arizona Common Cause, 80 percent of state campaign donations comes from lobbyists and their spouses.

"That's the amazing truth of Arizona politics. It's funded by lobbyists. They own the process," Burke said. "The party with the votes has the most to sell."

GOP ASSIGNS LOBBYISTS TO CANDIDATES

Republican leaders have coordinated lobbyists' money-raising efforts for GOP candidates in three Senate "swing" districts. According to this memo from a July 15 meeting at GOP headquarters, Senate President Brenda Burns assigned lobbyists to raise money for campaigns in Yuma, Glendale and Tempe by soliciting campaign donations from their clients and industry political action committees. One note in the margin reads, "Need champion for each candidate." The first page of the memo is reproduced below.

JULY 15, 1998, 7:30 A.M.
ARIZONA REPUBLICAN PARTY HEADQUARTERS

[Handwritten Notes Omitted In Printing]

INDUSTRY	Larry Nelson District 5	Darden Hamilton Dist. 16	Gary Richardson Dist. 27
AGRICULTURE:			
CONSTRUCTION:			

FINANCIAL:			
HEALTHCARE:			

Following is a printed version of the handwritten notes in all three pages of the memo:

Agriculture
Bob Fannin
Jim Klinker
David Iwanski
(Agribusiness)
Rick Lavis
Bas Aja

Construction
Bob Fannin/Jeff
Connie Wilhelm
Janice Burnett
Mike Williams

Financial
Kevin DeMenna
Ellen Poole
Skruggs
American Express
(Charlie) Stevens

Health Care
Laurie Lange
Greg MacFarland
John Mangum
Don Isaacson
Bob Fannin
David Landrith
Rip Wilson

Hi-tech/Manufacturing
Bob Fannin
Michael Preston Green
Knox Kimberly
Allan Stanton
Me

Hospitality
Ed Wren
Bob (Fannin)
Wendy (Briggs)/Jeff
Michael Preston Green
Don Isaacson
Phil MacDonnel
Mike Williams
unknown

Insurance
Wendy (Briggs)
Steve Barclay
Bob/Wendy
Michael Preston Green
Don Isaacson
Dave Childers

Mining
Chuck Shipley
Kevin Kinsall
Jim Bush

Kevin DeMenna
unknown

Real Estate
Tom Farley
Larry Landry
Suzanne Gilstrap

Retail
Michelle Ahlmer
John Mangum
Mike Williams
Larry Landry

Transportation
Michael Preston Green
Dave Barry
Larry Richmond/
auto dealers
Terry Smalley
Web Crockett
Allan Stanton
C.A. Howlett

Utilities
Joe Abate
Manny (Lerma)
Russell (Smolden)
Susan Bitter Smith
Richard Foreman
Don Isaacson
Marty (Schultz)
Knox Kimberly
Jim Hartdegen
illegible

Other:
Sidney Hoff Hay
Samantha Fern
Cathy Herrod
Small business
Tom Guerrin
Chambers

Public Safety
Firefighters
Police
Don Isaacson
Elaine Arena
Jim Skelly
Ed Wren

Oil Companies
Jim Bush
Mike Williams
Charlie Stevens

Professional
CPA
Doctors
Attorneys
Funeral
Dentists
DeMenna
Charlie (Stevens
Wendy (Briggs)
Jeff Hill
(John) Mangum
Paul Messenger
unknown

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

1998
BALLOT
PROPOSITIONS

Vote Arizona!
1-877-THE VOTE
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Toll-free Voter Registration Hotline

GENERAL ELECTION
NOVEMBER 3, 1998

PUBLISHED BY
BETSEY BAYLESS
ARIZONA SECRETARY OF STATE

* * *

Where does the money come from? Why should you be concerned? Because important issues regarding health care, children, and the environment are affected by political contributions. Health care industry interests opposed to new standards for patient care have stepped up their political giving. Drugs cost more because of campaign contributions from the pharmaceutical industry. School construction is obstructed because legislators yield to the bonding industry.

Most corporations and wealthy donors give money because they expect something in return. Elected officals who consistently vote against the interests of their donors will see future contributions significantly reduced.

You can end the money chase, halt corruption, limit campaign spending and reduce special interest influence by supporting "Clean Elections." The League of Women Voters of Arizona urges you to vote yes on the "Clean Election Act."

Dr. Lila J. Schwartz,
President
Leauge of Women
Voters of Arizona
Sun City West

Ann Eschinger, President
League of Women Voters
of Metropolitan Phoenix
Phoenix

Paid for by League of Women Voters of Metro Phoenix; Ann Eschinger, President

ARGUMENT "FOR" PROPOSITION 200

As an active member of our community, I have witnessed Arizona thrive economically over the past three decades. During these years every segment of our society has been participating in Arizona's growing reputation nationally as a good place to raise a family, pursue a career, and participate in the community.

However, after years of grass roots support for local, state, and national political candidates of both parties, I have noticed an alarming trend which if not stopped will destroy democracy as we know it. The culprit is the insatiable pursuit of private political contributions by candidates for office. With the demand for big money so acute, powerful contributors

lock up the attention of their candidates, and at worst influence public policy.

It is time to stop our politcians' addiction to huge privately funded campaigns. Our politicians should be free again to represent the best interests of all the citizens, not just the large financial contributors who can trade their cash for political support. When we return Arizona's politicians to the competition of ideals and not money we will reset the foundation of democracy in Arizona.

The Citizens' Clean Elections Act is the right step to clean up Arizona politics. It frees the politicians from the money chase, ends the relentless pursuit from big money, and allows more Arizonans the opportunity to serve in public office. Simply stated, it levels the playing field and stops corruption. Only those who have been stealing our politicians' independence with big money could oppose the Clean Elections Act. I urge you, for the future of Arizona, to vote yes for Clean Elections.

John Benton
Tempe

* * *

The Citizens Clean Election Act – endorsed by the State Legislative Council of AARP, Arizona League of Women Voters and countless other organizations, will take big money out of politics and reduce special interest influence. By limiting campaign spending and increasing disclosure requirements, it will level

the playing field so that the voices of Arizona's working families and seniors on fixed incomes are heard just as loudly as the big money donors who are corrupting our system.

Join me in voting "YES" on Proposition 200. Let's clean-up Arizona politics.

John Eichenauer
Phoenix

Paid for by Arizonans for Clean Elections; Gary Tredway, Treasurer

ARGUMENT "FOR" PROPOSITION 200

Argument for Proposition 200 (Arizonans for Clean Elections)

As members of the organization responsible for many of Arizona's existing campaign spending limits and lobbyist reforms, and as an organization that works every day in the Legislature and sees the pervasive and corrosive effects of lobbyist money in political campaigns, we believe that Proposition 200 is the the strong medicine needed in the Arizona Legislature. It provides a sensible way to reduce the role of special interest money, ratchet-down the expense of political campaigns, enable good, new people from our communities to run against lobbyist-funded candidates, enable elected leaders to stop the money chase altogether and spend more time on the hard issues, and provide Arizonans with more timely disclosure regarding who is receiving special interest money.

Arizona Common Cause volunteers strongly support Proposition 200 and urge you to vote "YES."

Rod Engelen, State Chairman
Common Cause of Arizona
Phoenix

* * *

Spelling, grammar, and punctuation were reproduced exactly as submitted in the "for" and "against" arguments.

U.S. District Court for the District of Arizona

(Filed Jun. 13, 2009)

[Title Omitted In Printing]

BEFORE THE OFFICE OF
ADMINISTRATIVE HEARINGS

In the Matter of JOAN FITZ-RANDOLPH ID # 2000-91625 and JAY BLANCHARD ID # 2000-91559	)	01F-001-CCE 01F-002-CCE **MEMORANDUM OF THE CITIZENS CLEAN ELECTIONS COMMISSION**

This matter is a consolidation of two separate, but related matters regarding matching funds for Clean Elections Candidates. The Citizens Clean Elections Commission ("Commission") incorporates by reference the Statement of Agreed Facts filed separately by the parties in this matter.

Mr. Randolph requests that he receive matching funds for contributions received by his opponent Jeff Groscost, even though those contributions have been returned to donor. Ms. Fitz-Randolph seeks matching funds for a large amount of money that was transferred by her opponent, Steve May, to his 2002 account. In both cases, the Commission determined that

because those donations were no longer a part of the candidate's 2002 account, that no matching funds would be distributed. This determination was based on the Commission's interpretation of their legal obligations, the purpose of the Citizens Clean Elections Administrative [illegible]. To count such offsets in this case would be contrary to the procedures used by a [illegible] of state contributions returned do not count towards contributions [illegible] and contrary to the purposes of the act. Simply put, why should participating candidates be able to spend money that their opponents do not have available to them?

The statute must be construed in accordance with the purposes of the act. The Appellants' reading of the Act would lead to an absurd result. Jay Blanchard would receive $5,516 that his opponent does not have available to spend. Ms. Fitz-Randolph would receive approximately $15,000 that her opponent does not have available.

In *Waltz v. Arizona Dep't of Public Safety*, the Arizona Court of Appeals said:

> In interpreting a statute, "legislative intent is controlling" and "pragmatic construction is required if a technical construction would lead to absurdity." [cite omitted].

> If, however, a liberal application of the language [of a statute] leads to a result which produces an absurdity, it is our duty to construe the act, if possible, so that it is a reasonable and workable law, not inconsistent with the general policy of the legislature, even though in doing so we may be compelled to change the punctuation or even the precise language of the act. [Citations omitted].

120 Ariz. 591, 594-594, 826 P.2d 1217, 1220-1221 (App. 1991). See also, State v. Walker, 181 Ariz. 475, 480, 891 P.2d 942, 947 (App. 1995) (statute should not be interpreted to result in absurdities).

As the Act was passed into law through an initiative of the People, there is no "legislative history" to look to in order to determine legislative intent. However, in construing an initiative, the Court looks to "ballot materials and publicity pamphlets circulated in support of the initiative." *Ruiz v. Hull*, 191 Ariz. 441, 957 P.2d 984, 993 (1998). The primary informational pamphlet distributed by proponents of the initiative, Arizonans for Clean Elections, is attached as Exhibit B. That pamphlet reflects public concerns and a desire to "level the playing field for candidates and voters. It enables people without access to wealth to run for office waging a battle of ideas rather than bank accounts." The pamphlet also describes when matching funds should kick in.

> Matching funds, up to three times the original amount, are provided *if the participating candidate is outspent by non participating*

> *opponents*. With this provision, Clean Elections candidates will have the resources to get their message out and run credible campaigns.
>
> Pamphlet, page 2 (emphasis added).

The purpose behind the act is clear. Clean elections candidates should have equal opportunity to get their message out. If non-participating opponents spend money in the political battle, the Act is intended to give the participating candidate an opportunity to respond. The requirements of 16-952(B) are not applicable to a situation where a candidate returns contributions or moves money into another account. If disbursements with no impact on the non-participating candidate's race are not counted for matching purposes, the purpose of the Act is fulfilled. A.R.S. §16-952 can be read to require matching funds when contributions *subject to use by an opponent* are in the account during the general election period. Such a construction of the statute is consistent with the purposes of the Act (in providing matching funds) and avoids an absurd result in which the participating candidate has more to spend than the non-participating candidate.

Given the Act's stated objective of leveling the playing field and equalizing spending, finding that A.R.S. § 16-952(B) requires payment in all circumstances would deprive the Act's other provisions of their due effect. Moreover, Plaintiff's reliance on the

word "shall" in the language of the statute is not dispositive.

> Use of the word 'shall' does not automatically render a statute mandatory; 'shall' may indicate desirability, preference or permission. *Arizona Downs v. Arizona Horsemen's Found.*, 130 Ariz. 550, 554 (1981). As a general rule, if a statute 'states the time for performance of an official duty,' without any language denying performance after a specified time, it is directory [as opposed to mandatory].

Forino v. Arizona Dept. of Transp., 952 P.2d 315, 319 (App. 1998). In the instant case, the purpose of the word "shall" is directive as to time. A.R.S. § 16-952(B) specifies that when a participating candidate qualifies for matching funds, " . . . the commission shall immediately pay . . . ".

[illegible] is hot" and raise as much money as possible right now. His decision to raise money for [illegible] 2002 campaign should not result in a windfall to Ms. Fitz-Randolph.

The money transferred to the 2002 account is entirely unavailable to Mr. May because Commission rules bar him from using more than one account for the current campaign. R2-20-103(A). Mr. May has acknowledged the implication and application of that rule in his case. He cannot move funds from the 2002 account back to the 2000 account. Thus, for purposes of this election, that money is entirely unavailable to him. If the money transferred to Mr. May's 2002

account is included for purposes of matching funds, Ms. Fitz-Randolph will be able to spend much more than her opponent. That would be unfair to Mr. May and contrary to the "equalizing of spending" purposes of the Act.

Conclusion

It can not be disputed that the purpose of the Citizens Clean Elections Act is to equalize the playing field and give participating candidates equal opportunity to get their message out. Although the Appellants are participating candidates, they appear to have forgotten this principle. Instead, they demand that they be given "matching funds" for monies that their opponents do not have available for use this campaign. This argument would lead to an absurd result whereby the participating candidates will be able to outspend their opponent. Rules of statutory construction require that the intent of the act be read into the statutes. By not counting funds which are either returned or transferred to another account towards total contributions for purposes of matching funds, the Commission has clearly fulfilled the purpose of the Act. Thus, the Appellants' demand for addition funds should be denied.

For the Reasons set forth above, the Citizens Clean Elections Commission requests that the Appellants' claims be denied.

RESPECTFULLY SUBMITTED this 27th day of October, 2000.

Janet Napolitano
Attorney General

By: /s/ Todd F. Lang
Todd F. Lang
Assistant Attorney General
Attorney for Citizens Clean
Elections Commission

U.S. District Court for the District of Arizona

(Filed Jun. 13, 2009)

[Title Omitted In Printing]

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of JOAN FITZ-RANDOLPH, ID # 2000-91625 Appellant	No. 01F-001-CCE RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE
In the Matter of JAY BLANCHARD, ID # 2000-91559 Appellant	No. 01F-002-CCE RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE

HEARING: October 27, 2000

APPEARANCES: David W. Eagle, Esq., represented Appellants Joan Fitz-Randolph and Jay Blanchard. Assistant Attorney General Todd F. Lang represented the Citizens Clean Elections Commission.

ADMINISTRATIVE LAW JUDGE: Daniel G. Martin.

Political candidates Joan Fitz-Randolph and Jay Blanchard opposed two separate decisions by the Citizens Clean Elections Commission (the "Commission") regarding payment of matching funds under the Citizens Clean Elections Act, A.R.S. § 16-940 et seq. (the "Act"). Prior to hearing, the parties submitted legal briefs and a Statement of Agreed Facts

(incorporated herein with minor modifications). The parties also stipulated to the admission of exhibits. In light of the foregoing, the hearing was limited to legal argument. Having considered the record and the arguments of the parties the Administrative Law Judge now makes the following Findings of Fact, Conclusions of Law and Recommended Orders.

* * *

the Act to allow Ms. Fitz-Randolph the benefit of equalizing funds based on this money. The Commission asserts that to construe the Act to allow Ms. Fitz-Randolph the benefit of equalizing funds based on money no longer available to her opponent would violate Arizona's rules of statutory construction because it would produce an "absurd" result.[1]

24. A.R.S. § 16-940 sets forth detailed "findings and declarations" in support of the Act. There is no direct declaration that the Act's purpose is, as urged by the Commission, to "level the playing field." A.R.S. § 16-940(A) states:

> The people of Arizona declare our intent to create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will

[1] In support of this argument, the Commission cites *Waltz v. Arizona Dep't of Public Safety*, 120 Ariz. 581, 584-85, 826 P.2d 1217, 1220-21 (Ct. App. 1991) and *State v. Walker*, 181 Ariz. 475, 480, 891 P.2d 942, 947 (Ct. App. 1985).

promote freedom of speech under the U.S. and Arizona Constitutions. Campaigns will become more issue-oriented and less negative because there will be no need to challenge the sources of campaign money.

25. Although the Act does not directly state that one of its purposes is to "level the playing field," the Administrative Law Judge finds that this intent can be inferred from several sources. First, one of the Act's primary objectives is to provide funding to participating candidates. To the extent that such funding is dependent, as it is under A.R.S. § 16-952(B), on contributions raised by the participating candidate's opponent, there can be little question that the Act functions to "level the playing field." Second, informational literature that was distributed by the Act's proponents when it was an initiative measure (Exhibit B) plainly states that one of the Act's purposes is to "level the playing field for candidates and voters. It enables people without access to wealth to run for office waging a battle of ideas rather than bank accounts."

26. The only authority cited by the Commission in support of its position that Mr. May no longer had use of the money that he transferred to his 2002 Exploratory account is Arizona Administrative Code ("A.A.C.") R2-20-103(A). This rule requires

* * *

RECOMMENDED ORDERS

In view of the foregoing, it is recommended that the Citizens Clean Elections Commission enter the following orders

1. With respect to Joan Fitz-Randolph, Docket No. 01F-001-CCE, the Commission shall authorize payment to Ms. Fitz-Randolph under A.R.S. § 16-952(B) of equalizing funds in an amount equal to the amount restricted to bring Ms. Fitz-Randolph up to the $45,000.00 general election cap.

2. With respect to Jay Blanchard, Docket No. 01F-002-CCE, the Commission shall include in its calculation of Mr. Groscost's total contributions under A.R.S. § 16-952(B) the amount of $5516.00 in returned contributions that the Commission had previously elected to offer.

Done this day, October 31, 2000.

/s/ Daniel G. Martin
Daniel G. Martin
Administrative Law Judge

Original transcribed by fax and mail this 31st day of October, 2000, to:

Colleen Connor, Executive Director
Citizens Clean Elections Commission
ATTN: Paula Ortz
[illegible]001 North 3rd Street, Suite 200
Phoenix, Arizona 55012

By /s/ [Illegible]

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

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The Associated Press State & Local Wire

September 26, 2002, Thursday, BC cycle

SECTION: Political News

LENGTH: 494 words

HEADLINE: Bush to stump for fellow Republicans in Arizona

BYLINE: By MICHELLE RUSHLO, Associated Press Writer

DATELINE: PHOENIX

BODY:

The Republican candidates in two high-profile and hotly contested Arizona races said they're hoping President Bush's visit Friday will propel them past their opponents.

Bush will stop first for a midday rally in Flagstaff, where organizers hope thousands will turn out to welcome the president and to support gubernatorial candidate Matt Salmon and congressional candidate Rick Renzi. Bush is then scheduled to

speak in Phoenix at a $700-a-plate fund-raising dinner for Salmon.

Both Salmon and Renzi, the Republican nominee for the 1st District congressional seat, hope Bush's endorsement will help them break away from their respective opponents.

"It's a huge boost to our campaign efforts," Renzi spokesman Joe Galli said Thursday. At the Flagstaff rally, "we'd anticipate that he's going to give a real rousing speech on behalf of our Republican candidates."

Nationally, Republicans and Democrats are closely watching Renzi's neck-and-neck race against Democrat George Cordova. The 1st District, one of two new seats in Arizona this year, covers a vast section of the state, including the Grand Canyon, Flagstaff, the Navajo Reservation and Casa Grande. Statistically, the district gives Democrats a slight edge, but a recent poll showed the two candidates virtually tied.

The same is true of Salmon and Democratic gubernatorial contender Janet Napolitano. Supporters hope Bush's visit will help tip the scales in Salmon's favor.

"It's the biggest shot in the arm a candidate can ever get to have the leader of the free world come in and endorse his candidacy," Salmon said in an interview.

His spokeswoman, Camilla Strongin, said that in addition to the endorsement, Bush's visit will provide Salmon with an opportunity to discuss a number of issues with the president, including a guest worker program and the state's budget issues.

Salmon is scheduled to introduce Bush at the rally in Flagstaff and then to fly back to Phoenix for the fund-raiser on Air Force One, Strongin said.

She said the financial benefit of Bush's visit is really secondary to the endorsement and strengthened relationship with the president.

The financial windfall from the fund-raiser could be significant, however. About 1,500 tickets had been sold by Thursday, grossing the party and Salmon more than $1 million. Even once expenses are deducted, the proceeds should be substantial.

Because of the way Arizona's Clean Elections laws work, Napolitano's campaign also stands to benefit from the Republican fund-raiser. Because Napolitano opted for a publicly funded campaign, she'll receive matching dollars for every dollar Salmon raises up to $400,000.

"I'm not sure the president realizes he's raising money for both candidates," said Napolitano spokeswoman Kris Mayes, who referred to the dinner as a "dual fund-raiser."

On the Net:

Napolitano campaign: http://www.gojanet.org

Salmon campaign: http://www.salmonforgovernor.com/

LOAD-DATE: September 27, 2002

U.S. District Court for the District of Arizona

(Filed Jun. 13, 2009)

[Title Omitted In Printing]

The Road to Victory

Clean Elections Shapes 2002 Arizona Elections

An Executive Summary Report by The Clean Elections Institute December 2002

This report is available online at www.azclean.org

The Clean Elections Institute, Inc.
2001 N. 3rd St., #210
Phoenix, AZ 85004
602.840.6633 phone
602.840.2236 fax
www.azclean.org

Mission of the Clean Elections Institute

The Clean Elections Institute encourages participation in the electoral process and seeks to build confidence in democratic institutions.

The Clean Elections Institute is a nonprofit advocacy organization dedicated to promoting, enhancing and defending Arizona's unique Clean Elections law passed by the voters in 1998. The Clean Elections Institute is privately financed and operates solely on the charitable donations of foundations and individuals.

The Institute wishes to thank its generous donors and supporters, specifically the foundations dedicated to the mission of the Clean Elections Institute.

ARCA Foundation
Arizona Social Change Fund
Deer Creek Foundation
Common Cause
Lodestar Foundation
McKay Foundation
Northeast Action Implementation Project
Open Society Institute
Piper Foundation
Public Campaign
Solidago Foundation
Stern Family Fund
Threshold Foundation

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Executive Summary

Arizona's Clean Elections system celebrated a clear victory in 2002 electing the first ever publicly financed governor in addition to 38 other clean candidates. Seven of nine (78%) statewide officers were elected as Clean Elections candidates using public funds, a clear reflection of Arizona Republic poll

results showing that 64 percent of Arizona voters support the Clean Elections system.

Arizonans elected their first ever Clean Elections Governor, Secretary of State, Attorney General, Treasurer, and Mine Inspector in addition to a Corporation Commission with four of five Clean Elections commissioners. In addition, 27 members of the Arizona House of Representatives and 5 members of the Arizona Senate were elected as Clean Elections candidates.

Arizonans demonstrated tremendous insight and leadership by passing election reforms in 1998 to restore integrity to the electoral process and give voters the power to create honest, representative government. The 1998 passage of Clean Elections and its successful implementation in the 2000 and 2002 elections exhibit that such reform measures empower Arizona voters and expand their choices.

Arizonans promoted and passed the Clean Elections law to increase participation in the electoral process, reduce the influence of big money in campaigns and government, and increase competition among candidates, all of which worked to make 2002 the most competitive election season in Arizona history.

Clean Elections worked to increase Participation in the electoral process, reduce the influence of big money in campaigns and increase competition among candidates.

The Clean Elections system increased voter education through public debates and the delivery of a voter information pamphlet to every Arizona registered-voter household. The Clean Elections system also gave community leaders the opportunity to stand for election without assistance from deep pocket contributors and special interests. For the first time, Arizona elections had more competition among candidates, more choices for voters and an open political climate where constituents mattered more than lobbyists' checkbooks.

Candidate participation increased 23 percent in the primary and 21 percent in the general elections since 1998, the last year in which all statewide and legislative offices were open to election. The number of contested races increased, particularly in the senate when only 10 races were contested in 1998 and 21 were contested in 2002. Competition for statewide races also rose from 14 general election candidates in 1998 to 23 statewide candidates in 2002, a 64 percent increase in just one election cycle.

When the Clean Elections system was first implemented in 2000, 59 candidates sought office as Clean Elections candidates. Just two years later in 2002,

participation rose by 140 percent to 139 Clean Elections candidates. The increased number of candidates and opportunities for increased citizen involvement provided more voters with the opportunity to support candidates through the minimal ($5) qualifying contribution, with more than 90,000 $5 contributions collected from Arizona voters. Voters also continually express their support for Clean Elections in statewide polls with 80 percent indicating that political contributions influence voting patterns (Behavior Research Center, December 2001) and 66 percent supporting the Clean Elections system (KAET, June 2002).

The Clean Elections system proved to be a popular option for candidates. More than 57 percent (139 of 247) of all candidates participated in Clean Elections, up from 30 percent in 2000. Participation in statewide races also increased to 70 percent. In the governor's race, all but two candidates chose to run as Clean Elections candidates. In the State Legislature, 54 percent of all candidates (113 of 208) ran Clean. The Clean Elections Fund distributed $12.8 million to participating candidates, which allowed all 139 participating candidates to run competitive races for their respective offices.

Arizona's Clean Elections law garnered support from across the country with U.S. Senator John McCain and Arizona Corporation Commissioner Marc Spitzer indicating their support in a public education advertising campaign funded by the Clean Elections Institute in June 2002. In addition, the Arizona Supreme Court upheld the constitutionality of the law's

funding further blocking opposition attempts to undermine Arizona's voter-approved Clean Elections system.

More than 400 Arizona organizations and individuals have lent their public support and endorsement to Arizona's Clean Elections system; and support continues to grow. Clean Elections is a major step forward. As with any new major, systemic change, there are adjustments needed including minor changes to reporting requirements, adjustments to matching funds provisions, changing some certification guidelines, and increasing candidate and candidate staff education regarding campaign law implementation.

History of the Arizona Clean Elections System

The voter-approved Citizens Clean Elections Act (CCEA) of 1998 was an innovative, groundbreaking aspect of the campaign finance reform movement in America. In fact, Arizona is one of only four states with full public financing of statewide elections. The Act gives political candidates the choice to run "clean" with public funds or to run with private contributions.

The passage of this Act was a direct response based on voter disdain for Arizona's corrupt political history, particularly the influence of special-interest money in political campaigns. In the recent past, Arizonans impeached a Governor, witnessed a major legislative scandal, saw a Governor resign over financial improprieties, and had a two U.S. Senators caught up in

the financial Savings and Loan Scandal surrounding Charles Keating.

The CCEA provides a proscribed amount of public funding to qualified candidates who agree to contribution limits and to raise very limited private money. Candidates qualify by demonstrating broad public support within their specific election districts. Participating candidates must raise a substantial number of $5 qualifying contributions in a limited period of time from Arizona voters only. For those who choose not to participate in this voluntary program and use what has been the traditional campaign finance system, no limits are imposed on the total funds a candidate may raise from private donors, however the amount of individual donations does have a limit. Matching funds are available to Clean Elections candidates to ensure that a participating candidate's campaign is funded proportionately to their non-participating opponent, up to certain preset limits.

State Senator Joe Eddie Lopez first introduced Arizona's Clean Elections law in the 1996 Senate. The bill was ignored by legislators and never afforded a proper hearing. The good-government coalition pushing for the law then turned to the Initiative process and formed the *Arizonans for Clean Elections Committee*. This committee consisted of individuals and organizations including the League of Women Voters, Common Cause, Arizona Citizen Action and Public Campaign.

Increases Competition and Voter Choice

Voters passed the Clean Elections Act in November 1998 and candidates first participated in the Clean Elections system in November 2000.

Arizonans passed the Clean Elections Act in 1998 to increase participation in the electoral process, reduce the influence of big money in campaigns, and increase competition among candidates.

Candidate participation increased 24 percent in the primary and 13 percent in the general since 1998 before Clean Elections was implemented.

In the 2002 election cycle, when compared to the 1998 election year when all statewide and legislative offices were last up for election, candidate participation increased 23 percent in the primary (199 candidates in 1998 vs. 247 candidates in 2002) and 21 percent in the general election (150 candidates in 1998 vs. 170 candidates in 2002).

Competition among candidates also increased since 1998 when only 10 State Senate races were contested while 21 were contested in 2002. Competition for statewide offices increased 64 percent in four years from 14 general elections candidates in 1998 to 23 statewide candidates in 2002.

In the primary elections, Clean Elections funding increased competition among candidates and provided

more choices for voters. Many Arizona races are determined in the primary due to a district map with a majority of districts considerably favored by one-party. In addition, overall voter registration and voting trends favoring men and Republicans have, in previous election years, discouraged Democrats, Independents and women from running for office because a lack of money kept them from running competitive races. Clean Elections changed this and in 2002 more candidates of all parties, both men and women, ran for office.

Recent primary election trends indicate that women and Democrats who participated in Clean Elections were much more successful in winning their primary elections than their general elections. The increased ability of women and Democrats to survive the primary clearly indicates that Clean Elections increased competition in primary elections and also allowed these viable candidates to participate in the general election.

After a 2000 election in which 59 candidates participated in Clean Elections, the popularity of the Clean Elections system skyrocketed with candidates and voters in 2002. Participation increased by 2.5 times that of the previous election to 139 total Clean Elections candidates. Increased involvement also provided more voters with the opportunity to support candidates through $5 qualifying contribution with more than 90,000 such contributions made in 2002 by Arizona voters.

Increase in number of candidates from 1998 to 2002

	Primary – all offices	General – all offices	Primary – statewide	Primary – legislative	General – statewide	General – legislative
1998	199	150	27	172	14	136
2002	247	170	39	208	23	147
Increase #	48	20	12	36	9	11
Increase %	24%	13%	44%	21%	64%	9%

Increase in candidates participating in Clean Elections

	Legislative		All-Primary		All-General	
	Total	CE	Total	CE		CE
2000	216	54	223	59	154	44
2002	208	113	247	139	170	89
Increase #	-8	59	24	80	16	45
Increase %	-4%	117%	11%	140%	10%	100%

Candidates Receive Adequate Resources

During the 2002 elections, 55% of all statewide and legislative candidates participated in the Clean Elections system. Among only Republican and Democratic statewide and legislative candidates, 70% participated in the Clean Elections system. Only one major party (Republican) gubernatorial candidate chose to run his campaign outside the Clean Elections system. However, even that one candidate understood the value of the Clean Elections system and took advantage of and participated in the statewide Clean Elections Voter Guide and Clean Elections sponsored public debates.

When Arizonans passed the law in 1998, they took into consideration spending limits to reduce the high cost of running campaigns. Spending limits open the door for new candidates to participate who otherwise could not have afforded the high cost of opposing an incumbent who traditionally has access to large amounts of money. In addition, the Clean Elections system provides for adequate resources that make it appealing for many incumbents to forgo traditional financing in favor of Clean Elections.

As more candidates are able to free themselves from long-time ties to entrenched funding, the number of candidates participating in the Clean Elections system will continue to increase.

The CCEC disburses funds to Clean Elections candidates who gather the necessary petition signatures and $5-qualifying contributions from Arizona voters.

During the 2002 elections, the CCEC disbursed $12.8 million to Clean Elections candidates.

Matching Funds

To combat the inequalities that exist with disproportionate funding, when a nonparticipating candidate outspends his Clean Elections participating opponent, the CCEC provides the Clean Elections candidate with matching funds up to a preset limit. Clean Elections candidates can receive as much as three times their original disbursement in matching funds. Matching funds are triggered through a timely review of reports filed by the non-participating candidate that allows the CCEC to effectively calculate the amount of funds spent by the non-participating candidate.

	Candidates who received matching funds in the primary	Candidates who were matched and won their primaries
Statewide	5	1
Senate	7	2
House	23	9
Total	35	12

The CCEC calculates matching funds based upon spending during the primary election and based upon actual campaign account deposits during the general election cycle. In addition, the CCEC matches funds

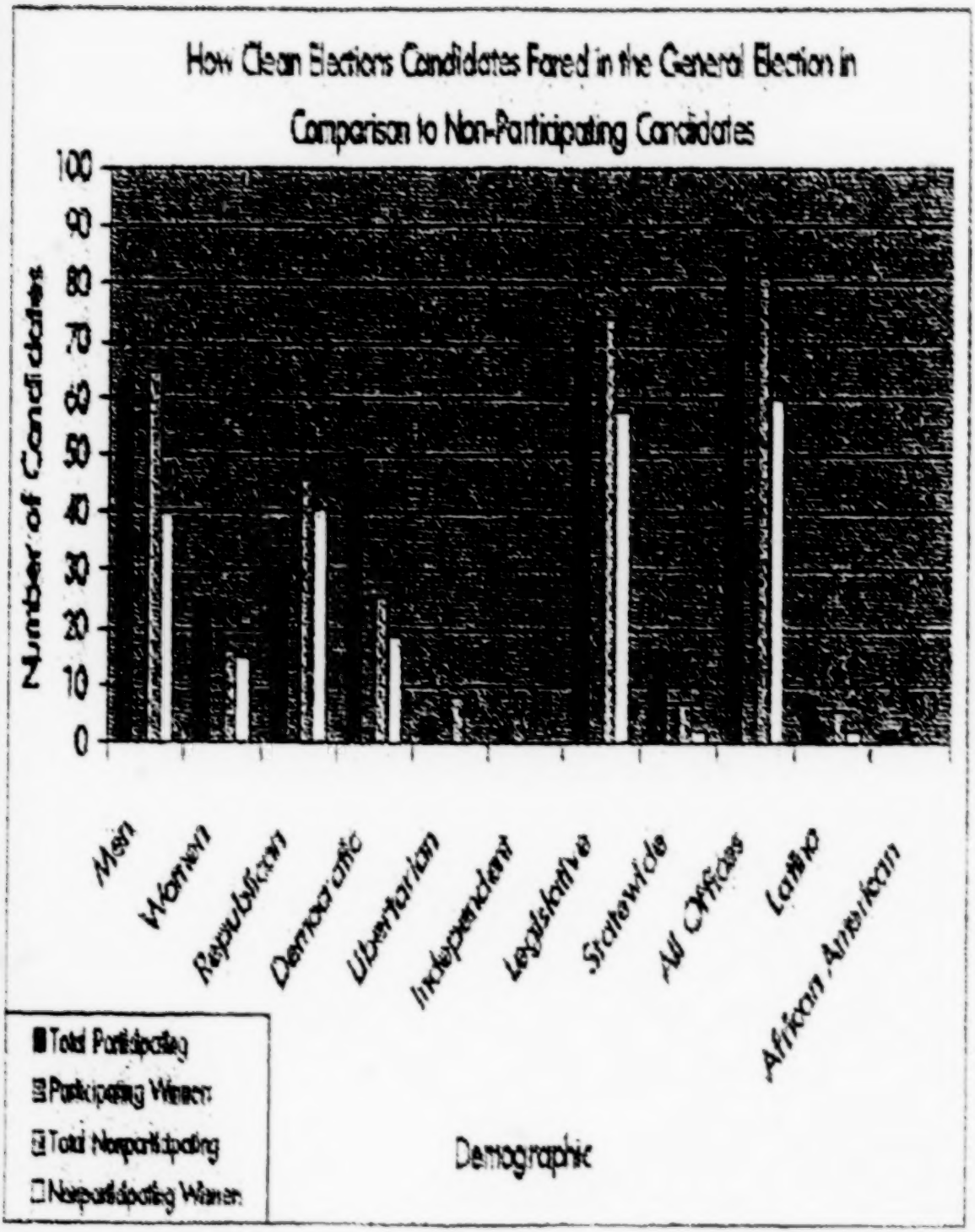
to participating candidates based upon independent expenditures that target participating candidates. During the 2002 elections, 77 clean Elections candidates received matching funds.

The 2002 Elections provided voters with more choices. In addition, Clean Elections funding ensured that in nearly all races campaign funds were equalized or comparable allowing all candidates to effectively reach voters with their messages.

Overall participation in Clean Elections stood at 56 percent for the 2002 primary election and held at 52 percent for the general election. Of the 99 Arizona general election races and more than 200 primary election races, disproportionate funding was a factor in only five primary races and two general election races. In one of those races, the Clean Elections candidate won against a primary opponent who spent more than twice the campaign funds, clearly demonstrating that unlimited money is not necessary to win, but adequate funding is.

The Citizens Clean Elections Commission disbursed $7.4 million to Clean Elections candidates for use in primary campaigns. Of this, $2 million were matching funds over and above the base amount disbursed to candidates whose opponents used traditional financing and outspent the initial Clean Elections disbursements of their Clean Elections opponents. In races where candidates received matching funds, a Clean Elections candidate won 34 percent of the time, or 12 of 28 races.

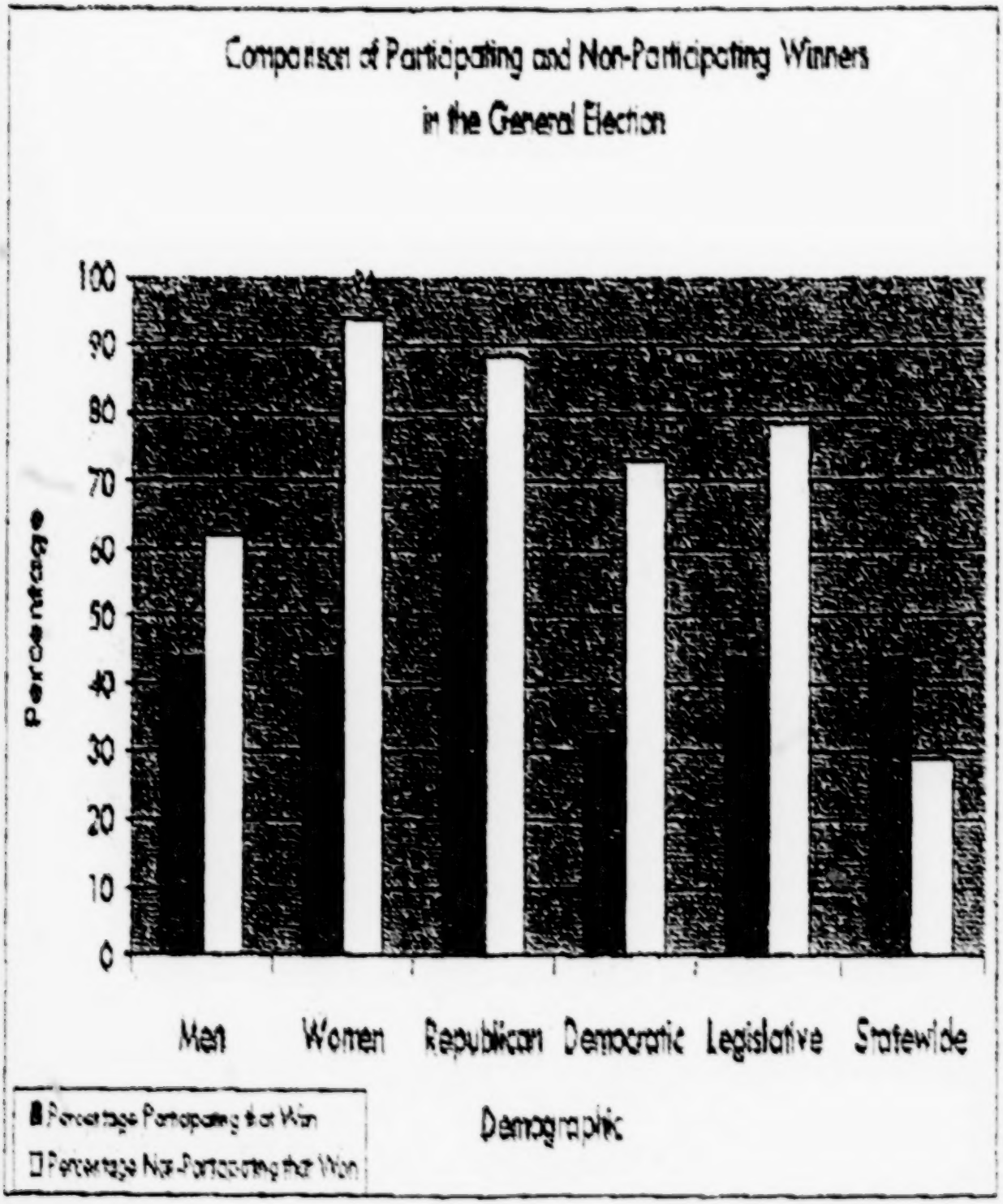
One interesting note: In the primary elections, it appears women and Democrats faired better than Republicans who participated in Clean Elections. This outcome may not have anything to do with participation in the Clean Elections system since in some Republican legislative primaries as many as four Clean Elections Republican candidates competed for just two available nominations. In these races, it was only possible for 50 percent of the participating candidates to win.


How Clean Elections Candidates Fared in the General Election in Comparison to Non-Participating Candidates
Number of Candidates
0
10
20
30
40
50
60
70
80
90
100
Men
Women
Republican
Democratic
Libertarian
Independent
Legislative
Statewide
All Offices
Latino
African American
Total Participating
Participating Women
Total Nonparticipating
Nonparticipating Women
Demographic

Clean Elections candidates were provided the financial resources to run competitive campaigns. The number of Clean Elections candidates who won their races clearly indicates they had adequate funding to build name recognition and reach Arizona voters.

In the general election, men and Republicans who participated in Clean Elections won more often than other Clean Elections candidates. Seventy-three percent of all Republicans participating in Clean Elections won their general election races compared to 31 percent of participating Democrats. This is likely due to the Republican voter registration and turnout advantage and follows the overall trend of the 2002 elections, which saw considerably more Republicans elected to office across the nation.

General Election trends were similar to primary election trends in that a higher percentage of non-participating Clean Elections candidates won in both the primary and general elections. However, when it came to statewide offices, Arizonans overwhelmingly favored Clean Elections participating candidates. Republicans as well as men fared better across the state regardless of whether they participated in the Clean Elections system.


Comparison of Participating and Non-Participating Winners
in the General Election
Percentage
100
90
80
70
60
50
40
30
20
10
0
Men
Women
Republican
Democratic
Legislative
Statewide
Demographic
Percentage Participating that Won
Percentage Non-Participating that Won

Reduces Special Interest Influence Increases Voter Participation

In 1998, lawyers and lobbyists were the largest contributors to Arizona candidate campaigns aside from candidate or political party contributions. As an industry, lawyers and lobbyists gave $1.43 million to candidate campaigns, and they did not discriminate between candidates by political affiliation, geographic location or voting history for incumbents. In fact, lawyers and lobbyists often contributed to more than 40 candidates each with clear favoritism for incumbents.

As with all campaigns, money played a major role in the 1998 Arizona campaigns with 79 percent of the candidates with the largest campaign war chests winning their races. However, after the implementation of the Clean Elections system, this was true for only two percent of candidates in the 2002 elections. In just four years, Arizona politics changed dramatically creating a 75 percent reduction in the number of races determined by money.

In 1998, winners raised 55 percent more money than losers. Only one candidate lost despite having more money than his opponent. Incumbents won 95 percent of their races (only 3 of 63 lost) and raised nearly twice as much as their challengers. In the 2002 primary, 14 of 58 incumbents (24 percent) lost to their challengers and of the 14 losers, three had more money than their opponents, two had less money and in all other races funds were essentially equal.

In 2002, Clean Elections afforded candidates without access to special interest money to run competitive races. Forty percent of Clean Elections candidates won their general election races and 58 percent won their primary races. While Clean Elections is not able to overcome all disparities, the access to public funds allowed good candidates to run competitive races and win.

Voter support of Clean Elections candidates resulted in seven of nine statewide offices being won by candidates participating in the Clean Elections system and a total of 39 such candidates were elected in the 2002 election. The primary election results clearly indicate that voters are willing to consider and support Clean Elections candidates. Voters nominated Clean Elections candidates for 68 percent of the 99 available legislative and statewide offices.

Arizona Voters Become $5-Donors

Clean Elections reduced the influence of special interests in campaigns by providing an avenue for voters to support candidates without having to compete with the large checkbooks of special interests and political action committees (PACs).

Candidate campaigns have typically been financed by a small number of high-dollar contributors, many of whom live out-of-state. The Clean Elections system changes that system through the collection of large quantities of small-dollar ($5) contributions from Arizona voters. Clean Elections candidates collected

almost a half-million dollars (90,000 $5-qualifying contributions) in small contributions from Arizona voters – all of which goes to support the Clean Elections funding system.

Grassroots Campaigning

Clean Elections opened the door for increased voter communication by candidates. Through the collection of $5-qualifying contributions, candidates returned to walking door-to-door and attending small neighborhood gatherings – traditional aspects of grassroots campaigning that, in recent years, were replaced by high-dollar advertising and big dollar events.

Voter Education Materials

The *Vote for Arizona* education guide mandated by the Clean Elections Act also increases voter-contact. Voters have traditionally requested more information about candidates, especially information that is not candidate-biased or candidate-produced. In August and again in October 2002, the Citizens Clean Elections Commission mailed a voter guide to 700,000 registered-voter Arizona households. As part of the mailing, every household received information for early voting with postcard request forms and directions for contacting their local County Elections Department.

Every candidate, participating or non-participating, was given the opportunity to place a statement in the

Voter Guide. Out of 247 total candidates, only 36 did not place statements, thus 86% of all candidates for statewide and legislative offices participated in the Clean Elections Voter Guide. Even those candidates who chose not to participate in the Clean Elections system saw the incredible value of the Voter Guide. Even vocal Clean Elections opponents chose to participate in the Clean Elections Voter Guides and public forums because they understood that Arizonans want more information and less biased information than contributor-driven campaigning has produced.

Public Debates

All Clean Elections candidates were required to participate in public debates as part of the voter education principles of the Clean Elections Act. The CCEC teamed up with Arizona universities and community colleges to host these debates. Most of the statewide debates were televised as a public service by local public television stations. Public participation and attendance at such debates was limited in many cases but will grow as the public becomes better aware of such debates and is more comfortable with the openness of such debates.

Media Coverage

Since December 2001 there have been more than 800 news stories, editorials and letters to the editor published statewide in regards to Arizona's Clean Elections law including candidate stories, election

coverage, stories on the Citizens Clean Elections Commission and stories on the Clean Elections Institute. The Clean Elections Institute actively pursued press coverage by sending press releases, holding press conferences, engaging the media in phone conversations, visiting the capitol press room, setting up one-on-one meetings with reporters and producers and engaging radio talk-show hosts in thoughtful debate on the issue.

> The 2002 election coverage featured headlines such as: *Privately Financed Hopefuls on the Rise*, *An Election Unlike Any Other* and *Election Law Sets New Tone for State*.

The media took such an overwhelming interest in Clean Elections that the editorial pages were, at times, filled with opinions on Arizona's system of publicly financing campaigns. Since December 2001, Arizona papers published more than 100 editorials and letters to the editor hailing the positive attributes of the system and an equal number of mixed or opposing letters and editorials were also published. In addition to statewide coverage, NOW with Bill Moyers, the Newshour with Jim Lehrer, USA Today, Governing magazine, Campaigns & Elections magazine, the New York Times, Washington Post, the National AP and The Nation all covered Arizona's Clean Elections system and the 2002 elections.

Positive Changes Will Protect the Future

The Clean Elections Law has changed and continues to change political campaigns and the political climate in Arizona. The Clean Elections system is changing the influence of special interest money in elections and enabling community leaders not beholden to big money to campaign for public office. The Clean Elections system is also working to engage the public in the election system, either through participation in the $5 qualifying process or through voter education projects such as the candidate-voter guide or public debates.

The results of Clean Elections are clear:

- **More candidate choices for voters**
- **Less special interest and PAC influence**
- **More qualified candidates running**
- **More time dedicated to discussion and debate of issues**
- **Less time spent fundraising**
- **More public involvement**
- **Less big money influence**
- **Higher voter participation**

The positive changes to the political landscape in Arizona due to the Clean Elections system will continue for years. In 2002, Arizona voters supported the principles of our nation's Founders by electing Clean Elections participating candidates. Polling, candidate and voter participation all demonstrate that Arizona's Clean Elections law has support on all levels. The 2002 election results further prove that big money

donors and special interests can no longer buy Arizona voters nor pay for Arizona government.

Clean Elections worked well in its first two election cycles but improvements are vital to improving the system. Technical changes to the implementation process will ensure smoother operations of the system.

One possible change includes removing the frequent, sometimes daily, filing of campaign finance reports by traditional candidates who do not have any Clean Elections opponents. Without a Clean Elections candidate in that specific election campaign, such a change will eliminate the cumbersome and time consuming process of filing reports that are not necessary to the integrity of the Clean Elections system.

Matching funds remain key to ensuring that the Clean Elections system works properly. Arizona law already requires the reporting of a campaign expenditure at the time an order is placed or a contract signed, not when it is invoiced or paid. However, because it made no difference prior to the Clean Elections system, candidates were in the habit of reporting expenditures when they were paid even though the law stated otherwise. However, adherence to the existing definition of expenditure is critical for matching funds to be properly determined in a timely manner through the Clean Elections system.

Streamlining of complaints is also needed to improve the Clean Elections system and while due process is

necessary, the decision time in many cases may be months, long after an election is decided. While the public has the right to know if a candidate is in violation of campaign finance laws, the process must be adjusted so that complaints cannot be used as campaign weapons. Sound and balanced procedures for public reporting of complaints and decisions must protect both the public's and the candidate's rights.

Other changes may include random sampling of qualifying contributions and a change in the deadline for filing of forms. While this change may seem insignificant, it will assist candidates in receiving their original grant checks in a more timely and appropriate fashion.

The 2004 election cycle is already beginning and the Clean Elections system will be more broadly utilized than ever before because of its successes in 2002. It is advantageous for all candidates and the public that necessary and positive changes be made to improve the existing Clean Elections system while protecting the major strides already accomplished by the Clean Elections Act.

U.S. District Court for the District of Arizona

(Filed Jul. 2, 2009)

[Title Omitted In Printing]

DECLARATION OF DEAN MARTIN

Dean Martin, an Arizona State Senator, a plaintiff in the above-captioned matter, declares pursuant to 28 U.S.C. § 1746 as follows:

1. I am Dean Martin, a resident of Phoenix, Arizona. I make this declaration based on my personal knowledge of the facts set forth below.

2. I am serving my second term in the Arizona State Senate, District 6. I was a nonparticipating candidate in 2000 and 2002, and am seeking reelection to my Senate seat in 2004. I am considering a candidacy for statewide office in 2006.

3. I have held the following offices: Arizona State Senator (2001-Present); Chairman, Senate Finance Committee (2003-present); Member, Appropriations Committee (2001-present); Member, Commerce Committee (2003-present); Member, Banking & Insurance Committee (2001-2002); Vice-Chairman, Government Committee (2001-2002).

4. I do not believe politicians should use taxpayer money to run for office. If presented with a truly voluntary system of government funding, I would not choose to use public funds due to closely held philosophical beliefs. Nevertheless, I believe that this Clean Elections matching funds system is so lopsided and coercive that there is

no real choice but to accept government funding. To be a viable and competitive candidate for office without taking government funding, you must be able to overcome the heavy burdens and shackles placed upon nonparticipating candidates. Since I am not a multi-millionaire, I have no choice when considering a run for statewide office but to use government funding, and only in limited circumstances can a run for legislative office be successful without government funding under the system as currently constituted. This is because the system provides overwhelming benefits to participating candidates and punishes nonparticipating candidates through its reporting requirements and contribution, expenditure, and independent expenditure matching fund provisions.

5. The Clean Elections matching fund system in fact and in practice is punitive against candidates that do not choose to use state funding. The following is the statement repeated continuously throughout the Clean Elections materials and instructions to nonparticipating candidates:

IMPORTANT NOTE

The campaign finance software, provided free of charge by the Secretary of State's Office, is programmed for the triggering events and will prompt the user when it is time to file a report. *The software must be opened and used* ***every day*** *during an election cycle in order for the triggering events to occur properly.* If campaign transactions are not entered

into the software when they occur, a trigger reporting deadline may be *inadvertently missed*, causing matching funds to be withheld from participating opponents. *The CCEC may initiate an enforcement action against a nonparticipating candidate who does not file trigger reports correctly.* A Clean Elections enforcement action may include fines of $100 a day up to twice the amount misreported and possible REMOVAL FROM THE BALLOT.[1]

6. On its face, the Clean Elections Act appears to require nonparticipating candidates to file 37 additional reports; in fact, we are told that we need to process all the reports every single day throughout the year-long election cycle in order to prevent an enforcement action.

7. As a candidate and elected official, the reporting system forced me to get to the one single computer with internet access that also has my campaign finance software installed every day to input transactions (donations and expenditures). Each month, I live in fear that events outside my control can cause me to be out of compliance and subject to stiff penalties as a nonparticipating candidate. For instance, automatic withdrawals such as monthly bank charges, website charges, or other normal campaign expenses may be charged but I wouldn't be notified of the charges for a few days. (Bank statements are notoriously mailed several days later, and the website provider

[1] For more info on this, visit http://www.ccec.state.az.us/ccecscr/pub/pdf/nonPartReporting.pdf

automatically debits the campaign account monthly.) If those charges are enough to trigger a report, I am threatened with an enforcement action since the Commission repeatedly states that they will pursue enforcement actions even if a report was "inadvertently missed."

8. Due to the Clean Elections system's design and practice, even an eight dollar bank fee could cause the 70% trigger report under A.R.S. § 16-941(B)(2) (triggered at $7,924) or the 10% trigger report under A.R.S. § 16-959(A) (triggered at $1,132) to be missed. If the eight dollar fee occurs before a trigger date, but the data entry does not occur (since the bank statement may not have been received) until after a trigger date, the entire $7,924 or $1,132 is late and thus the candidate is subject to FORFEITURE OF OFFICE under A.R.S. § 16-942.

9. The design and practice makes it effectively impossible for nonparticipating candidates to use outside accounting staff since the delay required to send information to an accountant could put you out of compliance. For example, if I went to The Home Depot to buy sign posts and ties for the campaign after work at 8pm and spent anywhere from one dollar to several hundred dollars, that information must be entered into the software within the next 4 hours (before midnight) just in case it triggers a report. If I hire an accountant to process the work, they must agree to process expenditures at least until 9pm when the stores close (which is unlikely since there is only one computer that can store campaign finance software and they will not likely stay at

the office until 9pm on the chance that I might expend funds). The only other solution is to never make purchases after 5pm, on weekends, or anytime the accountant is unavailable to do immediate data entry (vacation or illness).

10. Since I have a job during the day as a Senator for the State of Arizona and routinely work past 5pm at the Capitol, most, if not all, campaign purchases will occur at night and on weekends. I have no choice but to complete all the onerous reporting myself. This is time that I will not have to campaign. This is an additional burden imposed by the government on a nonparticipating candidate's ability to campaign, which is not placed on government-funded candidates.

11. Allowing petty cash is not practicable for members of a nonparticipating candidate's campaign to make minor purchases. Since the campaign must report expenditures daily as they occur, all candidates must effectively make all their own purchases. I cannot tell a staffer, "Here's $20; when we run out of twist ties for signs, just go buy some more." Since I need to track the exact date of the purchase and report it the same day, practicality demands that I must purchase all supplies in advance and have it available to volunteers/staff. In fact, this process of reporting affects the schedule of even larger ticket items. Before I can purchase anything, I need to make sure that I can get home that night before midnight and do the data entry. Government-funded candidates have more flexibility in making expenditures and are not burdened by

the excessive reporting requirements imposed upon nonparticipating candidates.

12. Additionally, Internet access is required to post trigger reports. If your Internet access is unavailable (network maintenance is common late at night) you may "inadvertently miss" a trigger report. In order to prevent this from happening, as a nonparticipating candidate, I am forced to make provisions to stay in compliance, such as purchasing a "backup" dialup Internet access just in case my regular Internet connection is not available. While nonparticipating candidates are burdened with these hardships, their government-funded opponents can dedicate all of their time to campaigning.

13. The same process occurs with fundraising. I cannot schedule a fundraiser on the day of a trigger report, or if it is a large event, on the day before as well, since I must be able to do all the campaign data entry before the trigger date. The design and practice of the system only allows one person on one single computer to have access for data entry purposes. This not only takes time away from campaigning, but also eliminates some dates from being feasible for events. This affects both Primary and General election fundraising since both expenditures and donations must be filed, even if only one is required for trigger reports.

14. Unlike regular campaign finance reports, which, when a due date happens to fall on a weekend or a holiday, are allowed to be filed on the next business day, there is no provision for

next-business-day filing with Clean Elections trigger reports. Whereas government-funded candidates are not required to work on weekends and holidays, privately funded candidates are required to do so, or risk an enforcement action for "inadvertently missing" a trigger date. In fact, the very first trigger report is due on a holiday, New Year's Day.

15. As a candidate, I live in fear that a member of the campaign committee will accept a donation, but not immediately provide me with information for reporting purposes. If they have the donation in their possession before a trigger date but do not see or tell me until after a trigger date, we have missed a report "inadvertently." The reporting requirements are triggered during the General Election cycle by the acceptance of a donation, NOT the date of deposit of the donation into the committee's bank account. This is to prevent a candidate from delaying matching funds by just holding onto donations and not depositing them until they are needed. Unfortunately, it creates a system where "inadvertently missing" a report is possible if anyone other than the candidate or the treasurer accepts donations.

16. As a nonparticipating candidate, extensive additional training about complicated rules and procedures for campaign committee members and volunteers is required to prevent "inadvertently missing" a report that could get your candidate thrown off the ballot. None of this is required if the candidate would just choose government funding.

17. The trigger dates punish nonparticipating candidates by putting them at a competitive disadvantage to participating candidates. Nonparticipating candidates are required to publicly report their donations and expenditures more often, thus alerting their government-funded opponents of their campaign strategies, strengths and weaknesses; meanwhile participating candidates are not required to post their donations and expenditures as often, allowing them a significant advantage in terms of campaign timing and strategy.

18. Further, the Clean Elections Act punishes nonparticipating candidates by reducing the maximum individual contribution amount that nonparticipating candidates may accept by 20 percent. The Act, as well as the publicity surrounding the passage of the Act in 1998, purports to reduce the effects of "special interests" in elections. The Act's true purpose is to limit only those candidates that choose not to be government funded. The Act only limits donations in races where government funding is available. Other races such as school boards, city councils, JP's, county boards of supervisors, etc. are not limited. The stated purpose to reduce corruption is invalid since it is possible for a candidate to run for both school district board and legislature simultaneously. These candidates are allowed to accept the FULL individual contribution amounts for their school board race where government funding is unavailable. In fact, my legislative seatmate, Rep. Ted Carpenter, is an example of a candidate who is simultaneously running for both the Deer

Valley Unified School District governing board and the legislature.

19. The Clean Elections Act would have us believe that the same person, Mr. Carpenter, is not corruptible as a school board candidate, but is corruptible as a legislative candidate, and therefore, the legislative contribution limits must be lowered by 20%. This is not only absurd; it is punitive and coercive in its design to get candidates to choose government funding when it is available.

20. The practical effect of the reduction provision is to save the Clean Elections Commission matching funds while punishing nonparticipating candidates by limiting the fundraising potential only of those candidates in races where the government has a direct interest.

21. The design and practice of matching trigger reports to prevent an enforcement action is punitive and coercive to steer candidates toward government funding since the system mandates requirements in excess of even the stated purpose of the matching funds. The reports require both donations AND expenses to be reported even though matching funds are triggered by only one or the other, (depending on whether it is a Primary or a General election cycle).

22. The design and practice of the Clean Elections matching system shows that its true purpose is to coerce candidates to choose government funding by the implementation of the restrictive reporting and other requirements in cases where there is no stated need for implementation of

these reports. The extensive additional reporting is supposedly needed to provide matching funds to government candidates. However, the requirements and penalties are STILL IMPOSED in races where there was NO GOVERNMENT-FUNDED CANDIDATE. In the 2002 cycle, I ran as a nonparticipating candidate and my opponent did not qualify for Clean Elections funding; however, I was still subject to all the extensive Clean Elections regulations and trigger reports, under penalty of removal from office. In the 2000 election cycle, my Primary opposition was also privately funded, yet complaints were filed and the commission examined my reports to make sure I followed the reporting requirements even though there were no government-funded candidates and matching funds in the Primary Election.

23. In fact, the trigger dates for nonparticipating candidates began on January 1st of the election year. This first trigger reporting date occurs BEFORE it is even possible for a potential Clean Elections opponent to qualify and receive matching funds. Government funded candidates cannot even start to collect qualifying contributions until January 1st. The trigger dates ostensibly exist for the purpose of matching funds to participating candidates; yet since the trigger reports begin before a participating opponent can even begin the qualification process, these trigger reports are solely coercive in nature to influence a potential

candidate to take the easier and less regulated path of government funding.[2]

24. As I consider a potential campaign for statewide office in 2006, the punitive provisions of the "clean elections" system essentially leave me with no choice but to run as a participating candidate if I have any chance of winning statewide. Especially in statewide races, where the amount of money needed to succeed is significantly more than a legislative race, the "clean elections" system favors only self-funded millionaire candidates or government-funded candidates. Since I am not independently wealthy, I am compelled to become a participating candidate if I want to be competitive.

25. After watching the first statewide election cycle under the "clean elections" system, I have realized that in order to be competitive in a statewide race, I must accept government funding. In a legislative race, I have been able to manage the onerous additional reports by limiting sole donation and expenditure reporting authority to the candidate and treasurer alone. The number, size and frequency of donations, although time consuming, can still be managed by one or two people at the legislative campaign level, with a significant time commitment and understanding that we will be hamstrung in the process and saddled with additional burdens that our government-funded opponents will not have.

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[2] For more information, visit http://www.ccec.state.az.us/cceceser/pub/pdf/collectingFive.pdf

However, it is clear that as the size and magnitude of campaigns balloon for larger offices, so does the number of people required to handle expenses. The costs to fundraise also substantially increase with the larger statewide campaigns and would continue to put my candidacy at a disadvantage if I chose private funding.

26. Further, the likelihood of independent expenditures increases substantially with a campaign for a statewide office. If an independent expenditure would be run against me, I would need to respond. However, any government candidates would get matched for any response, hard dollar for hard dollar. Thus, I would be financially behind by the amount of the original independent expenditure, plus by the amount of the new hard money given to me for the purpose of responding, which would be matched by the government to each of the other candidates in the race. I would fear an independent expenditure being run on my behalf, because by state law my campaign would have NO CONTROL over the planning and implementation of the expenditure; however, my government-funded opponents would get hard dollars which they DO CONTROL with which to respond.

27. The experience of the 2002 campaign cycle has shown that the systems' penalties are arbitrary and capricious against candidates who do not choose government funding. The burdens imposed on nonparticipating candidates can only be overcome in statewide races by being independently wealthy. Since I am not independently wealthy, it has become obvious that without

injunctive relief from the courts on this unequal and punitive regulatory environment, I cannot even consider a bid for statewide office as a non-participating candidate.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of February, 2004.

/s/ Dean Martin
Dean Martin

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

DECLARATION OF CHRIS BOWEN

* * *

1. I am Chris Bowen, campaign manager for Plaintiff Matt Salmon's 2002 gubernatorial campaign. I make this declaration based on my personal knowledge of the facts set forth below.

* * *

25. Not only were our operations severely crippled by the actions of the Commission, our opponents were effectively making money from our efforts to raise enough funds to continue our campaign. At least two or three nights per week, generous individuals were attending fundraisers on our behalf. We were paying for the cost of food, wine, entertainment and invitations. Our opponents were collecting the gross amount of everything we raised, while we had to settle for the net amount. A typical fundraiser cost us about 25% of the gross. As a result, we worked harder than any other campaign (because we had to) and we were penalized for doing so, since our efforts directly benefited our opponents. In fact, when President Bush came to Arizona to fundraise for Salmon, Janet Napolitano's spokeswoman, Kris Mayes, said "I'm not sure the president realizes he's raising money for both candidates," and also referred to the Bush dinner as a "dual fund-raiser" (Michelle Rushlo,

"*Bush to stump for fellow Republicans in Arizona*," *Associated Press*, September 26, 2002).

* * *

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of February 2004.

/s/ Chris Bowen
Chris Bowen

U.S. District Court for the District of Arizona

(Filed Jul. 2, 2009)

[Title Omitted In Printing]

DECLARATION OF MATT SALMON

Matt Salmon, former U.S. Congressman and 2002 Republican gubernatorial candidate Arizona, a plaintiff in the above-captioned matter, declares pursuant to 28 U.S.C. § 1746 as follows:

1. I am Matt Salmon, a resident of Mesa, Arizona. I make this declaration based on my personal knowledge of the facts set forth below.

2. I currently serve as president of Upstream Consulting, LLC, a public affairs consulting company. I was formerly a member of the U.S. House of Representatives elected in November 1994 to represent Arizona's First Congressional District, where I served a self-imposed limit of three terms, fulfilling a campaign promise I made to Arizona's voters in 1994.

3. While serving in the Congress I served on the International Relations Committee, and its subcommittees on Asia and the Pacific, and International Operations and Human Rights. I also served on the Helsinki Commission and was Chairman and a founding member of the House Renewable Energy Caucus. I also served on the Education and the Workforce Committee. Throughout his time in Congress, I maintained an active legislative agenda and played a prominent role on issues related to foreign

affairs, crime, education, energy and taxes, among others.

4. Prior to my election to the House, I served four years in the Arizona State Senate, and thirteen years as a telecommunications executive with US West Communications. In Arizona, I have been active in civic and community boards, including Mesa United Way, Child Crisis Nursery, East Valley Child Crisis Center, and the Maricopa County Council on Families, Youth, and Children. I am also on the National Advisory board of Childhelp U.S.A. I have also devoted considerable time and energy to the Association of Retarded Citizens of Arizona.

5. The Arizona Clean Elections system of public campaign funding makes candidates for public office accept taxpayer money through a series of punishing provisions. I suffered under this system as a private candidate for governor in 2002.

6. The independent expenditure provisions of § 16-952(C) worked against me when the Democratic Party made an independent expenditure of approximately $1 million for TV ads attacking me, alleging that I voted to cut seniors' benefits while in Congress. This expenditure was not counted against public monies to be received by my Democratic opponent Janet Napolitano. But when my own party countered the ad with a $330,000 independent expenditure – which by law was not coordinated, approved, or chosen by my campaign – this resulted in $330,000 being paid to both Napolitano's campaign and to

Independent Dick Mahoney, my other government-funded opponent. So while she could receive unlimited independent expenditures that either favored her or opposed me, the amount of any independent expenditure that favored me or opposed her ended up in her campaign account – because the State wrote her checks for matching funds. The only difference was, Napolitano got to decide how her money was spent, and I didn't.

7. Privately supported candidates like me would be better off refusing independent expenditures – in fact, looking back on it, it would have been better if none would have been made on my behalf, because my opponent would just have gotten the money. But that is not legally possible, because independent expenditures are by definition not coordinated or solicited by the candidate who benefits from them. I think that the law should treat these unsolicited independent expenditures neutrally, so that they have no effect on the recipient in any way. This would avoid punishing private candidates like me in the future. Because as the law stands now, whenever private candidates receive independent support that they do not control, they must suffer having Clean Elections give their government-funded opponents more, taxpayer money that these participating opponents do control.

8. Clean Elections hampered my private campaign spending in the 2002 Republican primary election by matching it dollar-for-dollar for each of my two government-funded opponents, Betsey Bayless

(who received $1,077,169.61 in taxpayer money) and Carol Springer (who received $1,068,850.87).[1] The state tried very hard to reduce my chances of winning by "leveling the playing field." The goal was making my two opponents have just as much money as I did, without them having to go out into the community and have political support reflected by private donations.

9. My gubernatorial campaign was severely punished by the provisions of § 16-952(B), in that Clean Elections paid Napolitano and Mahoney the *gross* amount of contributions received by me during the general election. After the primary President Bush came to Arizona and raised about $750,000 for the my campaign; I paid about $250,000 in expenses for the event, which included the cost for Air Force One, the cost of meals, the facility, and invitations, resulting in a net gain of $500,000. But the system turned around and gave my two government-funded opponents $750,000 each (an amount equaling my *gross* receipts), resulting in a net loss of $1 million for my campaign ($1.5M paid out to opponents *minus* the $500,000 net gain from the Bush event). In the future, who will run as a private candidate for governor of Arizona under these circumstances? No one will want to raise private money because the law guarantees the other side will get *even more money* in the

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[1] See Clean Elections Commission website, www.ccec.state.az.us/cecesr/elections2002/candAccts.asp

general election than the candidate who did all the work and spent all the money raising the money!

10. Steve Moore, director of the Club for Growth, a conservative activist group, told me during the campaign that he would like to support my candidacy, but that his Board of Directors did not want to fundraise or contribute to my campaign because my opponents would just get the money – so it would be like contributing to them. Steve Moore also gave the same reasoning for declining to make a significant independent expenditure on my behalf.

11. This goes beyond mere promotion of the public funding scheme and punishes privately supported candidates like me. By failing to account for the significant fundraising costs incurred by traditional, privately supported candidates in the determination of matching funds, the system gives the government-funded candidates all of the benefits of my fundraising efforts, while ignoring all of the costs. In effect, this provides government-funded candidates with much greater than dollar-for-dollar matching funds, and actively discouraged private fundraising that would have been vital to my success.

12. Using A.R.S. § 16-941(B)(1), Clean Elections also reduced the amount of permissible contributions that I could receive by lowering the maximum personal donation amount by 20 percent. That made it more difficult for me, as a privately funded candidate, to raise the amount of money that subsidized candidates automatically receive, because all it did was

lessen the total amount of private money available to me from individual donors.

13. A.R.S. §§ 16-941(B)(2), 16-941(C), and 16-958 set up stringent daily reporting requirements that amounted to an overwhelming benefit for my government-funded opponents, by punishing me for refusing taxpayer money to run my campaign. My campaign had to spend much time, effort and money preparing and filing 37 special "trigger" reports, just so my government-funded opponents could be given more taxpayer money. By comparison, government-funded candidates like Napolitano and Mahoney were required to submit only three additional reports over and above the six reports that all candidates must file. The reporting requirements also operated coercively by punishing the acceptance of private finding, and provided government-funded candidates an advantage by forcing me to disclose valuable strategic information much more often.

14. The Commission enjoys unchecked power that was used aggressively against my campaign in 2002. By announcing allegations publicly before even investigating them – during the campaign – had a negative impact on the perception of nonparticipating candidates in general and my campaign in particular. Because the filing requirements for private candidates are so much more burdensome than for taxpayer-funded candidates, the Commission ends up going after nonparticipants like me in an effort to "level the playing field" and give my taxpayer-funded rivals a better chance of winning. This not only

creates a strong disincentive to the launching of private campaigns, but is downright un-American.

15. A.R.S. § 16-941(B)(1) seeks to coerce candidates to accept public financing by reducing the maximum individual contribution that can be accepted by a nonparticipating candidate by 20 (twenty) percent. It does not promote the acceptance of public funding, as it has no affect whatsoever on participating candidates. Rather, these reduced limits diminish the available pool of private resources available to a candidate who chooses to exercise his or her First Amendment right to bring his campaign speech to voters by not participating in the public funding scheme.

16. For the reasons so stated, I believe that the Clean Elections system is an unconstitutional monstrosity that must be drastically altered if democracy is to remain in Arizona's future. After seeing what happened to me, I doubt that anyone will be brave (or foolish?) enough to run a private campaign in the future.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18 day of February, 2004.

/s/ Matt Salmon
Matt Salmon

U.S. District Court for the District of Arizona

(Filed Jun. 13, 2009)

[Title Omitted In Printing]

Tucson Weekly
July 29, 04

MORE DIRT ON CLEAN ELECTIONS

It was a hot and heavy week for the effort to dismantle the state's Clean Elections program.

First there's the news, curiously underreported south of the Gila River that onetime Libertarian candidate **Yuri Downing** was indicted for theft, fraud and perjury for his 2002 publicly funded campaign for the Arizona Legislature. (Wait a minute. We thought nobody was ever indicted on perjury charges!)

Fun-loving Yuri – son of Tucson's state Rep. **Ted Downing** – got a couple of his buddies together to run a Libertarian slate of candidates for the House and Senate. The trio had a good ol' time blowing about $100,000 while campaigning in Tempe and Scottsdale hot spots and nightclubs.

Yuri's accomplices agreed to pay back half their campaign funds but Yuri insists he did nothing wrong and ran a legitimate campaign. See ya in court!

* * *

U.S. District Court for the District of Arizona

(Filed Jun. 13, 2009)

[Title Omitted In Printing]

Arizona Republic Editorial

Clean up the Act

Let's give Clean Elections a thorough scrubbing before 2006

Aug. 22, 2004 12:00 AM

Arizona's Clean Elections Act, by the judgment of the state Supreme Court, will not be challenged on this fall's ballot.

Very well. Now what?

What do we do to attend to the glaring flaws that are written into this revolutionary method of financing elections?

Whether or not you agree with the high court's ruling is almost beside the point. Its practical effect is to cancel an anticipated $6 million showdown between supporters and detractors of the 1998 voter-approved act.

For die-hard supporters and critics, the debate over Clean Elections is a simple black-and-white matter: Either the public-financed system is heaven-sent or it is ushering free and democratic elections to hell in a handbasket.

But there also is a great middle ground. Even those who (however grudgingly) accept the value of allowing candidates the option to seek public funding for their campaigns still express grave misgivings about the system as it exists.

The 2002 elections in Arizona – the first in which the Clean Elections system was widely employed – revealed some gross inequities.

The law clearly punishes privately financed candidates.

Regarding funding, the example of GOP gubernatorial candidate Matt Salmon remains striking. Salmon's three-way contest against Democrat Janet Napolitano and independent Richard Mahoney provided stark evidence that the law discriminates against traditionally funded candidates.

A Salmon fund-raiser that brought in $750,000 but which cost $250,000 to mount, nevertheless triggered a $750,000 Clean Elections contribution to Napolitano's campaign and nearly as much to Mahoney's.

Matching funds provisions under Clean Elections fail to take into account the cost of raising those funds. Worse, the law permitted hundreds of thousands of dollars in independent expenditures to be spent by supporters of the Clean Elections candidates without triggering any compensation for Salmon, while independent support on Salmon's behalf prompted immediate matching funds for Napolitano and Mahoney.

Candidates and voters alike would be far better served if the public contribution to Clean Elections candidates simply was increased and the matching-funds provisions were dropped.

Also, the Clean Elections law burdens traditionally funded campaigns with extraordinary reporting requirements including daily reports as Election Day approaches. Clean Elections candidates have far fewer reporting requirements.

A number of the law's tenets beyond campaign financing could do with some reconsideration, too. In particular, the candidate statement booklet published by the Citizens Clean Elections Commission is becoming a real embarrassment.

Rather than take the opportunity to explain their positions to voters, many candidates are using the booklet to pummel their opponents, often with scurrilous accusations that the commission cannot justifiably edit. The commission would do better to publish nothing at all.

To date, even the most minor Clean Elections "reform" efforts have garnered few supporters. Following the 2002 elections, a committee of mostly government staff proposed a list of reforms of the law, all of them highly technical and none of them attending to the issues cited above. Even those modest proposals failed to gain the support of lawmakers.

Opponents of the law say they will re-write a ballot measure they feel will pass Supreme Court muster,

and launch it for 2006. It's their right. We would hope, however, that their allies in the Legislature won't oppose efforts to reform Clean Elections.

Strategically, opponents of Clean Elections may wish to have the worst possible campaign funding law to present to voters in 2006. But in the process they will be doing a disservice to the rest of us.

U.S. District Court for the District of Arizona

(Filed Jun. 13, 2009)

[Title Omitted In Printing]

CAPITOL TIMES AZ Capitol Times September 10, 2004

Losing Candidate Probed Over Signatures To Qualify For Public Funding

A defeated Democratic candidate for the House in District 28 is being investigated for allegedly forging signatures on forms to qualify for public campaign money.

A search warrant filed Sept. 1 in Pima County Superior Court identified the candidate as Dan Lawrence, 25.

The investigation grew out of suspicions in the Arizona Secretary of State's Office in August when Mr. Lawrence submitted 223 $5 contributions to qualify for up to $11,320 in public funding for the primary election. He did not receive any public funding.

Legislative candidates need contributions from at least 210 registered voters to qualify for public funding.

Officials in the Secretary of State's Office said at least 75 of the signatures accompanying the contributions couldn't be identified. They included signatures in which the names of registered voters were misspelled and many of them appeared to be signed by the same person, officials said.

The Citizen's Clean Elections Commission, which administers public campaign funds voted 3-2 at its Aug. 31 meeting to decertify Mr. Lawrence which means he will not be able to receive public money.

* * *

U.S. District Court for the District Of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

Publication: Tribune 2003-Current; Date: Sep 15, 2004; Section: East Valley News; Page: 8

Clean Elections panel backs extra funds for close races

By PAUL DAVENPORT THE ASSOCIATED PRESS

A state commission on Tuesday refused to back down from providing extra campaign cash for some legislative candidates in hot primary races, and a group whose mailers triggered the payments said it will press a legal challenge.

The Citizens Clean Elections Commission ratified its staff's decision to provide a total of $67,500 of extra funding to 15 candidates to offset money spent by a group praising moderates.

Although the commission backed the staff decision, it also Tuesday reversed a 2-year-old policy and said it, not staff, will make the call in similar cases in the future.

That change probably will delay payment of matching funds to publicly funded candidates to offset so-called "independent expenditures" that benefit rival candidates, commission Executive Director Colleen Connor said.

Connor and other commission staff members in August authorized the matching funds because of

preprimary mailings by Mainstream Arizona, a group that supports moderate candidates.

Five of nine candidates praised by Mainstream Arizona's mailings lost in Tuesday's primary election. Mainstream Arizona on Friday filed a lawsuit arguing that its mailings should not have triggered matching funds to rivals of the moderate Republican legislators it praised.

The Clean Elections system provides a limited amount of matching money to participating candidates to offset higher spending either by nonparticipating candidates or independent groups' efforts to influence election outcomes.

Mainstream Arizona's lawsuit contends the mailings did not expressly advocate re-election of the incumbents, but the commission and its staff concluded the mailings amounted to election endorsements.

Commissioner Marchia Busching of Phoenix proposed the policy change.

"It seems appropriate because we have gotten to a point where we have got a number of close questions," she said after the meeting. "The whole issue can get very complicated and difficult."

Mainstream Arizona cochairman Jack Jewett later said the possibility of more matching funds has a chilling effect on his group's plans.

U.S. District Court for the District of Arizona

(Filed Jun. 13, 2009)

[Title Omitted In Printing]

Arizona Republic Editorial
Reforming a reform

Any fix for Clean Elections must include an end to 'matching funds'

Dec. 2, 2004 12:00 AM

If Arizona's trailblazing campaign-finance law, Clean Elections, is to fulfill its expectations, supporters are going to have to make some hard choices about just what those expectations really are.

Thus far, they seem inclined merely to nip at the edges of its deficiencies, a decision that someday may imperil the system's future altogether.

In a "My Turn" column published last Friday on the Opinions page, the Citizens Clean Elections Commission voter-education manager, Autumn Southard, presented four reforms the commission will recommend to the next state Legislature.

Some have value, such as the proposal to help candidates who survive expensive primary races and who then face general-election opponents who did not. But overall they amount to tinkering, not real reform.

To effect real change, supporters must better come to grips with the law's mission.

Is the primary mission of Clean Elections to provide electoral access to candidates who otherwise could not

afford to run? We think it is, and the impressive diversity of candidates running in the last election cycle suggests that in this regard the system is working.

But many activist supporters of Clean Elections cling to the far more elusive hope that it will somehow eradicate all imbalances – real and perceived – from election campaigns. Down this road lie the inherent dangers of unintended consequences.

The short history of the 1998 voter-approved law is exposing its fundamental flaws: its mind-blowing complexities for understaffed campaigns, especially traditionally funded ones; its embedded hostility to those candidates who choose not to use public funds, and, the counterproductive mirco-management that is written into the law.

At the heart of the law's issues is the Utopian expectation that if its enforcers dam up (or try to dam up) every avenue for special interests to influence an election, eventually they will give up and go away. This is a ludicrous expectation.

If supporters want to make Clean Elections work, they must come to terms with its real bugaboos. And the top bugaboo by far is its "matching funds" provision, which seeks to counter private contributions and independent expenditures.

This provision creates as much inequity as it supposedly resolves.

Let's fix that one by providing "Clean" candidates with a reasonable sum of money to run and do away with matching funds, if their opponents choose to run with private funds, let the chips fall where they may.

U.S. District Court for the District of Arizona

(Filed Jun. 13, 2009)

[Title Omitted In Printing]

Foothills Focus
March 2, 2005

Clean Elections Commission not so clean?
Steele Coddington

ANTHEM – Anthem resident Patrick Meyers, acting on what he considers the Arizona Clean Elections Committee's "selective enforcement" of the Clean Elections Law against five conservative Republicans, has filed complaints against Governor Janet Napolitano and Attorney General Terry Goddard.

In his complaints, filed Feb. 24, Meyers specifically points out that the commission has publicly stated and maintained "that payments from campaigns must be made directly to the root vendor, i.e. no brokers, middlemen, consultants, etc." He further stated "that recent audits of several campaigns resulted in the auditors confirming that the payments to vendors/consultants were proper and were properly reported, yet the commission while accepting the audits, specifically refused to accept that finding."

Meyers points out that while the commission has initiated investigations into allegations and complaints for such actions against a few conservative candidates, it has failed to investigate the same conduct by a large number of other candidates, including Napolitano and Goddard in the 2002 campaign.

His complaint documents 83 specific expenditures by Napolitano's 2002 campaign, obtained from campaign finance reports filed with the Secretary of State's office, amounting to more than $1,962,341. All allegedly violate Clean Elections while apparently under the same presumption of legality that affects the complaints against the current five Republicans.

For example, Meyers lists as Napolitano's complaint #58 "a payment of $199,959.40 was made on 08/27/2002 to Shorr and Associates for Primary Election Media Buy. This is a clear example of a middleman and given the enormous size of the expenditure, I cannot imagine how Clean Elections allowed it in the first place. It also seems obvious that the Philadelphia address makes it additionally clear that this single expense item fails to disclose any of the local vendors who actually provided the media time/space being purchased . . . Shorr is not the actual vendor and under Clean Elections interpretation this would be a violation as payments were not made directly to a vendor."

Meyer's complaints against Attorney General Goddard documents at least 21 similar alleged violations of Clean Elections expenditures.

Self-described private citizen Meyer's whole point is that if people like Napolitano and Goddard, both lawyers and Attorney Generals, charged with knowing the law, interpreted it in essentially the same way as the five Republicans, how come the conservative

Republicans are the only ones held to a different or higher standard of understanding.

The conclusion is that the Clean Election Commission is guilty of failing to conduct its duties with impartiality, and the entire law needs rethinking or repeal so that mere commission interpretations don't cloud the reputations of candidates who have won elections based on ethical campaigns.

U.S. District Court for the District of Arizona

(Filed Jun. 13, 2009)

[Title Omitted In Printing]

Clean Elections. Make your voice heard.

Ever wish you could level the political playing field? Give people from different backgrounds a shot at being elected? Well, now you can. Here in Arizona, we have the Citizens Clean Elections Act, which provides funding to citizens who choose to run for legislative or statewide office.

Candidates may receive campaign funding from the Citizens Clean Elections Commission after they collect a minimum number of valid $5 qualifying contributions from registered voters. Registered voters can give $5 qualifying contributions to as many individual candidates as they would like – there is no limit. And, the party affiliation of the candidates or the registered voters does not matter!

By making $5 qualifying contributions to the candidates of your choice, you can get involved and help level the playing field. You can help impact the political process for about the cost of a bumper sticker. To find out more, visit www.azcleanelections.gov.

[LOGO]

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

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phone (602) 258-4554 •
fax (602) 252-2729

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p.o. box 13178 •
phoenix, arizona 85002 •
www.brc-research.com

AWARENESS AND ATTITUDE STUDY

January 2006

Prepared for

Off Madison Ave and
Arizona Citizens Clean Elections Commission

Prepared by

Behavior Research Center, Inc.
1101 North First Street
Phoenix, Arizona 85004
(602) 258-4554

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* * *

EXECUTIVE SUMMARY

Major findings from this study include:

- Half of Arizona heads of household are unaware of the Clean Elections Act. However, two-thirds of high-efficacy voters are familiar with the program.
- Among those familiar with Clean Elections, support for continuing the program is very widespread, with 85 percent calling the program important to the voters of the state.
- Provision of funding and oversight of the electoral process are the main roles of Clean Elections in the minds of those who are aware of the program.
- Six in ten indicate that whether a candidate is "clean" makes no difference as to his/her credibility, but one-fourth feel a "clean" candidate is more credible, while just one in ten feel a "clean" candidate is less credible.
- Almost half feel a spending limit violator should be required to repay the amount spent that is over the limit, while three in ten feel that candidate should be removed from office.
- Stories in newspapers and on television are the main sources of information on Clean Elections.

DETAILED FINDINGS

Familiarity With Clean Elections Programs

Half (49%) of all respondents know nothing at all or have never heard of the Clean Elections program and fewer than one in ten (8%) profess to be very familiar with it. However, among high-efficacy voters, overall awareness rises to two-thirds (67%), and over half are very (14%) or somewhat (41%) familiar with the program.

As may be seen in Table 1, women, younger respondents, Democrats and minorities are least familiar with Clean Elections. In addition, we note that Maricopa County residents are more aware of the program than are Pima County or rural residents. This may trace to the news coverage, centered in Maricopa County, over the case of Representative Smith and the challenge to his seat.

TABLE 1

"Thinking about legislative and statewide elections here in Arizona, would you say that you are very familiar, somewhat familiar, not very familiar or not at all familiar with the election funding program called Clean Elections?"

	Very Familiar	Somewhat Familiar	Not Very Familiar	Not At All Familiar/ Never Heard Of
TOTAL	8%	32%	11%	49%
GENDER				
Male	9	37	12	42
Female	7	26	9	58
AGE				
Under 35	2	24	7	67
35 to 54	8	34	13	45
55+	14	38	11	37
POLITICAL PARTY				
Republican	11	36	12	41
Democrat	6	31	11	52
Independent/ Other	10	42	9	39
High Efficacy Voter	14	41	12	33
ETHNICITY				
Caucasian	9	36	11	44
Hispanic	3	18	15	64
Other	5	22	5	68
COUNTY				
Maricopa	10	33	12	45
Pima	6	28	8	58
Rural	4	30	9	57

* * *

PERCEIVED FUNCTIONS OF CLEAN ELECTIONS

Almost four in ten (37%) of those who are aware of Clean Elections identify funding of candidates as the principle role of the program while another one-fourth (25%) mention overseeing the political process. On the theory that awareness of functions tracks roughly the level of significance of each function, we note that Independents, Libertarians and other minor party voters find the overseeing of the political process as more important than do Republicans and Democrats.

One-fourth (24%) of those who are aware of the program are unaware of what it does.

TABLE 4

"*As far as you know, what does Clean Elections do?* (PRECODE; RECORD ALL MENTIONS; PROBE: *What else?*"

Among Those With An Awareness of Clean Elections

		Political Party		
	TOTAL	Republican	Democrat	Independent/ Other
Provides funding to candidates	37%	43%	39%	38%
Police/ oversee the electoral process	25	21	26	33
Endorse certain candidates	8	5	11	9

Enforce contribution/spending limits	8	10	6	9
Lowers emission/cleans up pollution	4	4	4	2
Other	1	1	1	0
Not sure	24	21	25	14

Totals exceed 100% due to multiple responses

		Gender		Age		
	Total	Male	Female	Under 35	35 to 54	55 +
Provides funding to candidates	37%	42%	31%	44%	42%	29%
Police/oversee the electoral process	25	29	21	23	20	33
Endorse certain candidates	8	9	7	14	9	5
Enforce contributions/spending limits	8	8	8	0	10	10
Lowers emission/cleans up pollution	4	2	6	5	6	2
Other	1	1	1	0	0	2
Not sure	24	20	28	29	20	23

Totals exceed 100% due to multiple responses

Credibility of Clean Elections Candidates

While six in ten (59%) feel that whether a candidate runs as a Clean Elections candidate or is privately funded makes no difference to the candidate's credibility. Among those who feel it makes a difference, those feeling "clean" candidate is more credible outnumber those who feel the candidate is less credible by a 2½-to-one margin.

Among Republicans, the more credible/less credible ratio narrows to virtually even.

TABLE 5

"Do you feel a candidate who runs for office under Clean Elections guidelines and uses public funding is more credible or less credible than a candidate who raises his own money, or does it make no difference to you?

Among Those With An Awareness of Clean Elections

	More Credible	No Difference	Less Credible	Not Sure
Total	25%	59%	10%	6%
Gender				
Male	26	61	8	5
Female	23	57	13	7
Age				
Under 35	11	77	6	6
35 to 54	30	55	11	4
55+	25	57	11	7

POLITICAL PARTY				
Republican	17	63	15	5
Democrat	32	55	8	5
Independent/Other	29	59	6	6
High Efficacy Voter	24	60	11	5
ETHNICITY				
Caucasian	26	58	10	6
Hispanic	21	61	5	13
Other	18	66	12	4
COUNTY				
Maricopa	20	62	11	7
Pima	37	43	16	4
Rural	29	64	2	5

PENALTIES FOR VIOLATING CLEAN ELECTIONS

Respondents were asked what penalty is most appropriate for a "clean elections" candidate who violates the spending limit. Overall, just under half (46%) feel the candidate should be required to repay the amount spent that is over the limit, while three in ten (31%) feel the candidate should be removed from office.

As may be seen in Table 6, Republicans tend to be more lenient, while Democrats lean more toward more stringent measures.

TABLE 6

"When a candidate for office violates the spending limit, how should that person be penalized? Should they be removed from office, fined or be required to repay the amount that is over the limit?"

Among Those With An Awareness of Clean Elections

		Political Party		
	TOTAL	Republican	Democrat	Independent/ Other
Repay amount over limit	46%	58%	38%	46%
Remove from office	31	25	37	28
Fine	15	9	14	21
Do nothing	1	1	*	2
Unsure	7	7	11	3
	100%	100%	100%	100%

*Indicates less than .5 of one percent

		GENDER		AGE		
	Total	Male	Female	Under 35	35 to 54	55 +
Repay amount over limit	46%	44%	48%	49%	51%	39%
Remove from office	31	33	29	19	29	39
Fine	15	14	15	24	12	13
Do nothing	1	1	1	0	1	2
Unsure	7	8	7	8	7	7
	100%	100%	100%	100%	100%	100%

Importance of the Clean Elections Act

When asked how important it is to the voters in Arizona that the Clean Elections Act continue, fully 85 percent indicate it is very (54%) or somewhat (31%) important. Among Democrats, support for continuation of the program is virtually universal.

TABLE 7

"Do you think it is very important, somewhat important, not very important or not at all important to voters in Arizona that the Clean Election Act continue?"

Among Those With An Awareness of Clean Elections

	Very Important	Somewhat Important	Not Very Important	Not At All Important	Not Sure	Net* Important/Not Important
Total	54%	31%	6%	4%	5%	+ 75
Gender						
Male	52	31	8	6	3	+ 69
Female	55	31	5	2	7	+ 79
Age						
Under 35	33	57	2	2	6	+ 86
35 to 54	56	27	9	4	4	+ 70
55+	61	23	7	5	4	+ 72
Political Party						
Republican	44	32	12	5	7	+ 59
Democrat	71	26	1	1	1	+ 95
Independent/Other	53	40	4	2	1	+ 87
High Efficacy Voter	59	25	8	5	3	+ 71
Ethnicity						
Caucasian	51	32	8	3	6	+ 72
Hispanic	52	39	0	8	1	+ 83
Others	74	18	0	8	0	+ 84
County						
Maricopa	50	34	8	5	3	+ 71
Pima	52	26	5	5	12	+ 68
Rural	68	27	1	2	2	+ 92

*Very important + somewhat important - not very important - not at all important=Net

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

OpEdNews.com

Original Article at http://www.opednews.com/articles/opedne_todd_lan_060417_big_money_contributi.htm

April 17, 2006

Big Money Contributions in Political Races Will Open Flood Gates in 2006 Race

Citizens Clean Elections Commission Op-Ed

By Todd Lang.

Not too long ago, the citizens of Arizona realized a critical need to address how statewide and legislative elections are conducted. Recognizing a desire to remove special interest money from Arizona politics and to level the playing field in campaign financing, Arizona voters approved the ballot initiative establishing the Citizens Clean Elections Commission, in 1998.

Arizona's successful program has spawned many imitators. States such as New Jersey, West Virginia, Connecticut, Oregon and Washington are working to enact campaign finance laws and programs modeled after Arizona's Clean Elections Act.

Today, this voter-approved law is under attack by the state legislature via a last-minute "striker" bill (SCR1013) that would eliminate most Commission funding and cripple the advances Arizonans have

made toward improving campaign finance reform. Even more troubling is the intention of the legislation to relax penalties for candidates who violate campaign finance laws, and allow for exorbitant contribution increases from both individuals and political action committees.

This new legislation would effectively end meaningful regulation of so-called independent expenditure committees and their attack ads. It also allows individuals to contribute up to $5,000 to a candidate's campaign committee. Currently, for the entire election period, the limit for statewide candidates is $760; and $296 for legislative candidates. In essence, if this proposed law is passed, the efforts by Arizona voters to remove special interest money from candidate elections and to regulate how candidates finance their campaigns would be completely lost. In a time when our nation is facing some of the worst campaign finance corruption scandals in its history, it is stunning that some politicians would want to open the floodgates for unparalleled big money contributions.

A January 2006 survey conducted by Phoenix-based Behavior Research Center reveals that 85 percent of Arizonans surveyed believe that Clean Elections is important to Arizona. More taxpayers are making $5 contributions and more candidates are participating in public funding each election cycle. The People of Arizona made a choice to reform our campaign finance system, and that decision continues to be the right one.

We all recognize that the Clean Elections law is not a panacea, and there are challenges with any new progressive law. However, I encourage the State Legislature to listen to the voters and work to improve the law through proactive legislation that builds on the original intentions of the voters who created and enacted this law.

Todd Lang

U.S. District Court for the District of Arizona

(Filed Jun. 13, 2009)

[Title Omitted In Printing]

EAST VALLEY TRIBUNE
MESA, AZ

Catalog in Clean Elections sights

Commission: Is endorsement an in-kind donation?

By HOWARD FISCHER

CAPITAL MEDIA SERVICES

The Citizens Clean Elections Commission will have to decide what is a legitimate newspaper and what is not.

Todd Lang, executive director of the Citizens Clean Elections Commission, said he is exploring whether an endorsement of Republican gubernatorial hopeful Len Munsil in a catalog published by a Prescott gun dealer amounts to an in-kind contribution to Munsil's campaign.

An in-kind contribution is a noncash gift that can be given a cash value. The catalog with the endorsement was mailed to about 13,000 Arizonans.

Lang said if such an endorsement is to be considered a contribution – which is his preliminary conclusion – then the value of that endorsement should be considered an expense by the Munsil campaign.

And that would trigger a match of public monies to Don Goldwater, the other publicly financed candidate in the Republican gubernatorial campaign.

What Lang and the commission conclude has implications far beyond the J&G Gun Sales catalog. It puts the state in the position of defining what is a legitimate news publication. That's because an endorsement by what the commission considers a newspaper or magazine does not trigger matching funds, even if that endorsement were to suggest that people volunteer time or donate funds to the candidate.

But an identical plea in a private publication that goes out to more than just association members, Lang said, effectively is a donation.

At the heart of the battle is an eight paragraph endorsement of Munsil in the J&G catalog sent out at the end of March, signed by Brent DeSaye, vice president of the family-owned company.

DeSaye wrote that he had spoken to Munsil about "issues that are critical to Arizona shooters and hunters" – and found him friendly to issues of the right to own and carry firearms "how and where they choose."

Lang said there is no evidence of coordination between DeSaye and Munsil that would have made the endorsement – DeSaye called it an "editorial" – an illegal direct campaign donation. But he said it still could qualify as an in-kind contribution.

He conceded that course of action is fraught with potential pitfalls. The first, he said, is determining the value of the endorsement.

Potentially more serious would be that the Citizen's Clean Elections Commission would have to determine what is a legitimate news publication, whose endorsement does not trigger matching funds, and what is not.

"My preliminary take is this is not a newspaper," Lang said.

"This is effectively a mailer," he continued. "It's effectively the same thing as printing a gun catalog, mailing it to your guys, and then sticking a poster of Munsil in the middle of it."

Lang conceded he's not exactly sure where the line is drawn. But he said that daily newspapers clearly qualify legitimate publications and the J. Crew catalog does not.

"The question is what about in between those two?" he said.

The matching dollars provision is available only to candidates who accept public funding for their campaigns and agree to limit spending. Republicans Mike Harris and Gary Tupper are running for governor with private donations or their own cash and would not get a match.

* * *

U.S. District Court for the District of Arizona

(Filed Jun. 13, 2009)

[Title Omitted In Printing]

AZ Capitol Times

November 17, 2006

2006 POLITICAL ALMANAC

What happens when you run afoul of the rules

By Christian Palmer, ( )

Four election cycles have passed since Arizona voters passed the Clean Elections Act of 1998. Enforcing the statutes passed by the act has been time consuming. Many candidates have been forced to pay fines or reached agreements with the commission without admitting guilt to violating campaign finance laws.

The following candidates received the greatest penalties, and perhaps, most interesting, for intentionally or unintentionally running afoul of the Clean Elections Act rules.

David Burnell Smith:

Overspent, gets 'death penalty'

Original fine: $44,000

Reduced to: $2,500

It's one thing for elected officials to get themselves into trouble and another to lose elections when voters begin to question their character. But there's something to be said for making history, and Scottsdale/Carefree Rep. David Burnell Smith did just that

when he became the first legislator in the nation to be removed from office for campaign finance violations.

When the Citizens Clean Elections Commission found the District 7 Republican had overspent his 2004 primary election limit by more than $6,000 and ordered him to leave office, the West Virginia native didn't disappear quietly. Mr. Smith, a lawyer by trade, fought and lost every step of the way to the Arizona Supreme Court, which also denied his claim that the power to remove elected officials lies solely with citizen recall and impeachment by the Legislature.

The decision affirmed commission authority to sentence candidates who overspend by 10 percent or greater to the "death penalty," leaving advocates of publicly funded campaigns overjoyed, and Mr. Smith in self-described financial and emotional ruins.

But the saga of the man who ran four previous unsuccessful campaigns before his election in 2004 was not over. He filed an additional challenge against the commission based on a U.S. Supreme Court decision that struck down low contribution limits established in Vermont, and ran a competitive re-election campaign, this time with private funds.

After failing to qualify for the 2006 general election, he appeared before the CCEC asking for partial relief from the $44,000 in penalties levied against him for his earlier infractions. To his relief that wish was granted. On Oct. 25, the commission agreed to accept a fine of $2,500.

Libertarian team:

Bar tabs, car rentals

Original fines totaled: $26,970 each

Reduced to: $15,000 each

Usually car rentals, liquor and bar tabs don't show up on campaign finance reports, but Yuri Downing-Garcia and associates Trevor Clevenger and Paul DeDonati introduced a novel campaign method in 2002.

The trio ran and subsequently lost as a Libertarian team for House and Senate seats for District 17, which covers south Scottsdale and most of Tempe, including Arizona State University.

The commission and staff were not swayed by Mr. Downing-Garcia's claim that the "unconventional" campaigning in Scottsdale nightclubs such as Sanctuary, Six, and the Cat Eye Lounge was necessary to reach young voters. Colleen Connor, CCEC executive director at the time, noted most of the clubs were not even in their district and that little evidence of a political campaigning was ever discovered.

An indictment by the Attorney General's Office alleges Mr. Downing-Garcia filed false campaign finance reports, converted as much as $5,000 of public campaign funds into hard cash, and paid himself $111 after the 2002 general election in order to drain his campaign account.

Mr. Downing-Garica, who also served as campaign treasurer for Mr. Clevenger and Mr. Donati, would later be indicted for theft, fraud and multiple counts of perjury. And while his accomplices would later individually settle with the commission for $15,000 (paid for by an anonymous source), Mr. Downing-Garcia skipped a sentencing hearing and was arrested days later by Salt River Police while driving with a loaded handgun and a forgery device.

After serving almost a month in jail, he failed to report to another sentencing hearing in May and a warrant was issued for his arrest. His whereabouts are still unknown.

Bill Montgomery: Blurring the lines between primary, general election spending

Fine: $43,000

Illegal immigration was certainly a hot campaign topic for all Arizona candidates in 2006, and Republican challenger for attorney general Bill Montgomery was no exception. The former tank commander and West Point graduate repeatedly charged during the campaign that incumbent Attorney General Terry Goddard had failed to take illegal immigration seriously – and that Arizona's crime rate went through the roof as a result.

But Mr. Goddard's campaign would have the last word in the immigration debate. On Sept. 22, a complaint was filed with the Citizens Clean Elections Commission alleging that Mr. Montgomery filmed a tough-on-illegal-immigration commercial late in the

primary cycle that included authentic illegal immigrants.

Those charges are currently being investigated by the Maricopa County Sheriff's Office, and Mr. Montgomery has maintained he had no role in the hiring of actors for the commercial and that he believed the Hispanic men were volunteers.

The commission refused to rule on the alleged use of illegal immigrants but did believe that Mr. Montgomery's campaign inappropriately used primary campaign funds for general campaign purposes.

The Republican candidate was permitted to use the commercial, which reportedly was filmed on primary election day due to scheduling difficulties, but the commission reached an agreement with Mr. Montgomery to accept $43,000 from his general campaign allotment as a repayment for funds spent with the intent to air the ad.

U.S. District Court for the District of Arizona

(Filed Jun. 13, 2009)

[Title Omitted In Printing]

espressopundit.com

7-30-07

The problem with 'Clean Elections' commissions

Today the New York Post, in discussing the unintended consequences of regulating political speech, mentioned a dark chapter in the short history of Arizona's Citizens Clean Elections Commission.

{ HYPERLINK

"http://www.nypost.com/seven/07302007/postopinion/opedcolumnists/dont_let_nys_hacks_muzzle_you_oped columnists_stephen_m_hoersting.htm" }

> *"Nobel laureate James M. Buchanan Jr. teaches that there is no such thing as the disinterested bureaucrat. Throughout the country, "unbiased" enforcement agencies have been accused of making decisions based on politics rather than the merits.*
>
> *Consider Arizona, which claims to be model of "clean elections" of the kind Spitzer wants. Matt Shaffer, then a deputy director of that state's Citizens Clean Elections Commission, accused the agency's executive director of acting in an "unfair and political" manner by treating the campaign-finance violations of Republican gubernatorial candidate Matt*

Salmon more harshly than the violations of other candidates in that 2002 race.

The commission then turned around and fired Shaffer, claiming that he had "willingly and deliberately concealed" violations by Salmon. In 2005, a federal jury awarded Shaffer $1.1 million for defamation but declined to find that he was wrongly terminated."

U.S. District Court for the District of Arizona

(Filed Jul. 2, 2009)

[Title Omitted In Printing]

DECLARATION OF CHAD KIRKPATRICK

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1. I, Chad Kirkpatrick, pursuant to 28 U.S.C. §1746(2), hereby declare under penalty of perjury as follows:

2. I am the Chairman of the Arizona Taxpayers Action Committee ("Arizona Taxpayers"), an Independent Expenditures Committee organized pursuant to Ariz. Rev. Stat. Ann. § 16-902. I make this declaration in support of Plaintiffs' First Amended Complaint in the above-referenced matter.

3. I am a citizen of the United States and a resident of Maricopa County, Arizona. I am over eighteen years of age and fully competent to make this declaration. I make this declaration based on my personal knowledge.

4. Arizona Taxpayers was first organized in 2006. That same year, Arizona Taxpayers made independent expenditures in the primary election cycle in Legislative District 8.

5. In Legislative District 8, Arizona Taxpayers supported a government-funded candidate who was running against a privately financed candidate, meaning that Arizona Taxpayers' expenditures did not trigger any matching funds to the candidate it opposed.

6. Arizona Taxpayers also made expenditures to advocate the defeat of two Arizona Propositions, Prop. 201 and Prop. 203.

7. Arizona Taxpayers will make independent expenditures in the 2008 and 2010 elections and in other future elections, Arizona Taxpayers will soon have to decide whether to speak out against government-funded candidates (or in support of a privately financed candidates with government-funded opponents) thus trigging matching-funds under the Citizens Clean Elections Act (the "Act").

8. In the 2008 election cycle, Arizona Taxpayers will participate in at least three and up to five state legislative races within Maricopa County. Arizona Taxpayers will make a decision as to the precise number of legislative races in which it will participate, and the extent of such participation, based in part on whether Arizona's Taxpayers speech will trigger matching funds to a government-funded candidate whom Arizona Taxpayers, and its donors, desires to defeat. Arizona Taxpayers will either not voice its opinion, or will voice

its opinion to a lesser extent, when its expenditures will help a candidate with whom it disagrees.

9. When the Clean Elections Commission provides government funds to candidates with whom Arizona Taxpayers and its donors disagrees, based solely on Arizona Taxpayer's exercise of its free speech and free association rights, Arizona Taxpayers, and its donors, will be severely and negatively impacted by the operation of the Act. Because the expenditure of funds by Arizona Taxpayers will directly be responsible for adding to the government funded candidate's campaign coffers by spending that money, Arizona Taxpayers' speech and association rights will be impaired. The knowledge that a candidate Arizona Taxpayers does not want to be elected will receive a government subsidy, as a direct result of Arizona Taxpayers speech, will prevent Arizona Taxpayers from the full and unrestricted exercise of its speech in such races. Thus, rather than creating and fostering a system where there is "more" speech, the Act creates a climate of self-censorship resulting in less political speech.

10. During the 2006 election cycle some prospective donors expressed concern that their contributions would trigger government funds being distributed to a candidate they disagreed with. Donors were reassured that Arizona Taxpayers were not participating in an election where the opposing candidate was receiving government funds. Heading into the 2008 election cycle, when an opposing candidate receives funds from the Act, Arizona Taxpayers will either not spend money to

voice its opinion, or it will curtail its spending, due to concerns raised by potential donors in the 2006 election cycle.

11. Pursuant to 28 U.S.C. §1746(2), I, Chad Kirkpatrick, hereby declare under penalty of perjury under the laws of the United States and the State of Arizona that the foregoing is true and correct to the best of my knowledge, information and belief.

/s/ Chad Kirkpatrick
Chad Kirkpatrick

EXECUTED ON
NOVEMBER 20, 2007

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

DECLARATION OF DEAN MARTIN

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1. I Dean Martin, pursuant to 28 U.S.C. §1746(2), hereby declare under penalty of perjury as follows:

2. I am currently the Arizona State Treasurer. I was elected to that position in 2006. From 2001 to 2006, I was an elected member of the Arizona State Senate. I make this declaration in support of Plaintiffs' First Amended Complaint in the above-referenced matter.

3. I am a citizen of the United States and a resident of Maricopa County, Arizona. I am over eighteen years of age and fully competent to make this declaration. I make this declaration based on my personal knowledge.

4. I will run for statewide office in Arizona in future elections. I will be eligible to run for a second term as State Treasurer in 2010. While I would prefer to raise private contributions to fund my next statewide campaign, because the Citizens Clean Elections Act (the "Act") penalizes privately funded candidates I might be forced to run with government funds.

5. In my most recent race for State Treasurer, as a privately financed candidate, the matching funds provision of the Act forced me to self-censor myself. I was forced to limit my speech and abide by the Act's expenditure limits or risk being further outspent by my government-funded opponent because of the operation of the Act. In that regard, I was not able to raise or spend money to engage in my fundamental First Amendment right to speak freely and communicate with Arizona voters. I will suffer the same restriction, deprivation, and loss of my free speech rights in my future campaigns as I did in the 2006 election due to the Act's matching funds provision. The specific operation of the Act in the 2006 that forced me to abide by the Act's expenditure limits is detailed in paragraphs 6 and 7 of this declaration.

6. In the general election I faced a government-funded democratic opponent. My Democratic opponent did not have any primary opposition, but still received both full cash disbursements under the Act, which is an amount equal to the Act's spending limit for the office of Treasurer, meaning she received $47,770 for the primary election and $71,655 for the general election – for a total of $119,425. Because my opponent did not have any primary opposition, she was able to use every dollar of her full, government-provided war chest against me in the general election.

7. In addition, the Act operated to provide my opponent with matching funds in the general

election as soon as my campaign raised an amount equal to my opponent's general election spending limit of $71,655. In other words, even though she had $119,425 to spend against me, she started receiving one dollar for every dollar I raised in private contributions over the spending limit of $71,655. Considering that matching funds would have flowed to my opponent up to two times her initial disbursement, if my campaign had not stopped its fundraising activities, she would have received a total of $214,965 for the general election (for a total of $262,735 to use against me once you include the primary funds in that total).

8. The only way I could avoid being massively outspent by my opponent was to prevent the triggering of additional matching funds to her campaign. Thus, I stopped accepting contributions to my campaign to make sure that I did not exceed the Act's expenditure limitations for the Treasurer's race, despite the fact that I wished to continue to collect contributions in order to communicate with the voters of this state. I wanted to reach more voters by expending such funds, had I been able to collect them. I was thus coerced into accepting the same limits as my government-funded opponent and yet I did not receive any of the benefits of being a government-funded candidate, such as the receipt of matching funds for independent expenditures that opposed my candidacy and the label "participating" or "clean" candidate.

9. As the Clean Elections Commission spends funds to promote the Clean Elections system, especially during election years, I have personally noticed that there is an increasing public perception that candidates who do not accept government funding are "dirty" candidates because they are not participating in the "clean" elections system. The label "non-participating" candidate punishes me, as a privately financed candidate, for doing nothing more than exercising my constitutional right to raise money to run for political office and to speak without government-imposed regulations and limits on my speech.

10. The Legislature's recent amendment to the Act appears to have mitigated to some extent one discrete problem for privately funded candidates facing a government-funded opponent who had no primary opposition. However, due to the dramatically increased spending limits and lump sum disbursements under the amended Act, I will face similar, and in effect, identical, burdens on my free speech rights in future campaigns as I have in the past under the so-called Clean Elections Act. I will be forced to abide by the Act's expenditure limits or risk being drastically outspent by my government-funded opponent(s). For example, the expenditure limits for Treasurer were nearly doubled so that the initial dispersement in the primary election is now $82,680 and the general election is $124,020. That means that there is a potentially a total public subsidy of $372,060 for each government-funded candidate for Treasurer in the

general election with up to the two times matching funds being available.

11. In light of the fact that my campaign will have to spend far more than a mere 6% of $372,060 in order to raise such a substantial sum of money, the fact is that absent such an excessive campaign any government-funded opponent in the Treasurer's race will always have more resources than a privately funded candidate – and the harder the privately financed candidate works the more the government-funded candidate will benefit.

12. Pursuant to 28 U.S.C. § 1746(2), I, Dean Martin, hereby declare under penalty of perjury under the laws of the United States and the State of Arizona that the foregoing is true and correct to the best of my knowledge, information and belief.

/s/ Dean Martin
Dean Martin

EXECUTED ON
NOVEMBER 26, 2007

U.S. District Court for the District of Arizona

(Filed Jun. 13, 2009)

[Title Omitted In Printing]

Brennan Center for Justice

Money and Politics: The Good, The Bad, And The Ugly

Commentary

By Gov. Janet Napolitano (D-AZ)

– *04/10/08*

Thank you for joining me this evening.

I want to thank the Brennan Center for the special honor of delivering this first "Living Constitution" lecture. I would also like to thank the group of Justice Brennan's former clerks who made this possible. It's always a challenge to be the first to do anything – especially when you're in a room full of lawyers and legal scholars who are, naturally, looking for some kind of precedent.

I've been asked to discuss how my experiences have shaped my views of the many dynamic and evolving ideas within the Constitution. Well, let me tell you: I had a lot of potential material for this. My professional life has given me plenty of experiences with the day-to-day application of the Constitution. I've dealt with constitutional issues as a lawyer in private practice, as a U.S. Attorney, and as a two-term Governor. As Arizona's Attorney General, I had the privilege of arguing a case before the U.S. Supreme

Court. Now, the judgment in that case didn't go our way. But we did get the votes of the two Arizona justices on the Court at the time, Justices O'Connor and Rehnquist – which makes me think we were on to something.

I'd like to speak tonight both as an attorney and as a person who has run for office. I want to address a constitutional issue that is both timely and dynamic: money in politics, and the public financing of elections. When you talk about a "Living Constitution," it hardly gets more alive than this. It's an issue that stands at the heart of the American people's concern with our political system today. It is also an issue on which the Constitution is largely silent. The Founders devised an ingenious system of government for the new nation. But, for better or for worse, the Constitution did not seem to anticipate at all what an American political system – as opposed to a government system – might look like. The rules for partisan politics, campaigns, and elections were left for the people to figure out later.

Reading the Constitution or the Federalist papers, it's clear the Framers saw the Republic as subject to a few big threats: the tyranny of a strong central government; the tyranny of the majority; or the menace of a foreign enemy. But if you ask Americans today what most threatens our democratic values, many will say that it is the special interests or the high-dollar donors – those who can play king- or queen-maker, can rent time at a candidate's ear, or can buy their ticket into an expensive fundraiser.

People worry that their votes are less important than someone's money. They hear, for instance, about pharmaceutical lobbies donating to campaigns, and then they see nothing getting done on health care. They observe powerful oil interests bankrolling candidates, and then see America make insufficient progress on energy.

I have seen the political process close up, and I can tell you that it's more complicated than that. But I can also tell you that there are real drawbacks to the current interplay between money and politics. Perhaps more than overt corruption, the current system breeds cynicism and apathy – two enemies of participatory democracy. If Americans feel like they don't have a voice, then all sorts of people – potential voters and potential candidates alike – don't get involved because they don't think they can matter. Important policy differences are obscured by the patina of campaign contributions. And candidates are forced into a never-ending cycle of fundraisers and chicken dinners, which, especially at the federal level, greatly favors incumbents over even the most worthy challengers.

You're never going to get money completely out of politics – but there is a better way to do it.

The voters of Arizona helped move in the right direction by voting for an initiative known as "Clean Elections" ten years ago. Under Clean Elections, Arizona is one of 14 states that have a form of direct public financing for candidates in some elections –

and is one of only two that has a comprehensive funding, fundraising and matching formula.

Let's begin with some Clean Elections 101.

It is a voluntary system. Candidates who choose to "run clean" receive full public funding for their campaigns if they agree to adhere to the fundraising schemata and the spending limits of the act. To qualify for public funding, clean candidates must collect a certain number of $5 contributions along with the nominating petitions signatures required of all candidates.

The number of $5 contributions required of candidates varies with the office sought: 200 for a legislative position, 4,000 for a gubernatorial candidates. Once candidates collect enough $5 contributions to qualify for funding, they turn this money over to the state's Clean Elections Commission. After the qualifying period is over, clean candidates may not accept any more private donations. From then on out, the campaign is publicly funded.

In the rules I ran under in 2006, a "clean" gubernatorial candidate received about $450,000 in public financing for the primary and about $680,000 for the general election. If my opponent had opted not to participate in clean elections, as a clean candidate, I would have received a "match" for every dollar my opponent spent beyond the initial limits, up to three times the original cap. For governor, this cap was roughly $3.4 million, including both the primary and general election. This matching formula creates an

interesting dynamic. In my 2002 race, my opponent, former Congressman Matt Salmon, did not run clean and spent a lot of time raising money the traditional way. In 2002, you may recall, President Bush was quite popular, and Matt invited the President to Phoenix to do a fundraiser, which was quite successful.

At the next debate, I pulled Matt aside and thanked him, because under the Clean Elections match, his event raised $750,000 for my campaign. I am quite certain that I am the only Democratic Governor in the country for whom George Bush has held a fundraiser.

Where does the money for Clean Elections come from? None of it comes from the state's General Fund. Instead, almost two thirds of Clean Election funding derives from surcharges on civil penalties and criminal fines like parking tickets, and about one third comes from voluntary check-offs on the state's tax return. Arizona is a place of tremendous growth and dynamism, which gives us big challenges, but even bigger opportunities. These elements of Arizona are on display in our Clean Elections law.

It is a good example of the tremendous success, frustrating shortcomings, and intense acrimony – the good, the bad, and the ugly – that come with any good frontier.

Let's start tonight with the good. I strongly believe in the principle of public financing. It's opened up the

political process for thousands of voters and encouraged more people to get involved as candidates.

To look at the upside of public financing, you have to be realistic about what it can do. Public financing does not – and cannot – get the money completely out of campaigns. You need money to reach voters and inform them of where you stand. Try doing that on a shoestring.

Apart from this basic necessity, there's this fact:

When it comes down to it, people who want to contribute lots of money to causes they care about will find some way to do it. Our Clean Elections system in Arizona, for instance, effectively limits individual contributions to campaigns to $5. But a Clean Elections candidate always runs the risk of an opponent who can simply self-fund at an unlimited level. Moreover, anyone can give a lot of money to political causes simply by donating to the state political party, an advocacy organization, or an independent expenditure committee. Everyone should be familiar with this phenomenon: In 2004, we saw it on a national level, when donors responded to new campaign finance laws by funding 527 groups, which are much less regulated than campaigns or political action committees.

I strongly believe that these types of organizations should be held to strict and more timely reporting requirements for income and expenditures, so that voters can see what's going on. These would be positive steps, considering the fact that independent

expenditure committees and 527s are going to be with us for a very long time.

Public financing will not rid politics of money. What public financing can do is make the role of money in politics more equitable and more transparent. Public financing helps erase the big mysteries about campaign funding – it takes away the question of who the big donors are, and requires clear reporting of expenditures and incomes. It also levels the field for candidates in a way that breathes life into grassroots democracy.

Clean Elections has led to a different type of campaign: As a candidate, you focus on meeting voters, instead of dialing for dollars.

I ran for Attorney General in 1998, before the Clean Elections system was passed. I've successfully run for Governor twice – in 2002 and 2006 – as a Clean Elections candidate, choosing a clean campaign over a traditionally financed run. I can tell you: The system makes a world of difference.

In my Attorney General campaign, I spent a lot of time talking to donors just so I could have the resources to get my name out there. Running for Governor, I spent a lot less time doing that, and a lot more time talking to voters. In 2006, I collected 10,000 of the $5 contributions I needed to qualify for public funds. Compare that to the fewer than 3,000 donors I had while running for Attorney General without public financing.

Talk about opening the process up to more people. It gives voters a sense of ownership in the campaign – and they know their portion isn't bigger or smaller than anyone else's.

In this way, people giving their $5 have a lot in common with the everyday people who've formed the base of recent presidential campaigns built on small donors – such as Barack Obama's campaign. Everyone can play, and Obama's supporters know that their support lets the candidate bypass the influences that make many people cynical about politics. People can take ownership in the campaign and know their voices matter.

But you shouldn't have the benefit from a once-in-a-generation presidential candidates armed with a world-class Internet fundraising operation to foster this kind of democratic participation. Public financing allows a similar sense of citizen ownership – the feeling that everyone can play – across all levels of campaigning, even without the public limelight surrounding Obama.

As a candidate, I vastly prefer the Clean Elections model. I get to spend a lot more time talking to everyday Arizonans about the issues facing them during "$5 parties," which are common in clean campaigns. These events range from neighborhood dessert parties held in someone's living room to a hike put together by grassroots supporters and led by the candidate. To me, this is what campaigns are really about – bringing together the people you want to

represent, talking about important issues, and rallying behind common cause.

Public financing is also a good way to rein in expensive contests. In Arizona, Clean Elections has kept the cost of running way down. Candidates' ideas aren't inhibited by the obstacles of a big-money campaign, and instead compete on level ground.

Just look at the numbers. My 2006 campaign received $1.3 million in public funds, and my opponent got about the same amounts. So, together, we spent about two and a half million dollars in that Governors' race. Now look at another statewide contest in Arizona that wasn't eligible for public financing – the race for U.S. Senate. Combined, the two candidates spent nearly $30 million. Same year, same voters – but Clean Elections cut the cost of running by more than 90 percent. When you make it cheaper to run, you democratize the process. This is also true of what kind of people end up running with public financing in place.

Clean Elections has opened the doors for many more people to run for office in Arizona, because you don't have to worry about a money advantage. We've seen a 35 percent increase in the number of candidates running for Clean Elections-eligible offices from 1998 to 2006. Clean Elections, combined with term limits, has brought us a 140 percent increase in the number of contested state Senate races. Only 10 of our 30 state Senate districts were contested in 1998 – 24 of

them were in 2006. This kind of competition is a sign of a robust democracy.

And better yet, Clean Elections candidates are winning. Forty-seven percent of all state and legislative offices are now held by candidates who ran clean, including 9 of 11 statewide office. In 2006, 38 of the 90 legislators elected were Clean Elections candidates – including nearly half the House of Representatives. And clean candidates come from both major parties. Of the 47 clean candidates elected in 2006, 21 were Republicans and 26 were Democrats. In 2004, it was 28 Republicans and 18 Democrats. So public financing is far from a Democratic Party plot: It's a boon for all sorts of candidates.

So we can see all the great benefits of the Clean Elections system, and how they enhance some of the living, evolving democratic ideals that go back to the founding of our country. But there's another side to this system – some problems that we can call "the bad."

Public financing in Arizona is relatively new, which means there are real glitches that still have to be figured out.

First, let's talk about the amount candidates get to run. Through the base amount given to Clean Elections candidates, as well as through matching funds generated by independent expenditures made against me, I received $1.3 million in 2006. That's not a whole lot – but in comparison, candidates for other statewide offices received a pittance. Candidates for

Attorney General and Secretary of State received only about a quarter-million dollars to reach the same number of voters. Candidates for other statewide offices like Treasurer and Superintendent of Public Instruction received even less.

This problem was even worse in state legislative races. Clean legislative candidates do win, but many are hampered by the paltry amount the Clean Elections system gives to them – in 2006, about $29,000 for districts that have, on average, about 100,000 voters. I signed a bill last year that raised these limits by marginal amounts, but the numbers are still far too low.

One benefit of Clean Elections is keeping down the cost of running – but you have to make some concessions to reality and provide enough money through public financing to actually reach voters. And if you keep the maximum donation very low, you also accelerate that flow of money to the other organizations, which I spoke about earlier – a phenomenon that's unavoidable, but should be controlled for the sake of transparency.

There's also a cumbersome bureaucracy that faces Clean Elections candidates. Especially for first-time candidates, this can make running for office frustrating and confusing.

The fundamental problem with our Clean Elections law is that it was written by people who had never run a campaign before. This issue is compounded by the fact that anybody can file a complaint against a

campaign. This overbroad idea of standing leads to some frivolous charges, meant to score political points and eat up an opposing candidate's time.

And once your complaint is heard, judgment can be a crapshoot. The Clean Elections Commission is new, and doesn't have much precedent to go on – so its rulings can arbitrary.

And too often, its decisions are split according to the partisan ties of the commission members.

For a candidate, the consequences are potentially grave. If you spend money outside the law's limits, the Commission can fine the candidate – not the campaign, the *candidate* – up to 10 times the amount of the alleged infraction. In one case, the Clean Elections Commission removed a state legislator from office due to some serious breaches in the campaign that got him elected to his seat. I don't mean to say those penalties are never appropriate. But combining potentially stiff sanctions with unpredictable decision making does not make for confidence in the system.

Worse yet, the law's requirements don't match up with how campaigns – or, for that matter, businesses – actually function.

You can get caught up in a deep and inescapable Clean Elections bureaucracy for some pretty silly reasons.

Here's an example from my last campaign. Early in the running, we launched a web site and signed a contract to pay a monthly fee to our web site vendor.

But our opponent filed a complaint alleging that we didn't have sufficient funds on day one to pay the vendor's full contract – even though the idea, common to campaigns and to business, was to pay over time.

The complaint was ultimately dismissed, but only after a six-month audit that tied up campaign staff and resources, and which generated headlines – exactly what my opponent wanted.

This is not to complain about the ultimate result – after all, I prevailed on the complaint, and I won the election.

But in a different situation, this could have made a big difference on the outcome of a campaign. The Commission doesn't provide a perfect avenue for recourse – it can make decisions on instinct, rather than precedent; it can act too slowly; and it can apply its force unevenly. You can see flaws in the Clean Elections system that dampen the many benefits I spoke about earlier. After those stellar upsides I pointed to, you may wonder why not all Arizona candidates were running clean. Well, flaws like these are a big reason.

So we have that balance between the good and the bad. I believe that balance weighs toward the good. Now if I can discuss the acrimony and the litigation surrounding public financing – a.k.a., the "ugly" – and also, what we may be able to do to get past it.

We've seen multiple legal challenges to Arizona's system, many of them based in fundamental constitutional questions. The Brennan Center is a veteran of these cases, and has dedicated a truly admirable amount of energy to support public financing in Arizona. I want to take this moment to recognize all the important work that the Brennan Center has done to preserve this system.

The challenges, faced by the Brennan Center and others, often strike at the core of important Constitutional questions, and attempt to pit campaign finance reform against free speech. One of the basic questions that always arises when you limit campaign contributions is a familiar one that we recognize from *Buckley v. Valeo*: What about a person's right to express him or herself by donating a fortune to a candidate?

My perception of what our Constitutional principles mean today has changed with my experience as a candidate. Anyone who thinks that the marketplace of ideas is hurt by public financing should just take a look at how many people get involved under a public financing system in Arizona. In my state, the political discourse is more lively and robust *because* of public financing. In a system that values everybody's voice, you get many different types of candidates putting their ideas before voters, and a lot of people expressing themselves at a grassroots level.

Ugly legal battles are part and parcel of any new, pioneering system. But Clean Elections is not perfect,

and has some ugliness that I think we can act to expunge.

So, I'd like to close with a call to action aimed at maximizing the good, minimizing the bad, and getting around the ugly:

In public financing, Arizona has done its job as a laboratory of democracy. We've seen enough positive results to broaden the experiment. In my state, you have a real-life public financing system that has changed the landscape of politics.

My suggestion to the students and scholars here today is: Use the Arizona example to create a model code for public financing, which could be used by other states and the federal government Like I said earlier, Americans are worried about money in politics. Yet too few states have public financing, and presidential candidates are stepping away from using public money in their elections.

In our Arizona test case, you can see what has worked and what hasn't, and you can move forward from there. When discussing a "Living Constitution," it can be easy to talk in just terms of big principles. But particulars matter. The details are often at the heart of putting those big ideas to work – and this is very true in public financing.

If we can work through these particulars, we can give candidates a way to run for office that's equitable and transparent. Greater use of public financing can give citizens a greater voice, and greater confidence, in our

democratic system. I urge you to go forward, take a realistic approach to the problem of money in politics, and to contribute in this meaningful way to our nation's evolving campaign finance laws – and to do so in real time.

Aim to have a model code for states to emulate before the election of 2012 – the next presidential election and the first general election after the next census and reapportionment.

If you do this, and if states and the federal government adopt your recommendations, you will have contributed in a meaningful way to the electoral framework underlying our democracy. And that, my friends is a legacy that Brennan Center could be very proud of.

Thank you.

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

Gaming Arizona: Public Money and Shifting Candidate Strategies

Michael Miller, *Cornell University*

***Michael Miller** is a Ph.D. candidate in the department of government at Cornell University. His dissertation examines the manner in which public election financing alters campaign dynamics, citizen engagement, and political participation. He can be reached at mgm44@cornell.edu.*

Since public election financing was first implemented during the wave of post-Watergate reforms, the burning question has been, "does it work?" Evaluations of public financing have focused on its primary objectives, which are designed to address familiar grievances: Elections are too expensive and not competitive enough. Corporate PACs and other "special interests" contribute disproportionately to incumbents because they are interested in purchasing influence. Candidates must devote so much time to fundraising that little is left for other campaign tasks. Lost in these considerations, however, is the fact that mandated financial parity changes the strategic environment candidates function in, altering their decision making and potentially changing the nature of elections. As fully subsidized elections gain increasing

ubiquity in the United States, reformers must decide whether this is a cost worth bearing.[1]

Given its status as the most generously funded system of public election finance, Arizona is an ideal location to look to for unintended consequences. Some states, such as Hawaii and Wisconsin, have long employed public financing schemes with subsidies that partially cover the cost of a campaign, but Arizona's Citizens' Clean Elections system fully funds eligible candidates. Passed as a public ballot initiative in 1998, the Citizens' Clean Elections Act was implemented in time for the 2000 election. As it is in all subsidized programs in the post-*Buckley* regulatory environment, participation in Clean Elections is voluntary. However, participating candidates agree to abide by strict spending limits. Legislative candidates are provided with a subsidy equal to the spending limit, so long as they are able to demonstrate viability by successfully soliciting at least 210 contributions of exactly five dollars.[2] In other words, by accepting public financing, candidates agree to forego any additional sources of finance and to spend only the sum of the grant.

Subsidies covering the entire cost of a campaign are themselves unique, but the availability of matching funds marks the Arizona system as a paragon of generosity. Matching funds allocations are grants given to participating candidates when they are outspent; the extra subsidies mandate financial parity even when not all actors participate in the program. In primary elections, matching funds are triggered

when money is spent. In general elections, participating candidates are matched when either their opponent raises money or an independent expenditure is made.[3] In either instance, expenditures beyond the publicly financed candidate's subsidy amount are matched dollar for dollar to an aggregate limit of three times the original allocation. From the perspective of a non-participating candidate, once the original subsidy threshold is breached, a dollar spent is in effect a dollar contributed to the other side. The importance of matching funds is perhaps best understood by an example of publicly funded candidates in partially and fully funded states running against an opponent who raises and spends $75,000 (Table 1). In a system of partial funding, in which a candidate receives a subsidy equivalent to 45% of the spending limit (as is the case in Wisconsin), a publicly funded candidate would still be facing a spending deficit of nearly $64,000.[4] In Arizona's Clean Elections system, however, opponent's expenditures would trigger matching funds allocations, preserving funding equality.

The elimination of the funding gap is the keystone of Clean Elections's promise. Arizona's program diverges from previous attempts at public financing, which have employed only partial subsidies and have been far from overwhelmingly successful. Partial subsidies have proven ineffective in slowing spending inflation in New York City municipal elections (Kraus 2006) and Minnesota state campaigns (Schultz 2002), but have shown some promise in Wisconsin (Mayer and Wood 1995). In terms of enhanced competition,

13 years of gubernatorial elections from 1983 to 1996 yielded no measurable difference in competition levels of publicly-financed elections compared to those funded by private sources (Malbin and Gais 1998, 136). Two studies have found little change in competitiveness for legislative candidates in Wisconsin (Mayer and Wood 1995) or Minnesota (Jones and Borris 1985). However, a subsequent examination of Minnesota races found significant relationships between public money receipts and challenger vote totals, indicating a positive relationship between subsidies and competitiveness (Donnay and Ramsden 1995). As to the effectiveness of public money in diminishing the role of special interests, an early look at Minnesota found that public funds had helped individual interests (private contributors) to gain an aggregate dollar advantage over special interests (Jones and Borris 1985). Seventeen years later, however, Schultz (2002) found that Minnesota's PACs simply channeled their money through soft money and lobbyists, resulting in little net difference.

While it is unclear whether partial subsidies have had any real effect, it is worth noting that the basic candidate experience in those systems remains relatively unchanged. Candidates in partial funding systems still must raise money from external sources, and given the well-documented funding gap between challengers and incumbents (e.g., Herrnson 2004, 160; Cassie and Breaux 1998), it should not be terribly surprising if the former still find themselves well behind on Election Day. Clean Elections, however, not

only removes fundraising from the candidate experience with full subsidies, but the matching funds provision also means that participating candidates can be outspent in only the most exceptional cases. A guarantee of adequate funding, combined with mandated financial parity between participating and nonparticipating candidates, makes Clean Elections an entirely different policy. Compared to evaluations of its predecessors, studies of Clean Elections have been markedly positive, even if the program's youth has precluded broad study. A 2002 General Accounting Office study was cautiously optimistic as to the law's effectiveness (General Accounting Office 2003). Four years later, Mayer, Werner, and Williams (2006) concluded that Clean Elections has indeed enhanced competition. Francia and Herrnson (2003) found that candidates accepting full public subsidies devoted significantly less time to raising money than candidates in other states employing more traditional funding mechanisms, including partial public assistance.

For all the apparent success of the program to date, there is a vast potential for unintended consequences that must be considered. The enhanced availability of money alone is sufficient to change tactical considerations of candidate entry, but the generous matching funds provision leads to altered campaign strategy and spending patterns of Arizona's privately financed candidates. In short, nonparticipating candidates in Arizona are using matching funds to achieve maximum financial advantage, shifting traditional conceptions of campaign strategy as they modify their

spending patterns to minimize the impact of "clean" money. The resulting environment may undermine the spirit of the law itself. While Clean Elections may well have achieved some of its stated objectives, for better or worse, the law has fundamentally changed campaign strategy in the Grand Canyon State. As an increasing number of states and municipalities move toward full funding, the experience of Arizona in this regard is worth noting.

Data and Methodology

Arizona's liberal matching funds allocations make it the ideal case for analysis. If matching funds have resulted in a different sort of campaign, then it is reasonable to expect that the effect is most detectable there. I sent electronic and paper surveys to all registered primary candidates for legislative office in the 2006 Arizona election.[5] Of 186 registered candidates, I received 69 responses, for an overall response rate of 37.1%. This response rate is lower than the customary level for survey research, but it is consistent with previous surveys of elite candidate populations (e.g., Francia and Herrnson 2003; Howell 1982). Given the challenges of its relatively small size, the interview sample presents a reasonable approximation of the general candidate population with the exception of Democrats and Republicans being over- and under-represented, respectively (Table 2).

I designed the initial round of surveys to capture information regarding campaign time usage and

overall candidate attitudes. However, a number of candidates wrote notes expressing concern that the original survey was not capturing unintended consequences of the Clean Elections law. I therefore resolicited the respondent sample for personal interviews, and 16 of the original survey respondents agreed to move to the second phase of the study, discussing their experiences in recorded interviews collected in person at locations throughout Arizona.[6] I transcribed responses and coded for strategic and emotional concerns. I obtained data on matching funds distributions from the Citizens' Clean Elections Commission, Arizona's public funding regulatory agency.

Shifting Strategies

Nonparticipating (traditional) candidates must pay careful attention to expenditure levels so as not to benefit a publicly funded opponent. One traditional candidate described a campaign that was "very calculating in how much we sent out to keep spending as low as possible" in an effort to mitigate this effect. Another traditionally funded incumbent reached the same conclusion, saying, "If I raised $100,000 and he capped out at $69,000 that would give me a $30,000 advantage. I don't know that I could raise that much, so I think we would probably be equal. I would spend a lot of time and money raising that money . . . just (to) give it to him." Still another incumbent clearly articulated the degree to which matching funds call for careful attention to spending:

> I don't want to raise money and give my opponent money. If I can keep the spending down, me as an incumbent, I have a tremendous advantage . . . If I am a traditional candidate, and I raise $50,000, *he's* going to get that money, and he's going to use it to get more voters out. So I'm getting advice from both camps now. I'm getting advice that says "you need to raise $100,000, because you need to get your message out, you need to get your voters out," and I hear the other people are saying "you need to go clean, because you don't need to be raising money for him, and in a low spending race, it's you as an incumbent that has the advantage."

The desire for cost efficiency is present in all campaigns, but the effects of matching funds shift the spending calculus well beyond simple husbandry. While all traditional candidates interviewed expressed concern about the effect of matching funds on their opponents, some described conscious decisions to withhold expenditures for items that may have increased their performance at the polls:

> Every dollar I spend over the threshold starts feeding the alligator trying to eat me. So I have to be very careful with how I spend money, which meant that I sent out a lot less mail and held a lot less events than I would have but for my hands feeling like they were tied under this system. That really irritated me, because I'd say "I'd love to rent a big tent, and we'll have an old-fashioned ice cream sundae thing in the park" or

> whatever, but I didn't want to do it unless everything was absolutely essential so that we didn't trigger more money to our opponent. Quite honestly, I would have sent probably twice as much mail.

Stories like this one were echoed by *every* candidate who had ever run traditionally against a Clean Elections opponent. One challenger who ran with public money observed that "those who want to go for the hundred thousand dollar campaign, they're not so sure they want to do it because they don't want to give me matching funds. I'm sure that they don't want a level playing field." Another challenger noticed that her traditionally financed opponent had stopped spending in order to avoid triggering matching funds: "He spent just the amount in the general election to avoid having to give me matching money."

While traditional candidates ponder the advantage of *not* spending, those who accept public subsidies care little if their opponents spend large sums because they are protected by matching funds. When asked whether he would take issue with his opponent spending $75,000 against him, a first time challenger in a long-shot race said, "That would be O.K., because I like the matching funds clause. If my opponent wants to go raise traditional funds so I can get more money to spend for my campaign, I think I'm fine with it." However, there is a great deal of anxiety among participating candidates regarding the timing of opponent expenditures. One newly elected legislator, fresh from a tough fight in the general election,

echoed the sentiments of the others, but added an important clause (emphasis added):

> I think in some ways (my opponent) does think about (the effects of matching funds), and he limited his fundraising. I only got $2,500 in matching funds because of that. And he had a primary, and his one opponent was Clean Elections, and the other two were traditional, and the other two raised money like they were running a traditional campaign, not realizing that it impacted the Clean Elections candidate in huge ways. That Clean Elections candidate got huge amounts of money. *But they wait until the last minute and spend it*, to avoid that.

The belief in the existence of strategic expenditure timing is ubiquitous. According to *every informant I interviewed*, traditionally funded candidates try to maximize the competitive effect of the money that they do spend by releasing funds at the last moment, giving the Clean Elections candidate little time to react. Traditional candidates conceded that while the timing of expenditures was not an initial component of their strategy, by the end, it was crucial in maintaining control of the political message. So, while late spending "[was not] like a Manhattan plan or anything, [it] was part of our thinking . . . let's spend as little as possible early on, so that we could control the debate." By releasing a mailing on the Friday before the election, traditional candidates are aware that even if their opponent is matched on the same day, it

is prohibitively difficult to spend money over the final weekend in any meaningful fashion.

One experienced candidate described how traditional candidates maximize their strategic advantage: "You want to have a strategy and a plan of using those funds so that the matching funds are least beneficial to your opponent. In most cases you would think that that's at the last second, so they can't counter it. I think there's benefit to that. I think that's wise." An incumbent who funded her campaign traditionally said, "We . . . think about [spending at the last minute], frankly. At least I do. Sometimes we may have planned what we're going to do, but we don't initiate anything, because the minute we sign a contract or the minute we initiate anything, we have to report." Other candidates detailed how one can "really . . . work the system" by "spend[ing] money at the last minute if you're a traditional candidate . . . the clean candidate gets that money, that match, the day before the election." An incumbent with multiple cycles of election experience described this phenomenon:

> In terms of opponents incurring expenditures right before the elections, you know, the Friday before, that's happened both times that I've ran. And so you pick up a check from the Clean Elections department, you know, that Friday night, for the matching money, good luck trying to spend $5,000. So that has definitely played into most campaigns now, you know, people know that if you are going to go over the expenditure limit, you do it that weekend before.

Yet another legislator noted that campaign strategy has fundamentally changed as candidates play this game with ubiquity:

> If a traditional candidate waits towards the end, and has some expenses that go over the limits, then the Clean Elections candidate gets matching funds, but if you do that farther down the road and the clean candidate doesn't know about it, then she's not going to have much time to plan how to spend that money, so there's some strategic advantages that a traditional candidate has. It would not be an exaggeration to say the Clean Elections is shifting strategic considerations.

Available data supports the existence of this trend.[7] As Table 3 indicates, in no election since 2002 has the proportion of matching funds expenditures released in the last week of a cycle fallen below one-third. Some of this activity is attributable to the natural flow of campaign spending, but if the traditionally financed candidates who trigger matching funds allocations are as conscious of the effects of their speeding as they seem to be, a substantial portion of late spending is delayed to maximize its strategic effect. Further, matching funds allocations within one day of the election generally comprise a substantial percentage of overall "last-minute" expenditures. In the 2006 general election, which the informants participated in, over 40% of expenditures occurring in the last week were released just hours before the polls opened. The majority of these matching funds allocations are no doubt resultant

of strategic expenditure as traditional candidates and outside entities seek to gain favor with the electorate while leaving the publicly funded candidate little or no opportunity to respond.

Traditional candidates who purposely spend late have little sympathy for their publicly funded opponents, viewing a failure to adequately prepare for the expenditures on the final weekend as a lapse in proper planning. One legislator who had run as a traditional candidate described the importance of a prefabricated plan for publicly funded candidates to deal with late spending, saying, "I think I'm a good enough campaigner and strategist to figure that out." Some Clean Elections candidates who actually faced this situation effectively anticipated late expenditures, and took steps to respond. One incumbent who had been the victim of last-minute attacks by traditionally funded candidates in the past behaved differently the next time, saying, "I got smarter the second time around . . . thinking that our opponent would probably spend, and (I) had a strategy ready to go on how we could spend that money quickly if we got matched." Another experienced candidate said that when independent groups spent money against her in the closing weeks, she was ready to respond by hiring a group of people willing and able to walk on her behalf:

> In my last race, every other day there was a hit piece. Every other day I would get matching funds. What do you do when you get $4,000 right before the election? If you're

> smart, you have a strategy, and you think, "O.K. if I get $4,000 two weeks out, I'm doing this." If I get it right before the election, I'm doing something else. I'd already preplanned that I would hire union people who were out of work to work on Election Day for me, because it was something that represented my values, and was a financially prudent thing to do.

The expectation of strategically timed spending was not limited to those with political experience. One first-time candidate in a crowded primary field had heard the stories of last-minute spending in other races, but had failed to assemble a formal response plan. However, the possibility of spending during the final weekend was present in the back of his mind, and he was able to mount an effective counterattack in the last moments of an ultimately unsuccessful campaign. In his case, it was an independent group, and not the opposition, that released funds with only days remaining before the election:

> I was attacked by a group . . . they put out a hit piece. I was able to use that immediately to get myself qualified for another $3,000 worth of money to send out my own extra last minute piece, which was a really good one actually . . . I barely had time to respond. I had run out of money, because that's what happens. I really wanted to do another piece, but I just couldn't budget for it. So I had a couple of ideas sitting on the back burner, and then it just happened.

Despite the preparedness of some of their peers, many publicly funded candidates were not so savvy, and were caught unaware. Another first-time challenger described feelings of helplessness accompanying the realization that large amounts of money had been spent against him at the last minute, leaving him with matching funds but no time to spend them:

> The last day, or the day before the election, they do all this stuff, and you don't really have time to plan real well. I could do better if I did it a second time. As a matter of fact, I gave some money back, because I got five or six thousand dollars the last day. The traditional people, they do that so well. Some people said "you should do something" and I said I can't use it effectively, and I'll give it back.

Another neophyte faced a similar situation, confronting feelings of disappointment with a system that was supposed to guarantee an even playing field. Outspent at the last minute, she was unable to respond, and faced the reality that despite her expectation of financial parity, she had been outflanked in the election's closing hours:

> I believe [my opponent] spent a great deal of money in the time after the last reporting of expenses and income, so that I wouldn't have to balance, so that they wouldn't have to balance how much money I had with how much she had. You can't plan; you can't buy the media if you don't know what they're going to do. It would happen in a regular campaign

> anyway, but to be on the same playing field, we're not, because Clean Elections candidates are guaranteed this amount of money and the others are not, but if they get to this amount or higher, we'll raise the bar. And they can eventually outspend you. That's not fair.

Discussion

The allusion to fairness in the passage above is an important one. From the perspective of participating candidates, Arizona's Clean Elections system was supposed to move away from politics as usual to something better, empowering challengers with adequate resources while mandating financial equality among all contenders. However, while the matching funds provision has supposedly eliminated the financial gap between political haves and have-nots, an emotive gap remains. Traditional candidates view themselves as in control and on the offensive. They take a cool view of the shifting timing of campaign spending, describing strategic expenditures with such words as "smart," "well-thought," and "wise." There is a universal recognition among them that when it comes to spending, later is almost always better.

Publicly funded candidates play defense, powerless to behave proactively and forced to guess when the opposition will make a move. Challengers in particular know that if they are to swing votes in their favor, they must be able to spend money. Withholding expenditures until the final days of an election cycle allows traditional candidates to effectively

control the funding of their opponents, and given little time to respond, publicly funded candidates can be left holding the bag. These candidates, and particularly those running their first campaigns, report feelings of frustration and anxiety stemming from participation in a system that they believe falls short of its promised goal of "fairness."

Despite an emotional difference between the two groups, when traditional candidates directly face participating candidates, neither is fully in control. Once they near the spending limit, nonparticipating candidates subvert their expenditure instinct to the realities of matching funds, suppressing spending and/or fundraising so as to avoid the issuance of a check to their opponent. While they may have the resources to hold an ice cream social, the benefit must be weighed against the cost of bolstering the opposition. Participating candidates wring their hands in anticipation of strategically timed last minute expenditures, often unable to preempt such moves with activity of their own because, in the last stages of an election, they themselves have reached the spending limit. Indeed, when the ability of outside groups to trigger matching funds allocations is considered, it can be said that even candidates running in elections in which all participants are publicly financed experience a great deal of strategic uncertainty.

Clean Elections may well be stimulating electoral competition in Arizona, but faced with shifting incentive structures, political costs, and opportunities, candidates there operate in a strategic environment that

is fundamentally different from most of the rest of America. Public funding holds the potential to facilitate higher levels of financial equality among candidates, but while the money certainly helps, a subsidy alone is no panacea. In accepting financial assistance, candidates have given up control of their financial destiny and have acceded to conditions favoring both a flurry of last-minute campaigning and a depression in general campaign activity. These shifting strategies change not only the way in which candidates interact with each other, but also the manner in which they communicate with the electorate. If late activity becomes more ubiquitous, participating candidates are bound to catch on, and candidates on both sides of the public funding divide will hold money back to engage in last-minute point and counterpoint. Such a pattern may have broader impacts on voter perception and citizen mobilization as well.

The findings presented here have implications that reach well beyond Arizona's borders. Like Arizona, Maine implemented a voter-initiated program in the 2000 election, and has been offering full subsidies ever since. New Mexico opted for similar reforms for its Public Regulation Commission candidates in 2003, and the following year, North Carolina implemented full funding for judicial candidates. In 2008, Connecticut will begin offering full public subsidies in state elections, while New Jersey may expand its legislative program beyond a pilot stage. Public funding has also become a hot topic at the municipal level; Albuquerque and Portland have recently passed full

funding laws and at least a dozen other cities are considering them. With the Democratic takeover of Congress in the 2006 midterm elections, discussion of public funding of congressional campaigns has also become more widespread in Washington. The trend in public funding is clear: full funding is the future. However, while the goals of public election funding are noble, they will not be implemented in a strategic vacuum. If matching funds provisions will be part of the next stage of campaign finance reforms, their practical ramifications on candidates and campaigns must be considered.

Table 1
Public Funding Scenarios

Funding Mechanism	Opponent Spending	Spending Limit	Subsidy Amount	Matching Funds	Funding Gap
Clean Elections	$75,000	$25,000	$25,000	$50,000	$0
Partial Funding	$75,000	$25,000	$11,250	—	$63,750

Table 2
Representativeness of Candidate Sample

	Population	Survey Sample	Interview Sample
Democrats	34.0	39.7	62.5
Republicans	58.7	52.9	37.5
Chailengers	26.3	44.1	31.25
Incumbents	32.0	30.9	43.75
Open Seats	41.7	25	31.25
Primary Winners	77.4	80.8	87.5
Accepted Clean Elections Funds	60	67.6	75.0

Table 3
Timing of Matching Funds Allocations, 2002-2006

	Primary Election			General Election		
Year	Matching Funds Allocations	Matching Fund Allocations Within One Week of Election	Allocations Within One Day of Election (Percentage of Last Week Allocations)	Matching Funds Allocations	Matching Fund Allocations Within One Week of Election	Allocations Within One Day of Election (Percentage of Last Week Allocations)
2006	95	48 (50.5%)	10 (20.8%)	124	44 (35.5%)	18 (40.1%)
2004	120	54 (45%)	11 (20.4%)	124	56 (45.2%)	6 (10.7%)
2002	119	50 (42%)	38 (76%)	107	69 (64.5%)	22 (31.9%)

Notes

* The author acknowledges Peter Enns, Theodore Lowi, Sherry Martin, Walter Mebane, and two anonymous reviewers for advice. I would also like to thank the department of government at Cornell University for financial support of data collection, and two great friends, Nicholas and Angie Behm, for allowing me to use their home as a base of operations in Phoenix.

[1] Nearly half of the states currently employ public funding in some form. Partial subsidies (those covering a percentage of campaign expenses) have been commonplace since post-Watergate reforms, but with the exception of the presidential general election program, full public financing has been deployed only since 2000. In 2008, full funding will be utilized in at least some elections in six states and two major metropolitan areas.

[2] Candidates for all state offices are eligible for Clean Elections funds, and the entry requirements vary with office. In the 2006 election, spending limits for legislative candidates were $17,918 for the general election and $11,945 for the primary.

[3] Like many states, a majority of Arizona's legislative districts are noncompetitive, and the decisive campaign is often the primary. In 2006, for example, 17 of 30 senatorial candidates received more than 60% of the vote in the general election. Here, I interview primary candidates, although it is apparent that traditional candidates approach primary and general election strategy similarly despite the difference in the matching fund trigger mechanism.

[4] In the case of Wisconsin, spending limits only apply if all candidates in a race accept public funding.

[5] I chose legislative candidates because of their large number in comparison to candidates for statewide offices.

[6] Ten were winners, 10 were Democrats, and 12 were Clean Elections candidates.

[7] I obtained data from the Arizona Citizens' Clean Elections Commission. Data from the 2000 election were unavailable.

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U.S. District Court for the District of Arizona

(Filed Jun. 13, 2009)

[Title Omitted In Printing]

Exhibit A

Equality Arizona
www.equalityarizona.org

FOR IMMEDIATE RELEASE
August 7, 2008

Contact: Sam Holdren
samh@equalityarizona.org
(602) 650-0900 office
(602) 384-1864 mobile

Equality Arizona applauds conservative candidate's commitment to work with a leader of the lesbian, gay, bisexual and transgender community

Phoenix, Ariz. – In a recent campaign stop, State Representative Eddie Farnsworth (R-22) – who is currently campaigning for District 22's Senate seat – touted his record of "crossing the aisle" while in the Arizona House of Representatives, and promised to continue to do so if elected to the Arizona Senate. In particular, Rep. Farnsworth cited his work with our own Kyrsten Sinema (D-15), who is running for re-election to the Arizona House of Representatives.

While Equality Arizona has had strong differences with Rep. Farnsworth in the past, Equality Arizona supports Rep. Farnsworth's commitment to work with

lesbian, gay, bisexual and transgender community leaders like Sinema. In 2006, Sinema was the Chair of Arizona Together, the group that led the campaign to defeat Prop. 107 (which attempted to amend the Arizona Constitution to ban same-sex marriages even though they are already illegal under Arizona law).

As everyone knows, this issue will again appear on the ballot (this time as Prop. 102). In collaboration with lesbian, gay, bisexual, transgender and allied organizations and individuals from all across Arizona, Equality Arizona is again committed to ensuring that discrimination is not enshrined in the Arizona Constitution. Help our elected officials understand that "No" means "No," and support the effort to defeat Proposition 102 this November.

Please visit the campaign website at http://www.votenoprop102.com/ today to sign-up for volunteer opportunities, to donate, and to share your stories of how you are working to defeat Prop 102.

###

Equality Arizona recognizes the value of our progressive partners as we all march on the path toward equality. *The mission of Equality Arizona is to secure, protect and defend the rights and welfare of lesbian, gay, bisexual, and transgender (LGBT) people in Arizona.*

U.S. District Court for the District of Arizona

(Filed Jul. 17, 2009)

[Title Omitted In Printing]

State of Arizona

[SEAL]

Campaign Finance Report

Bouie for State Representative
Committee #: 200810141

Treasurer: Bouie, Allison Joy
3434 W Anthem Way, Ste 118-493,
Anthem, AZ 85086
Phone: (623) 551-7557
Email: campaign@tonybouie.com
Candidate Name: Bouie, Tony Vanderson
Office Sought: State Representative – District 6

2008 Pre-Primary Election Report

Election Cycle:	2007-2008
Date Filed:	August 21, 2008
Reporting Period:	June 1, 2008-August 13, 2008

Summary of Finances

Cash Balance at Beginning of Reporting Period:	$3,642.61
Total Cash Receipts this Reporting Period:	$31,199.20
Total Cash Disbursements this Reporting Period:	$24,309.57

Cash Balance at End of Reporting Period: $10,532.24

Report ID: 42998

Name: Denny's **Address:** 3160 W. Carefree Hwy, Phoenix, AZ 85086 **Category:** Event Expenses – Food/ refreshments **Memo:** Deb. Vandenboom (sp) Meeting	8/13/2008	$5.00 Cash	$5.00
Total of Operating Expenses		$31,309.57	
Total of Refunds, Rebates, and Credits Received		$0.00	
Net Total of Operating Expenses		$31,309.57	

U.S. District Court for the District of Arizona

(Filed Sep. 23, 2008)

[Title Omitted In Printing]

TERRY GODDARD
Attorney General
Mary R. O'Grady (011434)
Solicitor General
Tanja K. Shipman (025205)
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2926
Telephone: (602) 542-3333
Facsimile: (602) 542-8308

Attorneys for Defendants Secretary of State Jan Brewer and Arizona Citizens Clean Elections Commission

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, KEVIN GIBBONS, FRANK ANTENORI, TONY BOUIE, AND DOUG SPOSITO,

Plaintiffs,

v.

JAN BREWER, in her official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM

No. CV08-1550-PHX-ROS

Declaration of David Schapira

(Assigned to the Honorable Roslyn O. Silver)

and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Defendants.

David Schapira submits the following Declaration pursuant to 28 U.S.C. § 1746.

1. I am a Democratic candidate for Arizona State Representative in District 17.

2. As a candidate for this office in 2006 and 2008, I have been harmed by baseless attack ads.

3. I have needed matching funds from the Citizens Clean Elections Commission to educate voters about my campaign and to rebut the inaccurate statements about me made by supporters of my opponents, including independent expenditure campaigns.

4. If matching funds are enjoined for this election, I will not be able to run an effective campaign.

5. The availability of matching funds is an important factor in my ability to run an effective campaign and provides me with confidence that I can effectively respond to substantial campaign expenditures in the form of attack ads.

6. My campaign volunteers, supporters and I have spent hundreds of hours working on this campaign, and if matching funds were barred now, all of that work would be undermined.

7. I would not have run as a participating candidate if matching funds were not available.

8. I would not have run as a candidate if matching funds were not available.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of August, 2008.

/s/ David Schapira
David Schapira

INSTITUTE FOR JUSTICE
398 South Mill Avenue
Suite 301
Tempe, Arizona 85281
(480) 557-8300

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN COMMISH, *et al.*, **Plaintiffs,** **V.** **JAN BREWER, *et al.*,** **Defendants.**	**No.** **CV 08-1550-PHX-ROS**

DECLARATION OF RICK MURPHY

(Filed Jul. 2, 2009)

1. I, Rick Murphy, pursuant to 28 U.S.C. §1746(2), hereby declare under penalty of perjury as follows:

2. I am currently an Arizona State Representative, representing Legislative District 9. I was elected to that position in 2004. I make this declaration in support of Intervenors' Complaint in Intervention in the above-referenced matter.

3. I am a citizen of the United States and a resident of Maricopa County, Arizona. I am over eighteen years of age and fully competent to make this declaration. I make this declaration based on my personal knowledge.

4. I am currently running for re-election in Legislative District 9 as a privately financed candidate. I am running as a privately financed candidate because I oppose the use of taxpayer money to fund campaigns. When I first ran for office in 2004, I ran as a government funded candidate because the Citizens Clean Elections Act (the "Act") penalizes privately funded candidates and I felt that I had no choice but to run with government funds. In my 2006 campaign I ran as a privately financed candidate.

5. This year, I seriously considered running as a government funded candidate because with three government-funded opponents I believe I am running at a significant disadvantage. This is because of the matching funds provisions of the Act, which work to aid my opponents every time I engage in my First Amendment right to freely speak by raising or expending campaign funds. Thus I am penalized every time I engage in political speech as a privately financed candidate.

6. The impact of these matching funds provisions is that I must censor myself by limiting my speech. I have been forced to limit my speech and abide by the Act's expenditure limits or risk being further outspent by my government-funded opponents because of the operation of the Act. In that regard, I am not able to raise or spend money to engage in my fundamental First Amendment right to speak freely and communicate with Arizona voters.

7. In the upcoming general election I will face two government-funded Democratic opponents, and

one government-funded Republican. There were no primary election contests, so my Democratic opponents did not have any primary opposition, yet still received full primary cash disbursements under the Act of $12,921.

8. If I engaged in additional fundraising during the general election, it is likely that I will trigger matching funds. Basically, for every $1 I raise above the general election spending limit, I will trigger $3 in taxpayer financed matching funds paid to the government funded candidates in my race. I may, therefore, be forced to forego any fundraising in order to avoid assisting my opponents by sending government checks directly to their taxpayer financed campaign war chests.

9. Thus, the only way I can avoid being massively outspent by my opponents is to prevent the triggering of additional matching funds to their campaigns. I may be forced by the operation of the Act to stop accepting contributions to my campaign to make sure that I do not exceed the Act's expenditure limitations for this race, despite the fact that I would like to continue to collect contributions in order to communicate with the voters of in my district. I wish to reach more voters by expending such funds, were I able to collect them. I am thus likely to be coerced into accepting the same limits as my government-funded opponents and yet I did not receive any of the benefits of being a government-funded candidate, such as the receipt of matching funds for independent expenditures that opposed my candidacy and the label "participating" or "clean" candidate.

10. As the Clean Elections Commission spends funds to promote the Clean Elections system, especially during election years, I have personally noticed that there is an increasing public perception that candidates who do not accept government funding are "dirty" candidates because they are not participating in the "clean" elections system. The label "nonparticipating" candidate punishes me, as a privately financed candidate, for doing nothing more than exercising my constitutional right to raise money to run for political office and to speak without government-imposed regulations and limits on my speech.

11. Pursuant to 28 U.S.C. §1746(2), I, Rick Murphy, hereby declare under penalty of perjury under the laws of the United States and the State of Arizona that the foregoing is true and correct to the best of my knowledge, information and belief.

/s/ Rick Murphy
Rick Murphy
EXECUTED ON
AUGUST 29, 2008

INSTITUTE FOR JUSTICE
Timothy D. Keller (019844)
Jennifer M. Perkins (023087)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
P: 480-557-8300/F: 480-557-8305

INSTITUTE FOR JUSTICE
William R. Maurer (WSBA 25451)[1]
101 Yesler Way, Suite 603
Seattle, WA 98104
P: 206-341-9300/F: 206-341-3911

Attorneys for Plaintiffs-Intervenors

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*, Plaintiffs, and DEAN MARTIN, a citizen of the State Of Arizona, *et al.*, Plaintiff-Intervenors vs. JAN BREWER, in her official capacity as Secretary of State of the State of Arizona; *et al.*, Defendants,	Civil Action No. 08-1550-PHX-ROS PLAINTIFF-INTERVENOR MURPHY'S RESPONSE TO DEFENDANTS' AND DEFENDANT-INTERVENORS' INTERROGETORIES AND DOCUMENT REQUESTS (Filed Jul. 2, 2009)

[1] Admitted *pro hac vice*.

and	)	(Assigned to the
	)	Honorable
CLEAN ELECTIONS INSTITUTE, INC.	)	Roslyn O. Silver)
	)	
Defendant-Intervenor.	)	

These responses are based on information that is currently known to Plaintiff-Intervenor Rick Murphy and may not be conclusive. Investigation is continuing. Plaintiff-Intervenor reserves the right to supplement and/or amend any of these disclosures.

Interrogatories

1. Identify each hardship or harm that you contend you will suffer in the 2008 general election if a preliminary injunction is not granted in this case.

I will be harmed in this election every time my three opposing publicly funded candidates receive matching funds. My current fundraising total is almost equal to my publicly funded opponents' general election spending limit. That means that very soon, every dollar contributed to my campaign will trigger three dollars in matching funds – one dollar (less 6%) to each of my publicly funded opponents. I believe I have the fundraising capacity to raise between $40,000-$50,000. However, that amount on its own would not be enough money to exhaust my publicly funded opponents matching funds. Moreover, any independent expenditure made to support me will also trigger matching funds to my opponents. The

fact is that due to the availability of matching funds, I am going to be significantly outspent in the 2008 general election because of my exercise of my First Amendment rights and, potentially, the exercise of First Amendment rights of any independent groups supporting me or opposing my opponents. It is conceivable and perhaps likely that if matching funds were not available to my opponents, I would not be outspent in the general election in 2008.

Fundraising

Matching funds makes it more difficult to fundraise. Absent a preliminary injunction, high propensity donors will be less likely to donate money to my campaign. In my experience, donors do not like their contribution to be counter-acted by government funds. Donors are discouraged by the fact that their contribution to my campaign results in the government paying my opponents to come in and make the speech they just paid for null and void. If a preliminary injunction is granted, I will be able to raise additional money from donors who will not give money because of the clean elections matching funds scheme. For example, absent a preliminary injunction, my Father and Stepmother will not contribute to my campaign because they know it will get matched.

Under the matching funds scheme, my experience is that it takes twice as many calls to raise the same amount of money as it would if the preliminary injunction is granted. Moreover, there are different

kinds of fundraising and the return on those different kinds of fundraising can vary. Matching funds will require me to evaluate closely, and possibly forego, fundraising efforts that I otherwise might have engaged in, particularly those that will require a great consumption of time. The more time I spend fundraising, the bigger a net loser the effort will be because of the matching funds. I have to give up time on the campaign trail, while my publicly funded opponents can spend all of their time campaigning with the money that I essentially raised on their behalf.

Independent Expenditures

I will most likely be harmed in this general election by independent expenditures. State Republican Party officials, among others from both sides of the political aisle, have told me that I am a target this election and I expect that there will be significant expenditures made against me. Expenditures made against me neither count toward my publicly funded opponents general election spending limit, nor do they result in my receiving any matching funds. Generally, I would expect some group or groups to respond either with donations to my campaign or with independent expenditures of their own. However, any donations to my campaign or independent expenditures to support me, or oppose my publicly funded opponents, will trigger even more matching funds to my opponents. Every aspect of matching funds benefits the publicly funded candidates while working to my detriment.

If an independent expenditure is made that purports to support me – regardless whether it actually aids my campaign or is consistent with my message – my publicly funded opponents will receive matching funds triggered by that independent expenditure. My opponents will then have additional money on hand specifically to allow for a response to the independent expenditure. And yet, I will have had no control over the independent expenditure that triggered the matching funds. It is thus entirely possible that the entire exchange from both sides will be harmful to my message and campaign. And if I find myself in the position of having to engage in additional fundraising to respond, I may end up providing even more public funding for my opponents' taxpayer financed war chests.

The expectation of opposing independent expenditures means that I am going to have to have money on hand and in reserve to respond to those independent hit pieces. Yet, simply raising those reserve funds means providing taxpayer funds to my opponents that they can spend immediately as long as they continue to be eligible for additional matching funds. I have to raise money and hold onto it so that I can be ready in the event an independent expenditure happens. But as long as my publicly funded opponents know that there will be future matching funds triggered, they can spend the money that I raise and trigger to them right now without having to hold onto reserves because they can use matching funds that are triggered later on in the campaign to respond to

independent expenditures. The harder I work, the more my publicly funded opponents benefit.

2. Identify any other hardship or harm not identified in response to Interrogatory No. 1 that you contend you will suffer if a preliminary injunction is not granted in this case.

I do not have any additional allegations of hardship or harm other than those identified in response to Interrogatory Number 1.

3. Identify each instance where you did not spend money on your campaign because of the matching funds provision, and the date(s) upon which each such instance occurred.

It is not possible to be so specific. In reality, I do not run two campaigns: one with matching funds and one without matching funds. The availability of matching funds for my opponents dictates my strategy and influences my thinking from the very beginning of the election cycle right up to the very end.

There is, however, one specific example I can think of from the 2008 primary election. Absent the matching funds provisions, I would very likely have sent at least one mailer during the primary even though I was uncontested. The mailer would have helped me build name identification and typically once a person votes for a person in the primary they will vote for them again in the general. However, the reason I did not spend money on a mailer was in order to conserve money for the 2008 general election.

The matching funds provisions make it harder for a privately financed candidate to raise money from high propensity donors. As stated in my response to Interrogatory Number 1, matching funds make people less likely to donate, especially those who are in tune with the nuances of the Clean Elections scheme. It would have been nice to get a head start in the 2008 general election by mailing a 2008 primary election piece, but I could not take the chance that I might not be able to raise sufficient general election funds. My prospective donors understand that the Democratic Party is targeting me and that there will likely be significant independent expenditures opposing me. My donors know that I will be significantly outspent and that with the availability of matching funds I cannot catch up and that if they contribute to my campaign they will trigger a dollar-for-dollar match to my opponents.

4. Identify each instance where your speech was chilled or limited by the matching funds provision, and the date(s) upon which each such instance occurred.

See my response to Interrogatory Number 3.

5. Identify each instance where you did not spend money to engage in campaign speech because the matching funds for your opponent or opponents had been triggered.

See my response to Interrogatory Number 3.

6. Identify each person who participated in or contributed to any decision by you not spend money or engage in campaign communication because of the matching funds provision.

Up to this point, I have been the only person to make decisions with regard to my 2008 campaign.

7. Identify each advertisement paid for through independent expenditures that was "ineffective, confusing or damaging" and was "intended simply to trigger matching funds" for your opponent or opponents as alleged in Paragraph 43 of Plaintiffs' amended complaint in this action.

I did not make these allegations in my Complaint in Intervention. This question is therefore not relevant to me.

8. Identify each instance in a political race in which you were a candidate where a special interest has "multiplied the speech impact of their independent expenditures" by encouraging one candidate to run as a "traditional candidate" and others to run as "participating" candidates, and paying for advertisements supporting the "traditional" candidate in order to trigger matching funds for the "participating" candidates, as alleged in Paragraph 42 of Plaintiffs' amended complaint in this action.

I did not make these allegations in my Complaint in Intervention. This question is therefore not relevant to me. Speaking generally, I am aware that

privately funded candidates do sometimes run as a slate with other publicly funded candidates, such as the recent races for Corporation Commission that have already been documented in this case.

9. Identify each instance not described in response to Interrogatory Nos. 7 and 8 where the matching funds provision of the Act has been gamed by special interests for the purpose of triggering matching funds for your opponent or opponents as alleged in Paragraphs 42-44 of Plaintiffs' amended complaint in this action.

I did not make these allegations in my Complaint in Intervention. This question is therefore not relevant to me.

10. Identify the total amount of money you spent on fundraising in the 2008 primary election.

I did not spend any money on fundraising in the primary. I did make some fundraising phone calls, but that is mostly an investment of time.

11. Identify all election campaigns in which you participated as a candidate.

In 2004, I was a candidate for the Arizona House of Representatives in Legislative District 9 in both the primary and general elections as a participating candidate.

In 2006, I was a candidate for the Arizona House of Representatives in Legislative District 9 in both

the primary and general elections as a traditional candidate.

In 2006, I also ran for a seat on the Peoria Unified School District Governing Board.

In 2008, I was a candidate for the Arizona House of Representatives in Legislative District 9 in the primary and I am currently a candidate in the 2008 general election as a traditional candidate.

12. With reference to any Arizona statewide election campaigns identified pursuant to Interrogatory No. 11, identify whether you ran as a participating candidate under the Act.

I have not run in any statewide election campaigns.

13. Identify all expert witnesses you intend to rely upon in support of the motions for preliminary injunction.

Dick M. Carpenter II, Ph.D.

14. Identify any opinions that your experts intend to offer in support of the motions for a preliminary injunction and describe the basis for each of those opinions.

Dr. Carpenter's findings are spelled out in his written declaration, which was filed in support of the Motion for Preliminary Injunction.

* * *

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, KEVIN GIBBONS, FRANK ANTENORI, TONY BOUIE, AND DOUG SPOSITO,

Plaintiffs,

and

DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, AND ARIZONA TAXPAYERS ACTION COMMITTEE,

Plaintiff-Intervenors,

vs.

JAN BREWER, in her official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Defendants.

No. CV08-1550-PHX-ROS

DEPOSITION OF JOHN MCCOMISH

(Filed Jul. 17, 2009)

Phoenix, Arizona
September 11, 2008
2:02 p.m.

and)
)
CLEAN ELECTIONS)
INSTITUTE, INC.,)
)
Defendant-Intervenor.)

REPORTED BY:
CATHY J. TAYLOR, RPR
Certified Reporter
Certificate No. 50111

PREPARED FOR:
ASCII/CONDENSED
(COPY)

* * *

[52] Q. Are there goals set for those fundraising events?

A. Not individually, no. Not at this point. There will be.

Q. What types of events will those be? You said that you had two events –

A. Uh-huh.

Q. – where you had commitments from people to throw those –

A. Yes.

Q. – fundraising events.

A. What do you mean by type of event?

Q. Could you describe what those events will be.

A. Yes. One of them I anticipate will be at – at that individual's home where there will be some light refreshments served.

Q. And the other?

A. And the other I anticipate will be at a – at a – at a location, an event location.

Q. When you say event location, what do you mean?

A. Like bar/restaurant catered type of facility that's able to do some modest catering.

Q. For the event at the individual home, how will money be raised?

A. People will be invited to come.

* * *

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, KEVIN GIBBONS, FRANK ANTENORI, TONY BOUIE, AND DOUG SPOSITO,

Plaintiffs,

and

DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, AND ARIZONA TAXPAYERS ACTION COMMITTEE,

Plaintiff-Intervenors,

vs.

JAN BREWER, in her official capacity as Secretary of State of the State of Arizona, and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Defendants.

No. CV08-1550-PHX-ROS

DEPOSITION OF RICHARD A. MURPHY

(Filed Jul. 2, 2009)
(Filed Jul. 31, 2009)

Phoenix, Arizona
September 11, 2008
9:02 a.m.

and)
)
CLEAN ELECTIONS)
INSTITUTE, INC.)
)
Defendant-Intervenor.)

REPORTED BY:
MARTA M. RICE, CSR, RPR
Certified Reporter
Arizona Certificate Number 50746

PREPARED FOR:

ASCII/COPY

* * *

[12] Q. Okay. So have you had difficulty raising money?

A. I would say it's more difficult than I thought it would be, in the sense that, I've had more people that [13] have said – or the fact that I had any people that said that they weren't – they didn't really want to donate because, you know, with matching funds there was really no point. They would donate to me, my challenger would get money, it would be a wash, so why bother?

* * *

[30] Q. Yeah.

[31] You talked about a disadvantage with your opponent receiving matching funds. Can you please describe what disadvantage you feel or you encounter when your opponent receives matching funds from your

spending – well, I know there's two different ways – from – let's start with just from your going over their spending limits.

A. Well, the primary disadvantage –

Q. I'm sorry. And I just want to make clear that in the primary, I guess, it would be the spending limits and – it's a different calculation in the general –

A. Right.

Q. – so I'll – I'm talking about the primary at this point. And I'm sorry to interrupt you.

A. Oh, that's okay.

Well, we don't have – we didn't have a primary opponent this time. However, had I chosen to spend money in the primary or had we had a third candidate, you know, the dynamics can be different depending upon how many are participating and how many aren't, and all that kind of stuff.

But if I were running traditional and there were, say, two participating candidates in a primary, I would have to be real careful about how I spent my money, because every time I spend money both of them get matched. [32] And so I'm going to get outspent two-to-one for every single dollar I spend above that limit, regardless. And I've got to do the work to raise that money and take time away from campaigning to raise that money, and they don't have to do

anything. They can be out campaigning and meeting people.

And so it's kind of a double whammy in the sense that, not only am I doing the work and taking the time and losing out on the opportunity to be out with – with voters, but then it's two-to-one.

And so if it was a one-on-one race – well, if it was a one-on-one race then you don't. But if there was only one participating candidate, the potential damage would be a little less in the sense that it wouldn't be two-to-one.

But – but still, I have to take time, do the work, raise the money, and they just get the money. And they can be doing other things that are, you know, actually producing votes. And so even – even in the best case scenario, it's a disadvantage. The more participating candidates there are, the bigger the disadvantage becomes.

Q. And I appreciate that. I appreciate that explanation. I'm just trying to understand when you say a disadvantage, now, your opponent getting money, how – [33] what specifically does the money turn into or does it result in? Or is it just the fact that they have more money that causes you to be less likely to win a race or –

A. Well, money –

Q. – do you – I'm just wondering.

A. Sure. Money equals political speech. And it might be more signs. It might be bigger signs. It might be full color signs that I can't afford. It might be more mailers. I mean, it could be, depending on whatever they

* * *

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[41] But regardless of any of that, I specifically chose to stop raising money because I didn't want to trigger matching funds. You know, I didn't –

Q. Okay.

A. – I felt like it was just going to get to a point where I would raise money, I would spend money to raise money, and she would get money, and I would never – you know, her advantage would get higher and higher the more I raised and the more we both spent. It didn't seem like it made a lot of sense for me to do that, so I curtailed my speech and curtailed my fundraising in order to prevent it.

* * *

[54] Q. All right. But – and you told me you've never turned away a donation?

A. Not to this point.

Q. Okay.

A. Just to clarify, though. I have not turned away a contribution to this point, but I also have very pointedly stopped soliciting –

Q. Okay.

A. – because I knew that I didn't want to trigger the matching funds, particularly in 2006.

* * *

---

[58] And this is a point that's later on, but if I'm expecting that there are going to be independent expenditures against me that might distort my record, I have to have resources available to defend myself.

And the simple fact of even having that money on hand triggers matching funds for my opponent. They don't have to hold on to it.

If somebody spends an independent expenditure against them, they're going to get money to respond with.

So the money I trigger just by being ready, that I can't even spend yet, triggers matching funds to them that they go ahead and either attack me with or promote themselves with or both or whatever.

* * *

[60] And so the damage is significant and it's irreparable. And so I have to be ready. I have to have the money on hand. And my opponent gets the same money and didn't have to do anything to earn it and then they go out and spend it. So it's a double whammy.

* * *

[88] Q. Right. Can you give me a example of – I know you said they were less likely to – the high propensity donors are less likely to donate to your campaign.

Do you have any specific examples of a specific high propensity donor that has told you that they don't want to donate to your campaign?

A. I can't really give you a name right now, but – but here's – you know, the – the thing that you have to [89] consider is that there are 90 legislative candidates – there are 90 legislators, and obviously more candidates than that. Anyone who either donates a – close to the maximum or the maximum or whatever, you know, these – these people that like to be active, they want to – they can't afford to donate in every race because the cap doesn't really give – excuse me – give them that much room.

Q. Are you talking – you're talking about just their donation cap. Right?

A. Right. Absolutely.

Q. Okay.

A. And so they have to be selective. And, you know, like anybody else, I would think, with their money, they're going to make their donations where they think they're going to be the most effective.

And if they have a choice between donating to me, and I'm going to trigger matching funds if they do that, or they could donate to somebody else and it

won't trigger matching funds – I mean, if I'm that donor, I'm going to trigger – I'm going to donate to the other person because it's going to be more effective.

* * *

[Court Reporter's Certificate Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, KEVIN GIBBONS, FRANK ANTENORI, TONY BOUIE, AND DOUG SPOSITO,

Plaintiffs,

and

DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, and ARIZONA TAXPAYERS ACTION COMMITTEE,

Plaintiff-Intervenors,

vs.

JAN BREWER, in her official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Defendants,

No. CV08-1550-PHX-ROS

DEPOSITION OF NANCY McLAIN

Phoenix, Arizona
September 15, 2008
9:54 a.m.

(Filed Jul. 17, 2009)

and)
CLEAN ELECTIONS)
INSTITUTE, INC.,)
Defendant-Intervenor.)

REPORTED BY:
MARTA M. RICE, CSR, RPR
Certified Reporter
Arizona Certificate Number 50746

PREPARED FOR:

ASCII/COPY

* * *

[33] Q. And you told me there are different ways to go about fundraising for –

A. Yes.

Q. – every – okay.

What way would you characterize your – that you've gone abound raising fundraising – raising money for your campaign?

A. Well, in more than one way.

Q. What were the different ways?

A. I sent out a letter asking for contributions. There have been fundraisers in people's homes. I have spoken with people directly. And I have received unsolicited contributions.

Q. Have you turned down a donation in this campaign yet?

A. No.

Q. How many fundraisers in people's homes have been conducted in your support so far in – for this 2008 campaign?

A. There have been two.

* * *

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, KEVIN GIBBONS, FRANK ANTENORI, TONY BOUIE, AND DOUG SPOSITO, Plaintiffs, and DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, AND ARIZONA TAXPAYERS ACTION COMMITTEE, Plaintiff-Intervenors, vs. JAN BREWER, in her official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, Defendants.	No. CV08-1550-PHX-ROS DEPOSITION OF SHANE WIKFORS (Filed Jul. 17, 2009) Phoenix, Arizona September 16, 2008 10:01 a.m.

and)
)
CLEAN ELECTIONS)
INSTITUTE, INC.,)
Defendant-Intervenor.)

REPORTED BY:
CATHY J. TAYLOR, RPR
Certified Reporter
Certificate No. 50111

PREPARED FOR:
ASCII/CONDENSED
(COPY)

* * *

[41] Q. Is it fair to say that Arizona Taxpayers had limited funds in 2006?

A It is fair to say.

Q. Okay. And those limited funds restrained the number of races that you could get involved in?

A That's correct.

Q. Okay. Were there any other factors besides the limited funds that played a role in restricting the number of races that you could make independent expenditures in in 2006?

A. We looked at another race and decided not to get involved in it.

Q. What were the reasons why you decided not to get involved in that other race?

A. Funding.

Q. Meaning you didn't have sufficient funds?

A. That's correct. And we were unable to raise the money in that situation in such a short amount time, and our donors had indicated that they would prefer that the money be spent wisely.

* * *

[61] Q. And is this a report that was filed on behalf of the Arizona Taxpayers Action Committee?

A. Yes.

Q. And is this report – was this report prepared and filed by you?

A. Yes.

Q. How much did Arizona Taxpayers receive during the reporting period covered by Exhibit 4?

A. The report indicates that Arizona Taxpayers received $50 total.

Q. And who was the contributor?

A. The contributor was Thomas Husband.

Q. And Mr. Husband was one of the four contributors that we discussed Arizona Taxpayers had in 2007, is that correct?

A. That is correct.

Q. Okay. So between the November 2006 election and August 13th of 2008, Arizona raised – Arizona Taxpayers had raised less than $900 in contributions, and those contributions came from four individuals at most, is that correct?

A. That is correct.

Q. Okay. How much did Arizona Taxpayers make in independent expenditures during the reporting period covered by Exhibit 4?

[62] A. Based on the report, there were no Independent expenditures.

Q. Aside from bank fees, did Arizona Taxpayers have any expenses that it paid out during the reporting period covered by Exhibit 4?

A. No.

Q. What was Arizona Taxpayers' cash on hand as of the end of this reporting period covered in Exhibit 4?

A. $52.72.

Q. So Arizona Taxpayers had $52.72 in its bank account as of October – or August 13th, 19 – 2008?

A. That's correct.

Q. What is Arizona Taxpayers' cash on hand as of today?

A. I believe it is $52.72 unless the bank has deducted a monthly service fee. So it will be equal to or less than $52.72.

Q. So since the date of the primary election, Arizona Taxpayers has not received any contributions, is that correct?

A. That's correct.

Q. In the period since the November 2006 general election, what efforts has Arizona Taxpayers made to solicit contributions?

A. Minimal.

* * *

[65] Q. How much did you conclude that you needed to raise to be involved in the 2008 elections?

A. We don't – I don't think we discussed any dollar amounts.

Q. So what – what exactly was the action item coming out of these calls? Just that you needed to raise money?

A. That we needed – There was a need to raise money if we – if we intended to be involved in the 2008 election cycle.

Q. Okay. And when did you feel like you needed to raise this money by?

A. 12 months ago.

Q. Okay. And it's fair to say that that money was not raised, is that correct?

A. That's correct.

Q. Okay. Did you make any attempt to reach out to potential donors for the 2008 election?

A. I don't think that I did no. I don't know if Chad attempted to. I – I don't remember.

Q. Given that you needed to raise the money 12 months ago to participate in the 2008 election, why weren't efforts made to go out and raise contributions?

A. Both of us are very limited in our time. I think that we – we also see the – the fact of raising money to do what we'd like to do is almost an overwhelming task.

* * *

[67] Q. Is it fair to say that as of today, you don't have cash on hand to make independent expenditures in the 2008 general elections?

A. It's fair to say $52.72 is not enough money to have an impact.

Q. Okay. Have – how busy are you right now?

A. Extremely.

Q. How busy is Mr. Kirkpatrick?

A. He's also very busy. And would rather he answer for himself. He's difficult to read sometimes.

Q. Is fair to say that neither you, nor he has any more time available to raise funds than you had in 2007?

A. It's fair to say right at this moment we don't have enough time. We could make time if we – we move some things out of the picture.

Q. Like what things?

A. Daily life activities.

Q. Have you discussed –

A. Work schedules.

Q. Your work schedule is largely dictated by campaigns that are ongoing, is that right?

A. Yes.

Q. Okay. Those are campaigns for 2008 general election?

[68] A. Yes.

Q. Okay. Those aren't going to go away between now and the 2008 general election –

A. No.

Q. – is that correct?

And your personal activities are still going to be there between now and the 2008 general election?

A. Yes.

Q. Have you made any attempt to raise funds since the primary election?

A. I have mentioned it to Chad that we need to raise money. And have not made any phone calls to anybody.

Q. Okay. Do you know if Mr. Kirkpatrick has made any phone calls to anyone?

A. I don't know.

Q. Have you sent out any letters to anyone?

A. No.

Q. Have you sent out any e-mails to anyone soliciting contributions?

A. No.

Q. So aside from having conversations with Mr. Kirkpatrick, you have not made any efforts to raise contributions since the 2008 primary election, is that correct?

A. That's correct.

* * *

[91] The costs for the independent expenditures that Arizona Taxpayers contends it would make if matching funds were no longer an issue would be between $13,200 and $20,700, is that correct?

A. Yes.

* * *

[99] And you said during that conversation there was a – there was a discussion about the ability to raise money. And I think you said that you didn't discuss who, how, when or where that raising of money would take place, is that right?

A. That's correct.

Q. Okay. So is it fair to say that there haven't been any plans made yet on how you'll raise money for Arizona Taxpayers between now and election day?

A. Specific plans? With the – obviously the help of your insight in preparing the budget, no.

Q. Okay. Have you – had you laid out a budget before today?

A. We have in the past on other – not specifically for 2008.

Q. Okay. And you haven't made specific plans on how you'll raise the money, is that right?

[100] A. That's correct.

* * *

TERRY GODDARD
Attorney General
Mary R. O'Grady (011434)
Solicitor General
Tanja K. Shipman (025205)
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2926
Telephone: (602) 542-3333
Facsimile: (602) 542-8308
Attorneys for Defendants Secretary of State Jan Brewer and Arizona Citizens Clean Elections Commission

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, AND TONY BOUIE,

Plaintiffs,

and

DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, AND ARIZONA TAXPAYERS ACTION COMMITTEE,

Plaintiff-Intervenors,

v.

No. CV08-1550-PHX-ROS

DECLARATION OF ED ABLESER IN SUPPORT OF DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' AND PLAINTIFF-INTERVENORS' MOTIONS FOR PRELIMINARY INJUNCTION

(Filed Sep. 23, 2008)

JAN BREWER, in her official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, Defendants, and CLEAN ELECTIONS INSTITUTE, INC. Defendant-Intervenor.	(Assigned to the Honorable Roslyn O. Silver)

I, Ed Ableser, declare:

1. I am a Democratic candidate for a seat in the Arizona House of Representatives for legislative district 17. I am running as a participating candidate for the 2008 election. My two Republican opponents (Mark Thompson and Wesley Waddle) and another Democratic candidate (David Schapira) in that race also are running as participating candidates.

2. I ran for the same seat in 2004 and 2006. In each of those elections I ran as a participating

candidate, as did each of my opponents in those elections.

3. I choose to run as a participating candidate because I do not want to run a campaign that is funded by big money, special interest groups. I want to represent the individual voters of my district, who cannot afford to make contributions on par with corporations and high dollar special interest contributors.

4. My constituency has been overwhelmingly in favor of the Clean Elections system. Most of the many voters from my district that I have spoken with about my campaigns and the Clean Elections system are enthusiastic about that system because it puts power back into the hands of the individual voter, rather than special interest groups.

5. To qualify for Clean Elections funding, I was required to collect nearly 300 qualifying contributions in the amount of $5 each from individual electors. Many of the electors that contributed to my campaign in the form of qualifying contributions are students and other young adults, who cannot afford to give a lot of money but who can afford (as almost anyone can afford) the $5 contribution.

6. The Clean Elections system does not merely help to level the playing field for candidates who lack personal wealth or special interest contributors, the system levels the playing field for voters, who can make their voice heard in a way not previously possible, by contributing to participating candidates'

campaigns. As a result of the Clean Elections system, ordinary citizens now can have a seat at the political table of our state government.

7. In addition, because participating candidates must collect qualifying contributions in order to run, participating candidates are required to talk with voters face-to-face and listen to the things voters care about. That is important to me and to the electors of my district. It takes substantial effort to collect the minimum number of qualifying contributions. For my campaigns, I personally have done most of that work.

8. The matching funds provisions of the Clean Elections system are essential to my ability to run as a participating candidate. Although I choose to run as a participating candidate for the reasons explained above, I doubt whether that would be possible if the matching funds provisions were not in effect.

9. In my district, although my opponents have all been participating candidates, I have relied heavily on matching funds to respond to independent expenditures that were made in my races in the 2004 and 2006 elections. Indeed, independent expenditures made to attack me in the 2006 general election resulted in my receiving matching funds up to the statutory maximum.

10. Those matching funds were absolutely essential to my ability to respond to those attack ads against me, which were run just shortly before the election. For example, Dial Corporation has made independent expenditures to fund "hit pieces" against

me in both the 2004 and 2006 elections. Those expenditures amounted to approximately $15,000 in each election.

11. As a participating candidate, I was precluded from raising independent funds to respond to such attack ads. If I had not had access to matching funds, I would not have had any means of responding to such ads and educating voters on the inaccuracies contained therein.

12. In addition, in the typical campaign participating in Clean Elections, funds are spent "up front." It is necessary to spend most campaign money early to obtain signs, literature, and other campaign paraphernalia and to cover other campaign expenses. Saving money until the end of the campaign is foolish and ineffective from a campaign perspective.

13. Because most campaign funds are spent well in advance of the election, participating candidates such as myself do not have funds available to respond to late-run attack ads or other items funded by independent expenditures apart from the matching funds available under the Clean Elections system.

14. For the upcoming 2008 general election, I expect again to reach the maximum in available matching funds due to independent expenditures spent to benefit my opponents in the race. I must be able effectively to respond to those ads with funding for my own ads. If I do not receive those matching funds, I will be severely harmed in my campaign efforts. Specifically, I will not have the

funds necessary to respond to those attack ads, which I fully expect will be run near the time of the election.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 17 day of September 2008.

/s/ Ed Ableser
Ed Ableser

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, KEVIN GIBBONS, FRANK ANTENORI, TONY BOUIE, AND DOUG SPOSITO, Plaintiffs, and DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, AND ARIZONA TAXPAYERS ACTION COMMITTEE, Plaintiff-Intervenors, vs. JAN BREWER, in her official capacity as Secretary of State of the State of Arizona, and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, Defendants,	No. CV08-1550-PHX-ROS DEPOSITION OF ROBERT BURNS (Filed Jun. 12, 2009) (Filed Jul. 17, 2009) Phoenix, Arizona September 17, 2008 10:00 a.m.

and)
)
CLEAN ELECTIONS)
INSTITUTE, INC.)
)
Defendant-Intervenor.)
)

REPORTED BY:
MARTA M. RICE, CSR, RPR
Certified Reporter
Arizona Certificate Number 50746

PREPARED FOR:

ASCII COPY

* * *

[40] Q. Okay. Now, I know you told me earlier that based on your recollection you hadn't remembered triggering any matching funds for Mr. Poe. Does this – again, it's not a quiz. I was just wondering, does this refresh your recollection that maybe you had triggered funds for Mr. Poe?

A. Well, not really, because I guess the way I would have known about triggering funds would have been if I would have looked at his campaign finance report to see if he received money. And I didn't do that.

My – the way the system works is that we have a number of triggered reports. And, in fact, those triggers come so often, I have taken the position of, if I write a check or if I receive a check, I do a report. Just almost do daily reports practically to make sure I'm covered on these – on these trigger reports.

And so I wasn't really focused on whether or not I was triggering his contribution. I was focused on not overspending to prevent him from getting too much additional money. I mean, that was more of a concern to me than whether I triggered a money – a match for him.

I didn't – I wanted to keep within a relatively low-cost campaign so that I didn't trigger money to him. But I wasn't on a number. I wasn't focused on a number and say, "I'm not going to spend beyond this [41] particular point." I was just sort of in a range, say, I wanted to keep my expenditures at a – at a level that I thought I could get my message out and still not trigger matching funds.

Q. Okay. So you were willing to trigger some matching funds?

A. Well, yeah. I mean, it – it was a – sort of a happening, if you will. If I had to spend X number of dollars to get out a – a mailer, and I had that amount of money, I would go ahead and do the mailer.

* * *

[50] Q. Okay. Looking at the – these numbers, do you [51] recall triggering matching funds for your primary opponents in 2002?

A. Well, again, I didn't – I didn't track their – their expenditures. I'm surprised at the amount. I wasn't aware that that – that they received that amount of money, but I didn't – I didn't track them.

* * *

[87] Q. And do those hosts typically cover the cost of sending out the invitations?

A. Yes. And I – I believe that that is covered under our in-kind contributions statute that they are required to report those.

Q. As in-kind –

A. In-kind contribution, yeah

Q. – as an in-kind contribution to you?

Okay. Does your campaign incur any costs associated with holding those fundraising events?

A. It has.

Q. Okay.

A. It has. It depends on the sponsor. Some sponsors say, "We will – we will cover the costs." Others say, "We'll do the fundraiser." In one – in one case, I did a very limited fundraiser and the sponsor requested that I pay the costs of the – of the fundraiser.

Q. Okay. Did that include the cost of sending out the invitation?

A. No I don't believe it did in that case. This was a fundraiser where some food was available, and I ended up paying for the food.

* * *

[100] Q. Okay. Senator, can you point me to any type of communication that you had with voters in the 1990s that you have not had with voters in your races since 2002 because of the existence of matching funds?

A. Any correspondence now that I did not – or then that I do not have now?

Q. Yes.

A. Well, that's pretty hard to pinpoint. I can't point at a specific instance of communication.

Q. I –

A. I guess the difference would be there was no [101] limit before, there is a limit now on the number of – number of communications that I can make.

Q. Okay. But can you point me to any specific type or number of communications that you used to have with voters before the Clean Elections Act was implemented that you no longer have with voters since?

A. I can't point to a specific mailer or – or document, no. I guess the difference is that at that point in time, I could raise money. I could go out and work toward whatever amount I wanted to raise, and then use up that to make as many mailings as I possibly could make. I can't make that decision now.

Q. Have you reduced the number of mailings you send out to voters since the enactment of the Clean Elections Act?

A. The actual number – is the actual number smaller now then it was then? I can't say.

MS. PERKINS: I'm going to object to vagueness. Do you mean the number –

MR. DAVIS-DENNY: Do you – hold on.

MS. PERKINS: – of people that receive the mailing or the number of mailings that occur during a general election cycle?

I think there's a difference between what you're referring to and what the witness is answering.

[102] BY MR. DAVIS-DENNY:

Q. Okay. Well, go ahead and finish your answer and then –

A. Well, the – the decision to make – the decisions made in the nineties were not restricted like they are now. So the number of mailers, the possible number of mailers, was certainly higher. I don't know the exact number, whether or not the two are different.

Q. Just to be clear. I'm not talking about the hypothetical possible mailers that you could send out –

A. Um-hmm.

Q. – I'm talking about what you actually did then versus what you actually did now. What you

actually did before the Act versus what you actually do after the Act.

And my question is simply, have you reduced the number of mailers that you send out to voters since the enactment of the Clean Elections Act?

A. I don't have a document to prove that. I mean, I can do the hypothetical. I think that they have been reduced. But I can't specifically say that I did less, because I don't have the documentation to back that up.

Q. Okay. What is – if you don't have documentation to support that view, why – what's your basis for saying that?

A. Because I feel restricted now. I feel restricted [103] that I can't raise the amount of money that I have the potential to raise without triggering money for my opponent, and so I'm restricted in how I act.

Q. Okay. But have you actually reduced the absolute number of mailers that you send out since the enactment of the Clean Elections Act?

A. I don't know that – I can't –

Q. You can't say one way or the other?

A. I can't prove that, no.

* * *

TERRY GODDARD
Attorney General
Mary R. O'Grady (011434)
Solicitor General
Tanja K. Shipman (025205)
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2926
Telephone: (602) 542-3333
Facsimile: (602) 542-8308
Attorneys for Defendants Secretary of State Jan Brewer and Arizona Citizens Clean Elections Commission

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, AND TONY BOUIE,

Plaintiffs,

and

DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, AND ARIZONA TAXPAYERS ACTION COMMITTEE,

Plaintiff-Intervenors,

v.

No. CV08-1550-PHX-ROS

DECLARATION OF TAMMIE PURSLEY IN SUPPORT OF DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' AND PLAINTIFF-INTERVENORS' MOTIONS FOR PRELIMINARY INJUNCTION

(Filed Sep. 23, 2008)

JAN BREWER, in her official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, Defendants, and CLEAN ELECTIONS INSTITUTE, INC. Defendant-Intervenor.	(Assigned to the Honorable Roslyn O. Silver)

I, Tammie Pursley, declare:

1. I am a Democratic candidate for a seat as an Arizona State Representative for legislative district 18. I am running as a participating candidate for the 2008 election. I have three opponents in the general election. Cecil Ash and Steve Court are Republicans running as participating candidates; Joe Brown is an Independent running as a traditional candidate.

2. This is the second time I have run for a statewide office, and the second time I have participated in the Clean Elections funding program. I ran

for the same office in 2006 as a participating candidate.

3. I never considered running as a traditional candidate; it is simply outside the realm of possibility for me. I am a teacher, and I do not have a lot of money, nor do I have the ability to take time off from my job to engage in fundraising. My circle of potential donors is small. My peers also are teachers, and need representation, but cannot afford to spend a lot of money to support a candidate who will represent their interests. The Clean Elections program gives someone like me the opportunity to run for office and participate in the political process, and allows members of the public to get involved in a campaign without a huge expenditure of money.

4. The availability of matching funds also was an important part of my decision to run for office. If I am faced with an opponent who is running as a traditional candidate and can collect $50 to $60 thousand dollars, I am at a serious disadvantage without matching funds. I received matching funds in my 2006 campaign. If matching funds had not been available, I probably would still have participated, but I would have been at a serious disadvantage. Another reason that I chose to run as a Clean Elections candidate is that I want to be beholden to my constituents and answer to them, not to lobbyists or corporations who are giving large campaign donations.

5. It has been my experience that the public views the Clean Elections program as something very positive. It allows people who don't have a lot of money and wouldn't otherwise be able to participate to get involved in the election process and campaign without a large expenditure of money.

6. In order to run as a participating candidate in this election cycle, I collected approximately 252 $5 qualifying contributions. I started collecting these contributions in March 2008. I also collected approximately $2000 in early contributions. I spent all of my early contributions in the primary campaign. Other than these contributions, I received no private donations to my campaign.

7. I have received and allocated or spent all the Clean Elections money allocated to my campaign for the general election. I have no money available for the general election other than money provided to my campaign through the Clean Elections funding.

8. If matching funds were eliminated for the general election, it would put me at a serious disadvantage if there was a big campaign against me. My campaign strategy is already set, and my Clean Elections funding is spent. If the playing field changed, there would be no way for me to respond without additional funding. At this time, I don't know if I will face independent expenditures in my race. In general, I view independent expenditures as a good thing, because they can provide more information to educate the voters on issues. However, without

matching funds, I would be unable to respond to any negative campaign directed against me.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 17th day of September 2008.

/s/ Tammie Pursley
Tammie Pursley

TODD LANG

9/17/2008

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JOHN McCOMISH, et al., and DEAN MARTIN, a citizen of the State of Arizona, et al., Plaintiff-Intervenors, v. JAN BREWER, in her official capacity as Secretary of State of the State of Arizona, et al., Defendants, and CLEAN ELECTIONS INSTITUTE, INC., Defendant-Intervenor.	)	No. 08-1550-PHX-ROS (Filed Sep. 25, 2008) (Filed Jun. 12, 2009)

DEPOSITION OF TODD LANG

Phoenix, Arizona
September 17, 2008
1:36 p.m.

PREPARED FOR:
THE COURT
(ORIGINAL)

Reported by:
Thomas A. Woppert, RPR
Arizona CCR No. 50476

Ottmar Holiday & Associates
602-485-1488

* * *

[12] Q. Okay. All right. Well, then do you believe that looking at that – the section where it says that the – they intend to create a clean election system that will [13] improve the integrity of Arizona state government, would you say that improving the integrity of the Arizona state government is a goal of the clean elections system?

A. I think that's a fair characterization.

Q. Okay. Would you say that diminishing the influence of special interest money is a goal of the clean elections system?

A. Yes.

Q. Would you say that encouraging citizen participation in the political process is a goal of the clean elections system?

A. Yes.

Q. And would you say that the promotion of freedom of speech under the U.S. and Arizona constitutions is a goal of the clean elections system?

A. Yes.

* * *

[54] Q. Okay. Can you tell me exactly how the act has improved the integrity of Arizona state government since it went into effect?

A. Well, I think it's reflected by the findings and declarations in the act. I think voters and some – some office holders like the idea that they don't have to go to special interests to raise campaign funds and it creates the perception – and, again, I'm not accusing anyone of any wrongdoing – it creates the perception that the legislature is not for sale, which, in my view, improves confidence in our legislature.

Q. But you don't have any –

A. No studies.

Q. Okay.

A. Just based on feedback I've heard.

Q. And what – in those improvements that you've [55] identified, what can be directly tied to the matching funds provision?

A. Matching funds are really useful in that area in terms of integrity –

Well, wait a minute. In – in respect to what goal of the act are you asking me about?

Q. Improving the integrity of the Arizona state government.

A. It would be indirect. It would be because matching funds permit those who are attacked by

vicious, nasty attack ads – and, of course, we saw examples of those again this cycle. It gives them a chance to respond and correct the record and show the voters that, no, they're not as bad as their opponent would have them seem.

And that sort of response enables – enables voters to get more information, to understand the system better and to understand the candidates better and to erase some of the dirty laundry that's left by an attack ad. And in that sense, the view – my view is that it – it makes them – it allows them to respect candidates more and to believe they have more integrity.

Q. But you have no empirical evidence of –

A. I have not done a study.

Q. Okay. Let's talk about one of the other goals that you identified, which is diminishing the influence of [56] special interest money.

Has the influence of special interest money declined since the act went into effect?

A. I'm trying to – I want to read the statute.

Q. Oh, absolutely.

A. Yes. Most directly not in terms of legislative outcomes, but in terms of the fact that the voters get to decide. This is a point that I made at the Goldwater Institute. The voters get to decide who's elected in the primaries, not the chamber of commerce, not

the precinct committeemen and not the newspapers. The voters get to decide.

And in the past, it was who could raise special interest money proving thus to the chamber of commerce or whomever that they're a viable candidate. And what we've seen is those sorts of folks, the folks with connections, are getting beat by clean elections candidates in some cases even though they don't have access to that special interest money.

So in that very direct sense, the influence of special interest money is removed. In a more indirect sense or a more appearance sense, it means that legislators can be – or office holders no longer are beholding to those who might contribute to their accounts in terms of how they vote on a bill or what have you. So – and – and that obviously [57] is a – is a – in my view, a good thing because you want legislators making decisions on the merits.

Q. Do you have any – when you say beholding, what do you mean by beholding?

A. Well, if you come to me – Bill, if you've donated – if you're, you know, a big donor to my campaign and you come to me with a bill that would ban dancing, I might feel obligated to consider it because I don't want to alienate you. And if I get my money from clean – because I need your money. And if I get my money from public funding, I can just decide it on the merits. And, in my view, that's a good thing that promotes integrity.

Q. Let me ask you a question about that actually. Let me make sure I understand the – the theory behind clean elections as you've just articulated it.

The – the idea is that contributors or large contributors, when they make contributions to candidates, there's a chance that those candidates, should they be elected, would be beholding to those contributors in terms of effectuating public policy; is that correct?

A. Well, it's not just that they might actually be beholding, it's also that voter confidence in the system and willingness to participate in the system is reduced because, even though, say, you're an office holder and I give you a lot of money and you happen to vote the way I want you to [58] vote, it's not because you're relying on me for money, it's simply because it's the way you believe and you're doing the right thing.

The problem, though, is that the voters may perceive that, oh, Todd gave Bill a lot of money and, look, he voted yes on Todd's bill, he's corrupt, even though you're not, and that undermines voter confidence as well. So it's not actual corruption, it's the appearance of corruption that undermines voter confidence.

I don't think we have any corrupt legislators right now, I hope. This is about appearances and about encouraging participation and reinforcing good feelings about our – you know, our system of government.

Q. But candidates – under the clean elections system, candidates who are participating in the system still receive money.

A. That's right.

Q. They receive it from the government.

A. Yes.

Q. So wouldn't the perception then be that, instead of being beholding to contributors or large contributors, that the candidates would be beholding to the interests of the government?

A. I certainly think not.

Q. Well, what's the distinction?

[59] A. We have no fiscal interest in the outcome of bills. We're not a for-profit agency looking to improve – to decrease regulation, for instance, that would cost us money. We're simply there to run the act.

And the fact that several of the plaintiffs are clean elections candidates I think reinforces my point. We fund everyone whether they love clean elections or are opposed to it. And I don't think there's even – there's any – I have not seen any indication of any perception that legislators feel beholding to clean elections for any reason. I think they're quite comfortable letting us know their disagreements and problems and, when they agree with us on a particular legislative issue, it's because they agree with us.

Q. But you had said that the – that the perception of a private contributor causing a candidate to be beholding was sufficient to warrant the creation of the clean elections system.

A. It's one of many reasons.

Q. Even when that perception is inaccurate; is that right?

A. Yes.

Q. So the fact that a person may have a perception of the role of the clean elections commission that is inaccurate, does that change the – your calculus as to [60] whether it creates a perception that clean elections candidates are beholding to the government?

A. I don't think clean elections candidates are beholding to the government, if that's what you're asking me, and I've never seen any indication, even from my friends at Goldwater, that there's that perception even. So, no, I – I don't – I don't – I don't see them as the same.

* * *

---

[115] Q. Todd, do you recall Mr. Maurer's policy debate in [116] regards to whether the clean elections system itself creates the appearance of government causing candidates to be beholding to government?

A. Uh-huh.

Q. Do you remember that discussion?

A. I do.

Q. Are you at all concerned that your lobbying to protect the Clean Elections Act from amendment such as occurred in 2007 might be construed by the legislatures and people running for office in the state legislature as a sign that they might best be considering the interests of the commission when they take the commission's money?

MS. SHIPMAN: Objection to form.

MR. DAVIS-DENNY: Objection to form.

THE WITNESS: Absolutely not. I – if you check the transcripts, which you can search on the web, you'll see Senator Gray, who is no fan of clean elections, is opposed to clean elections and has never run clean, thanking me for being there and complaining about my predecessor who hadn't been there for particular testimony. So it's clear to me that the legislators want me there.

And to directly answer your question, for that – you know, for that reason and a million others, I – I know that they're in no way beholding to me or – or concerned that – because I'm lobbying, that somehow, you know, they [117] should run clean or – I'm not sure what you're alluding to, but I don't think it's a problem at all.

BY MR. DRANIAS:

Q. Well, remember you made a distinction between actual influence and the appearance of influence? Remember that distinction?

A. Uh-huh.

Q. Yes?

A. Yes.

Q. So regardless of what the reality might be of your lobbying efforts, wouldn't you agree that reasonable people might infer from your lobbying efforts the appearance of the commission attempting to influence legislators on how they might or might not amend the Clean Elections Act and hence public funding?

MS. SHIPMAN: Objection; form.

MR. DAVIS-DENNY: Object to form.

THE WITNESS: Frankly, no. It simply doesn't make any sense. I've never seen any indication that that might be the case. I've never even heard the most ardent critics suggest that. This is the first time I've even heard it as a possibility – a hypothetical possibility, was when Mr. Maurer raised the issue earlier.

BY MR. DRANIAS:

Q. Has the commission – the Clean Elections [118] Commission conducted any survey to exclude the possibility that there is the appearance created by your lobbying activities that the commission is trying to influence legislation?

MS. SHIPMAN: Objection; form.

THE WITNESS: Well, when we lobby, we are trying to influence legislation, so I'm not sure

what the survey – I'm not sure I understand your question.

BY MR. DRANIAS:

Q. Would you consider the commission to be a monied special interest?

A. No.

Q. Would you –

A. In terms of the fact that the legislature doesn't fund us. We get all the money separate from the legislature, which means that going – I can't imagine how there would be an appearance of corruption because of that because they don't fund us. In fact, we give money to the legislature, or to the general fund.

Q. So your definition of monied special interest is an interest that receives money from the legislature?

A. No, but that's about the only thing we could get from them other than, obviously, bills that improve the law. And how that would be, you know, undue influences, I – I don't understand.

[119] Q. Well, help me play this out just a little bit.

Do you remember how you discussed how the commission would decide whether to match funds for an ad that might be a sham ad? Remember that discussion?

A. Uh-huh.

Q. Yes?

A. Yes.

Q. You would agree that the commission is in a position relative to candidates running in an election to decide who does or doesn't get campaign funds?

MS. SHIPMAN: Objection; form.

THE WITNESS: We fulfill that function, yes, but it's not like it's a – a political decision. It's purely, you know, a function of interpretation of the law and application of the law. And I have enough Republicans and Democrats mad at me that I know that I'm doing it in a completely impartial fashion.

BY MR. DRANIAS:

Q. Again, I am in no way suggesting you're doing anything in less than an impartial fashion, but I'm simply exploring as a possibility that there might be the appearance of influence from the two roles, the role on the one hand, lobbying the legislature, the role on the other hand, during the election, deciding who gets campaign funds.

MS. SHIPMAN: Objection; form.

[120] BY MR. DRANIAS:

Q. Wouldn't you agree that appearance exists?

MS. SHIPMAN: Objection; form.

MR. DAVIS-DENNY: Objection; form.

THE WITNESS: I do not agree that that appearance exists. I – again, maybe – Nick, maybe I need time to think about it because, again, it's the first time you guys have raised it, but it just seems absurd to me. I've never heard of any sort of governmental election commissions whether it's the secretary of state, clean elections or, in other states, the ethics boards being accused of having special interest authority or power or any sort of undue influence. I – I just haven't seen it.

And considering all the bills we've run up to the legislature, last year was the first one we've ever gotten passed. I don't think that we have undue influence or – or that anyone even has that perception, which is more to the point you're making. I – I just don't think the perception's there.

BY MR. DRANIAS:

Q. You have no studies suggesting the perception's –

A. No, I don't. I have no – I have no studies.

* * *

[131] (Deposition Exhibit 9 marked for identification)

THE WITNESS: Can I look at it? Do you want me to look at it?

BY MR. MAURER:

Q. Oh, yeah, absolutely, please. That's what we're here for.

A. This is from the website?

Q. Yes.

Have you ever seen this document?

A. It looks familiar, but I don't specifically recall it.

Q. If I said it was from the clean elections website, would there be any reason why you would doubt that?

A. No, I – I would agree that – I would have no reason to disagree with you.

Q. Okay. It says that the Citizens Clean Elections Act was passed by the people of Arizona in 1998 to level the playing field in the first sentence of the second paragraph; [132] is that correct?

A. Yes.

Q. Okay. So, again, the representation has been to the people of the State of Arizona via your website that the purpose of the act was to level the playing field?

MS. SHIPMAN: Objection; form.

THE WITNESS: I agree that that's one of the purposes. It goes on to refer to some of the other purposes, but it does seem to indicate that that's the purpose, yes.

* * *

INSTITUTE FOR JUSTICE
Timothy D. Keller (019844)
Jennifer M. Perkins (023087)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
P: 480-557-8300/F: 480-557-8305

INSTITUTE FOR JUSTICE
William R. Maurer (WSBA 25451)[1]
101 Yesler Way, Suite 603
Seattle, WA 98104
P: 206-341-9300/F: 206-341-3911

Attorneys for Plaintiff-Intervenors

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*, Plaintiffs, and DEAN MARTIN, a citizen of the State of Arizona, *et al.*, Plaintiff-Intervenors vs. JAN BREWER, in her official capacity as Secretary of State of the State of Arizona; *et al.*, Defendants.	Civil Action No. 08-1550-PHX-ROS PLAINTIFF-INTERVENOR BURNS' RESPONSES TO DEFENDANTS' AND DEFENDANT-INTERVENORS' INTERROGETORIES AND DOCUMENT REQUESTS (Filed Jul. 2, 2009)

[1] Admitted *pro hac vice*.

and	)	(Assigned to the
	)	Honorable
CLEAN ELECTIONS INSTITUTE, INC.	)	Roslyn O. Silver)
	)	
Defendant-Intervenor.	)	

* * *

Interrogatories

1. Identify each hardship or harm that you contend you will suffer in the 2008 general election if a preliminary injunction is not granted in this case.

Without a preliminary injunction in this case, I am forced to alter my entire fundraising and campaign strategy. I will only hold one fundraiser during the general election in 2008 in order to avoid triggering matching funds to my government funded opponent. Although this will leave me with less funds, and thus less ability to communicate with my constituents, it is the only way I can ensure my actions do not directly result in filling my opponent's campaign war chest.

If the matching funds provisions were not enforced, I would instead hold multiple fundraisers in order to allow for additional contact with my constituents, most likely in the form of direct mail pieces. With my limited funds I will likely only be able to afford one mailer during this general election, and will not be able to target that mailing to the particular and broad audience I would like to reach. Rather,

I will likely only be able to reach a smaller, more narrow audience.

I also face potential harm based on the possibility of independent expenditures in my race that benefit my publicly funded opponent through matching funds. If an independent expenditure is made that purports to support me – regardless whether it actually aids my campaign or is consistent with my message – my publicly funded opponent will likely receive matching funds triggered by that independent expenditure. My opponent will then have additional money on hand specifically to allow for a response to the independent expenditure, but particularly given my decreased fundraising strategy, I will not have the means for a reply to that response. And given I had no control over the initial independent expenditure triggering matching funds, it's entirely possible the entire exchange from both sides would be harmful to my message and campaign. Nonetheless, I would be left without the means to voice my position and to obtain the means would require additional fundraising that would provide even more public funding for my opponent's taxpayer financed war chest.

* * *

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APR 13 2011

Nos. 10-238, 10-239

In The
Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, et al.,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

JOHN McCOMISH, et al.,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX, VOLUME 2, PAGES 461-731

NICHOLAS C. DRANIAS*
GOLDWATER INSTITUTE
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION
500 East Coronado Road
Phoenix, AZ 85004
Tel: (602) 462-5000
Fax: (602) 256-7045
ndranias@goldwaterinstitute.org
Counsel for Petitioners John McComish, et al.

WILLIAM R. MAURER*
INSTITUTE FOR JUSTICE
101 Yesler Way, Suite 603
Seattle, WA 98104
Tel: (206) 341-9300
Fax: (206) 341-9311
wmaurer@ij.org
Counsel for Petitioners Arizona Free Enterprise Club's Freedom Club PAC, et al.

MARY R. O'GRADY*
Solicitor General
1275 West Washington
Phoenix, AZ 85007
Tel: (602) 542-3333
Fax: (602) 542-4085
SolicitorGeneral@azag.gov
Counsel for Respondents Ken Bennett, et al.

BRADLEY S. PHILLIPS*
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071
Tel: (213) 683-9100
Fax: (213) 687-3702
Brad.Phillips@mto.com
Counsel for Respondent Clean Elections Institute, Inc.

*Counsel of Record

[Additional Counsel Listed On Inside Front Cover]

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CLINT BOLICK
GOLDWATER INSTITUTE
SCHARF-NORTON CENTER FOR
CONSTITUTIONAL LITIGATION
500 East Coronado Road
Phoenix, AZ 85004
Tel: (602) 462-5000
Fax: (602) 256-7045
Additional Counsel for Petitioners
John McComish, et al.

WILLIAM H. MELLOR
STEVEN M. SIMPSON
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682 9321
wmellor@ij.org
Additional Counsel for Petitioners
Arizona Free Enterprise Club's Freedom Club PAC, et al.

TIMOTHY D. KELLER
PAUL V. AVELAR
INSTITUTE FOR JUSTICE
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
Tel: (480) 557-8300
Fax: (480) 557-8305
tkeller@ij.org
pavelar@ij.org
Additional Counsel for Petitioners
Arizona Free Enterprise Club's Freedom Club PAC, et al.

TIMOTHY A. NELSON
Chief Deputy Attorney General
JAMES E. BARTON II
Assistant Attorney General
1275 West Washington
Phoenix, AZ 85007
Tel: (602) 542-3333
Fax: (602) 542-4085
Additional Counsel for Respondents
Ken Bennett, et al.

GRANT A. DAVIS-DENNY
ELISABETH J. NEUBAUER
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071
Tel: (213) 683-9100
Fax: (213) 687-3702
Additional Counsel for Respondent
Clean Elections Institute, Inc.

MONICA YOUN
MIMI MARZIANI
THE BRENNAN CENTER
FOR JUSTICE AT NYU
SCHOOL OF LAW
161 Avenue of the Americas
New York, NY 10013
Tel: (212) 992-8158
Fax: (212) 995-4550
monica.youn@nyu.edu
Additional Counsel for Respondent
Clean Elections Institute, Inc.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, KEVIN GIBBONS, FRANK ANTENORI, TONY BOUIE, AND DOUG SPOSITO,

Plaintiffs,

and

DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, AND ARIZONA TAXPAYERS ACTION COMMITTEE,

Plaintiff-Intervenors,

vs.

JAN BREWER, in her official capacity as Secretary of State of the State of Arizona, and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Defendants,

No. CV08-1550-PHX-ROS

DEPOSITION OF MARCUS B. OSBORN, Ph.D.

(Filed Sep. 25, 2008)

Phoenix, Arizona
September 19, 2008
10:00 a.m.

and

CLEAN ELECTIONS
INSTITUTE, INC.,

Defendant-Intervenor.

REPORTED BY:
MARTA M. RICE, CSR, RPR
Certified Reporter
Arizona Certificate Number 50746

PREPARED FOR:

ASCII/(COPY)

* * *

[22] Q. What conclusions did you reach in your dissertation?

A. Based on the statistics, I found that individual lobbyist contributions are correlated with influence, but at a very low magnitude. And when combined with Arizona's low campaign finance limits, meaning the individual contributions, the collective contribution limits, the PAC contribution limits, all that system, that that was enough of a regulatory impediment to create – or not create – to prevent any – any unjustified influence.

So in essence, if you're concerned about having interest group contributions influence the legislature, as long as you have low contribution limits, that does the job.

Secondly, that PAC contributions are inversely correlated, but not – but not at a statistically significant level. Meaning, the more PAC contributions that legislators receive, the less likely they are to be influenced by interest groups.

In this model I tested PAC – or individual lobbyist contributions for both Clean Elections candidates and for traditionally funded candidates.

* * *

[23] Q. So you were looking to see – sorry. Just so I can clarify. I'm trying to understand. You're looking at whether or not caps on contribution limits cancel out any interest group influence?

A. Yes. And they do.

* * *

[75] Q. Okay. Just to clarify before we move on, what are the opinions you intend to offer in this litigation based on your dissertation and your 2004 paper marked as Exhibit 2?

A. That Arizona's current regulatory structure that limits contributions outside of the Clean Elections Act is adequate in reducing or preventing undue interest group influence.

* * *

[94] Q. But as far as your opinion that the current regulatory structure without Clean Elections is sufficient to limit undue interest group influence, what is the basis for your opinion?

A. Arizona has one of the lowest campaign contribution limits in the country. That we have – we are one of the cheapest states in the nation to get elected to the state legislature. So the demand for campaign contributions, regardless of Clean Elections, is low, and is combined with low contribution limits as well.

Second, that there is not a strong tie between PAC contributions and interest group contributions – or I'm sorry – PAC contributions and interest group influence.

[95] And that there are other mechanisms if you want to improve constituent access to the legislature or improve their information use – there are more effective means of enhancing that then using a Clean Elections system.

Q. What are the more effective means?

A. Investment in legislative research staff and investments in legislators' ability to respond effectively to constituents. Increase secretarial staff, those kind of constituent service capabilities.

* * *

[98] Q. Are you looking at any real examples as part of your study?

A. The first part of the study is focused on the hypothetical examples. I have not yet looked at specific case studies.

Q. So your opinion is more of a hypothesis and not a conclusion?

A. No.

MR. DRANIAS: Objection. Improper form.

BY MS. NEUBAUER:

Q. So if you could state one more time clearly for the record, what is the opinion you intend to offer about the matching funds provision creating disparities in funding?

A. The matching funds provisions of the Clean Elections create disparities in funding depending on the number of competitors in the race and the mix of their funding source.

* * *

[101] A. The legislative race where Robert Blendu and Steve Montenegro and Jerry Weiers ran, where they had two-teamed opponents who created funding disparity against a single individual.

Q. And how are you aware that such a funding disparity was created?

A. In speaking with the candidate Robert Blendu.

Q. Is there any other source for your information?

A. You can look at the campaign finance reports from those candidates.

Q. Did you ever do a study of that scenario?

A. I haven't studied that in detail in terms of a study. It's one example.

Q. Could you please explain how that situation created a disparity.

A. The two-team candidates were able to create increased funding levels against a single privately funded candidate. By teaming up they were able to maximize or – I – in essence, double their money in terms of Clean Elections funding, because you have one private candidate who is teamed with a public candidate, and they were able to get matching funds and they used them collectively against a single opponent.

Q. Is it true that candidates can pull their resources and use them collectively in the absence of the [102] matching funds provision?

A. They could do that, yes.

Q. Okay.

A. The matching funds provision exacerbates that opportunity.

Q. And what is the basis for your conclusion that it exacerbates the opportunity?

A. By the simple fact that if another candidate gets matched based on both candidate's activities, that is not a corollary to any private/private campaign.

Q. In this situation, the real life situation you've described, involving Robert –

A. Blendu.

Q. Blendu, could you explain to me exactly how that disparity emerged?

A. They were able to team their resources together and do direct hit pieces on him supporting both the clean and the traditional candidate, and were able to out-spend or outmaneuver Blendu in the campaign.

Q. Is there any evidence that they would not have been able to do so in the absence of the matching funds provision?

A. Steve Montenegro is a new candidate. He may not have been able to raise those monies. And, secondly, and more importantly, they could have teamed together but [103] without the matching funds the expenditures of Robert Blendu would not have been matched. And so it would have been a – a more equal footing.

Q. Are you positive that the result that you – that there would have been a more equal footing without the matching funds provision?

A. Yes.

Q. Why are you so positive?

A. Because the matching funds provision in itself creates disparities.

Q. And your whole description of this situation involving Robert Blendu is based on what he told you. Is that correct?

A. And looking at campaign finance data.

Q. So you looked at campaign finance data regarding Robert Blendu's race?

A. Yes, briefly.

Q. Did you speak with anybody – when you say, "briefly," what do you mean?

A. I looked at the reports for a few minutes. I mean, nothing detailed, but . . .

Q. So you glanced at the reports?

A. Yeah. I noticed they used the same campaign consultant, those kind of things.

* * *

[104] Q. So you actually looked at the campaign finance reports to see how his opponents spent their money?

A. Um-hmm.

Q. Can you name any other real life example?

A. The Tony Bouie and Karl Seal race was a – someone who supported both Sam Crump and Tony Bouie, I watched that with great interest, yeah. I saw that Tony Bouie and – or excuse me – Sam Crump and Karl Seal used a team approach to gain advantage on Tony Bouie.

MR. DRANIAS: You know, I'm not so sure the transcription would have been clear on that. Can I have the question read back, if you don't mind?

MS. NEUBAUER: Sure.

(Record read.)

THE WITNESS: That – the race involving Tony Bouie, Karl Seal, and Sam Crump.

BY MS. NEUBAUER:

Q. Can you explain how a disparity was created in that race?

A. The ability of the two – Sam Crump and Karl Seal to team their resources together and go after Tony Bouie created a funding advantage – fundraising advantage or funding advantage for the two candidates.

[105] Q. Can you name any other real life example?

A. I can name the Corporation Commission race on both sides. The teaming of Bob Robson, Bob Stump, and Mary McClure. And on the Democrat side the solar team, Sam George and Paul Newman and Sandra Kennedy.

Q. How are you aware of disparities created in those races?

A. I know Bob Robson. I've talked to him. And I know the candidates in both – in both of those races.

Q. Just to go –

A. And – and by looking at the campaign finance spending.

Q. So Bob Robson ran as part of what you're describing as a slate?

A. Correct.

Q. And you're saying that he earned more funding – or he had more funding at his disposal than he otherwise would have because of the matching funds provision?

A. No. He did not, his slate members did.

Q. So the team that he was running with –

A. Correct.

Q. – had more money than they otherwise would have –

A. Correct.

* * *

[141] Q. So your opinion is that the system can be gamed?

A. Yeah. Current regulatory system allows manipulation of matching fund provisions.

Q. So your opinion is that the system can be gamed, or that the current regulatory system allows manipulation of the matching fund provisions?

A. The current regulatory system allows manipulation of the matching fund provisions.

Q. What is your basis for the opinion – for your opinion that the current regulatory system allows manipulation of the matching fund provisions?

A. Based on my 15 years of campaign experience and as a lobbyist who – as all campaign consultants look to maximize opportunities there are – there are ideas or concepts that have come up that could provide opportunities to game the system.

Q. Is there anything else that has formed the basis for your opinion that the current regulatory system allows manipulation of the matching fund provisions?

A. Fundamentally it's my experience in looking at – it's fundamentally based on my professional experience.

* * *

[143] Have you looked at any real life examples in reaching your conclusions that the current regulatory system allows manipulation of the matching funds provision?

A. Yes.

Q. What are those real life examples?

A. There was matching funds contribution provided to Len Munsil in the last gubernatorial election.

Q. Could you please explain how that matching fund –

A. Gaming occurred. A –

Q. I didn't ask the question.

A. Oh, I'm sorry.

Q. I'm sorry.

Could you please explain how matching funds going to Len Munsil supports your conclusion that the current regulatory system allows manipulation of the [144] matching fund provisions?

A. I can.

Q. Please do.

A. The issue in the Munsil case was there was an undocumented third-party expenditure. It was autodialers statewide. Matching funds were issued to compensate for those funds. The source of the campaign contributions was never determined, nor the extent. So they had to make estimations about the size and scope of the independent expenditure.

The fact that there was not a determination or a hard – any discovery that – about the specifics of that matching funds suggests that that – the level of matching funds could be over- or under-reported causing either too many matching funds to be distributed or too little matching funds to be distributed.

Q. Do you know that the independent expenditure you're referring to related to the Munsil campaign was intended to manipulate the system?

A. Since it was unreported, that's a reasonable conclusion to come to.

* * *

[156] Q. I had asked you what the basis for your opinion was that Clean Elections is not responsible solely for increased election competition?

A. The analysis that has been conducted to date, there have been two studies. One by the Goldwater Institute that showed that elections are not any more competitive. That was a very limited study. And then there was a paper by Meyer, Warner, and Williams that made a suggestion that elections are cleaner – or not cleaner, excuse me – are more competitive.

In looking at that analysis I believe that he failed to control for a number of significant variables, including spending by the political parties, changes in underlying demographics in the state that may have a significant influence on electoral competition.

Q. And just to clarify. Again, you've testified that you have never peer reviewed a paper, is that correct, an academic paper?

A. That is correct.

Q. Okay. Is there any other basis for your opinion that Clean Elections is not solely responsible for increased election competition?

A. Those are – those are the major points that I would argue.

* * *

[172] Q. To a reasonable degree of certainty in your fields of expertise, if a matching funds system is overlaid on top of the contribution limits that have already been in place and are in place under Arizona law, would that do anything to diminish undue influence by special interests?

A. No.

* * *

[173] When you say the current system since such low contribution limits across the board for any type of candidate, that the impact of the matching funds provisions of the Clean Elections system has no impact at all on the degree of undue influence by special interest?

A. That is correct.

Q. And is that to a reasonable degree of certainty in your fields of expertise?

A. Yes.

* * *

TERRY GODDARD
Attorney General
Mary R. O'Grady (011434)
Solicitor General
Tanja K. Shipman (025205)
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2926
Telephone: (602) 542-3333
Facsimile: (602) 542-8308
Attorneys for Defendants Secretary of State
Jan Brewer and Arizona Citizens Clean
Elections Commission

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, AND TONY BOUIE,

Plaintiffs,

and

DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, AND ARIZONA TAXPAYERS ACTION COMMITTEE,

Plaintiff-Intervenors,

v.

No. CV08-1550-PHX-ROS

DECLARATION OF PAMELA DURBIN IN SUPPORT OF DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' AND PLAINTIFF-INTERVENORS' MOTIONS FOR PRELIMINARY INJUNCTION

(Filed Sep. 23, 2008)

JAN BREWER, in her official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, Defendants, and CLEAN ELECTIONS INSTITUTE, INC., Defendant-Intervenor.	(Assigned to the Honorable Roslyn O. Silver)

I, Pamela Durbin, declare:

1. I am a Democratic candidate for a seat in the Arizona House of Representatives for legislative district 3.

2. This is my first time running for office in Arizona. I have two opponents in the race, Republicans Doris Goodale and Nancy McLain. Ms. Goodale is running as a participating candidate and Ms. McLain is running as a traditional candidate. There are two seats available in my race.

3. I have chosen to run as a participating candidate because it would be difficult, if not impossible, for me to raise the funds necessary to run as a traditional candidate. The Clean Elections system enables ordinary citizens, without great personal wealth, to run for office in Arizona and, as such, to offer voters greater choice of candidates. In addition, the Clean Elections system helps to ensure candidates' loyalty to the people they seek to represent, not to special interests.

4. Although I do not know whether or to what extent matching funds may be triggered in this race, I am concerned that such matching funds may not be available in the event that my traditional-candidate opponent makes expenditures against me above the election spending limit or in the event any independent expenditures are made against me or in favor of that opponent.

5. As in my primary race, I expect that the large share of the funding I received from Clean Elections for the general election will be spent by my campaign well in advance of the election. Indeed, most of my campaign committee's money for the general election has already been budgeted for specific campaign expenses. If independent expenditures or traditional-candidate expenditures are made either to defeat my candidacy or to benefit that opponent, I would be effectively unable to respond to those expenditures without the availability of matching Clean Elections funds.

6. In order to run as a participating candidate in this election cycle, I was required to collect approximately 220 qualifying contributions. I collected approximately 284 qualifying contributions in the amount of $5 each from different qualified electors. I personally collected most of those contributions, which required substantial effort on my part, especially considering that I have full time employment and am not able to devote full time to my campaign efforts.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 19th day of September 2008.

/s/ Pamela Durbin
Pamela Durbin

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

[LOGO] **Citizens Clean Elections Commission** [LOGO]

CCEC DISBURSEMENT SUMMARY

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Governor			Primary (P), General (G) Initial (I), Matching (M)
Bayless, Betsey – Republican	7/3/2002	$409,950.00	P, I
Bayless, Betsey – Republican	7/9/2002	$19,970.28	P, M
Bayless, Betsey – Republican	7/11/2002	$26,916.27	P, M
Bayless, Betsey – Republican	7/18/2002	$35,844.57	P, M
Bayless, Betsey – Republican	7/25/2002	$52,777.24	P, M
Bayless, Betsey – Republican	8/1/2002	$21,198.35	P, M
Bayless, Betsey – Republican	8/9/2002	$15,495.82	P, M
Bayless, Betsey – Republican	8/15/2002	$34,597.06	P, M
Bayless, Betsey – Republican	8/19/2002	$40,383.76	P, M
Bayless, Betsey – Republican	8/21/2002	$114,602.07	P, M
Bayless, Betsey – Republican	8/23/2002	$3,701.42	P, M
Bayless, Betsey – Republican	8/29/2002	$119,835.36	P, M
Bayless, Betsey – Republican	8/29/2002	$105,329.82	P, M
Bayless, Betsey – Republican	9/3/2002	$18,033.58	P, M
Bayless, Betsey – Republican	9/4/2002	$19,804.04	P, M
Bayless, Betsey – Republican	9/5/2002	$6,521.54	P, M

Bayless, Betsey – Republican	9/6/2002	$2,414.98	P, M
Bayless, Betsey – Republican	9/9/2002	$1,072.08	P, M
Bayless, Betsey – Republican	9/10/2002	$15,619.69	P, M
Bayless, Betsey – Republican	9/10/2002	$4,760.94	P, M
Bayless, Betsey – Republican	9/12/2002	$8,318.74	P, M
	Candidate Total	**$1,077,169.61**	
Gutierrez, Alfredo – Democrat	6/24/2002	$409,950.00	P, I
	Candidate Total	**$409,950.00**	
Mahoney, Richard – Independent	8/2/2002	$717,416.00	P, I
Mahoney, Richard – Independent	10/3/2002	$39,837.35	G, M
Mahoney, Richard – Independent	10/4/2002	$179,650.00	G, M
Mahoney, Richard – Independent	10/7/2002	$1,000.00	G, M
Mahoney, Richard – Independent	10/10/2002	$223,864.41	G, M
Mahoney, Richard – Independent	10/16/2002	$24,000.00	G, M
Mahoney, Richard – Independent	10/17/2002	$83,719.51	G, M
Mahoney, Richard – Independent	10/24/2002	$140,433.11	G, M
Mahoney, Richard – Independent	10/25/2002	$8,450.00	G, M

Mahoney, Richard – Independent	10/28/2002	$15,761.17	G, M
Mahoney, Richard – Independent	10/29/2002	$88,552.67	G, M
Mahoney, Richard – Independent	10/30/2002	$85,463.33	G, M
Mahoney, Richard – Independent	10/31/2002	$10,492.02	G, M
Mahoney, Richard – Independent	11/1/2002	$23,695.00	G, M
Mahoney, Richard – Independent	11/4/2002	$19,415.00	G, M
Mahoney, Richard – Independent	11/5/2002	$33,125.00	G, M
Candidate Total	**$1,694,874.57**		
Napolitano, Janet – Democrat	5/3/2002	$409,950.00	P, I
Napolitano, Janet – Democrat	9/12/2002	$614,930.00	G, I
Napolitano, Janet – Democrat	10/3/2002	$219,487.35	G, M
Napolitano, Janet – Democrat	10/10/2002	$223,864.41	G, M
Napolitano, Janet – Democrat	10/17/2002	$113,719.51	G, M
Napolitano, Janet – Democrat	10/24/2002	$672,788.73	G, M
Candidate Total	**$2,254,740.00**		
Osterloh, Mark – Democrat	5/21/2002	$409,950.00	P, I
Candidate Total	**$409,950.00**		

Springer, Carol – Republican	8/19/2002	$409,930.00	P, I
Springer, Carol – Republican	8/19/2002	$247,185.35	P, M
Springer, Carol – Republican	8/21/2002	$114,602.07	P, M
Springer, Carol – Republican	8/23/2002	$3,701.42	P, M
Springer, Carol – Republican	8/29/2002	$119,835.36	P, M
Springer, Carol – Republican	8/29/2002	$105,329.82	P, M
Springer, Carol – Republican	9/3/2002	$18,053.58	P, M
Springer, Carol – Republican	9/4/2002	$19,804.04	P, M
Springer, Carol – Republican	9/5/2002	$6,521.54	P, M
Springer, Carol – Republican	9/6/2002	$2,414.98	P, M
Springer, Carol – Republican	9/9/2002	$1,072.08	P, M
Springer, Carol – Republican	9/10/2002	$4,760.94	P, M
Springer, Carol – Republican	9/10/2002	$15,619.69	P, M
	Candidate Total	**$1,068,850.87**	
	Total For Governor	$6,915,535.05	

Secretary of State		Primary (P), General (G) Initial (I), Matching (M)	
Brewer, Jan – Republican	7/2/2002	$86,310.00	P, I
Brewer, Jan – Republican	9/12/2002	$129,460.00	G, I
Brewer, Jan – Republican	10/29/2002	$116.67	G, M
Brewer, Jan – Republican	10/30/2002	$22,973.33	G, M
Brewer, Jan – Republican	11/1/2002	$6,735.00	G, M
Brewer, Jan – Republican	11/15/2002	$36,400.50	G, M
Brewer, Jan – Republican	12/5/2002	$66,505.98	G, M
	Candidate Total	**$348,501.48**	
Collins, Sharon – Republican	8/19/2002	$86,310.00	P, I
	Candidate Total	**$86,310.00**	
Cummiskey, Chris – Democrat	7/30/2002	$86,310.00	P, I
Cummiskey, Chris – Democrat	9/12/2002	$129,460.00	G, I
Cummiskey, Chris – Democrat	11/4/2002	$20,590.50	G, M
	Candidate Total	**$236,360.50**	
DiCiccio, Sal – Republican	8/9/2002	$86,310.00	P, I
	Candidate Total	**$86,310.00**	
Total For Secretary of State		$757,481.98	

Attorney General			Primary (P), General (G) Initial (I), Matching (M)
Goddard, Terry – Democrat	6/26/2002	$86,310.00	P, I
Goddard, Terry – Democrat	9/12/2002	$129,460.00	G, I
	Candidate Total	**$215,770.00**	
Thomas, Andrew – Republican	6/11/2002	$86,310.00	P, I
Thomas, Andrew – Republican	7/9/2002	$7,351.68	P, M
Thomas, Andrew – Republican	7/25/2002	$16,199.63	P, M
Thomas, Andrew – Republican	8/1/2002	$33,266.82	P, M
Thomas, Andrew – Republican	8/7/2002	$18,884.49	P, M
Thomas, Andrew – Republican	8/14/2002	$11,014.00	P, M
Thomas, Andrew – Republican	8/22/2002	$10,407.74	P, M
Thomas, Andrew – Republican	8/26/2002	$6,981.27	P, M
Thomas, Andrew – Republican	8/30/2002	$21,738.66	P, M
Thomas, Andrew – Republican	9/5/2002	$3,829.52	P, M
Thomas, Andrew – Republican	9/6/2002	$500.00	P, M
Thomas, Andrew – Republican	9/10/2002	$13,308.80	P, M
Thomas, Andrew – Republican	9/12/2002	$12,263.28	P, M

Thomas, Andrew – Republican	9/12/2002	$129,460.00	G, I
Thomas, Andrew – Republican	10/29/2002	$116.67	G, M
Thomas, Andrew – Republican	10/30/2002	$22,973.33	G, M
Thomas, Andrew – Republican	10/31/2002	$1,116.43	G, M
Thomas, Andrew – Republican	11/1/2002	$6,735.00	G, M
	Candidate Total	**$402,457.32**	
Total For Attorney General		$618,227.32	

State Treasurer		Primary (P), General (G) Initial (I), Matching (M)	
Petersen, David A. – Republican	7/18/2002	$43,150.00	P, I
Petersen, David A. – Republican	9/12/2002	$64,730.00	G, I
Petersen, David A. – Republican	10/29/2002	$116.67	G, M
	Candidate Total	**$107,996.67**	
Petrenka, Richard – Republican	8/7/2002	$43,150.00	P, I
	Candidate Total	**$43,150.00**	
Solomon, Ruth – Democrat	8/15/2002	$43,150.00	P, I
Solomon, Ruth – Democrat	9/12/2002	$64,730.00	G, I
	Candidate Total	**$107,880.00**	
Total For State Treasurer		$259,026.67	

Superintendent of Public Instruction		Primary (P), General (G) Initial (I), Matching (M)	
Bee, Keith – Republican	7/16/2002	$62,422.89	P, M
Bee, Keith – Republican	7/16/2002	$43,150.00	P, I
Bee, Keith – Republican	7/24/2002	$1,448.86	P, M
Bee, Keith – Republican	7/29/2002	$3,137.22	P, M
Bee, Keith – Republican	8/1/2002	$19,291.03	P, M
	Candidate Total	**$129,450.00**	
Blanchard, Jay – Democrat	7/18/2002	$43,150.00	P, I
Blanchard, Jay – Democrat	9/12/2002	$64,730.00	G, I
	Candidate Total	**$107,880.00**	
Molera, Jaime – Republican	7/18/2002	$62,422.89	P, M
Molera, Jaime – Republican	7/18/2002	$43,150.00	P, I
Molera, Jaime – Republican	7/24/2002	$1,448.86	P, M
Molera, Jaime – Republican	7/29/2002	$3,137.22	P, M
Molera, Jaime – Republican	8/1/2002	$19,291.03	P, M
	Candidate Total	**$129,450.00**	

Rich, Rodney – Democrat	8/16/2002	$43,150.00	P, I
Candidate Total		**$43,150.00**	
Total For Superintendent of Public Instruction		$409,930.00	

State Mine Inspector	Primary (P), General (G) Initial (I), Matching (M)		
Hallock, Kenneth – Democrat	8/1/2002	$21,580.00	P, I
Hallock, Kenneth – Democrat	9/12/2002	$32,370.00	G, I
Candidate Total		**$53,950.00**	
Martin, Douglas – Republican	7/26/2002	$21,580.00	P, I
Martin, Douglas – Republican	9/12/2002	$32,370.00	G, I
Candidate Total		**$53,950.00**	
Total For State Mine Inspector		$107,900.00	

Corporation Commissioner – Term Ending January 3, 2005	Primary (P), General (G) Initial (I), Matching (M)		
Cunningham, George – Democrat	8/26/2002	$43,150.00	P, I
Cunningham, George – Democrat	9/12/2002	$64,730.00	G, I
Candidate Total		**$107,880.00**	

Hatch-Miller, Jeff – Republican	7/3/2002	$43,150.00	P, I
Hatch-Miller, Jeff – Republican	9/12/2002	$64,730.00	G, I
	Candidate Total	**$107,880.00**	
James, Roland – Democrat	8/29/2002	$43,150.00	P, I
James, Roland – Democrat	9/12/2002	$64,730.00	G, I
	Candidate Total	**$107,880.00**	
Total For Corporation Commissioner – Term Ending January 3, 2005		$323,640.00	

Corporation Commissioner – Term Ending January 1, 2007 Primary (P), General (G) Initial (I), Matching (M)

Irvin, Jim – Republican	9/10/2002	$43,150.00	P, I
Irvin, Jim – Republican	9/12/2002	$64,730.00	G, I
	Candidate Total	**$107,880.00**	
Walsh, James – Democrat	8/30/2002	$43,150.00	P, I
Walsh, James – Democrat	9/12/2002	$64,730.00	G, I
	Candidate Total	**$107,880.00**	
Total For Corporation Commissioner – Term Ending January 1, 2007		$215,760.00	

State Senator – District No. 1		Primary (P), General (G) Initial (I), Matching (M)	
Knight, Dawn – Democrat	7/2/2002	$10,790.00	P, I
Knight, Dawn – Democrat	9/12/2002	$16,180.00	G, I
Knight, Dawn – Democrat	9/17/2002	$11,315.84	G, M
Knight, Dawn – Democrat	11/1/2002	$3,389.07	G, M
	Candidate Total	**$41,674.91**	
O'Donnell, John – Democrat	8/14/2002	$10,790.00	P, I
	Candidate Total	**$10,790.00**	
Total For State Senator – District No. 1		$52,464.91	

State Senator – District No. 2		Primary (P), General (G) Initial (I), Matching (M)	
Johnson, Rita – Democrat	6/24/2002	$16,185.00	P, I
	Candidate Total	**$16,185.00**	
Total For State Senator – District No. 2		$16,185.00	

State Senator – District No. 3		Primary (P), General (G) Initial (I), Matching (M)	
Jessie, Jacqueline – Democrat	8/27/2002	$10,790.00	P, I
Jessie, Jacqueline – Democrat	9/12/2002	$16,180.00	G, I

Jessie, Jacqueline – Democrat	9/17/2002	$12,321.96	G, M
Jessie, Jacqueline – Democrat	10/3/2002	$7,210.00	G, M
Jessie, Jacqueline – Democrat	10/23/2002	$9,420.00	G, M
Jessie, Jacqueline – Democrat	10/29/2002	$965.00	G, M
Jessie, Jacqueline – Democrat	11/5/2002	$648.04	G, M
	Candidate Total	**$57,535.00**	
Total For State Senator – District No. 3		$57,535.00	

State Senator – District No. 4		Primary (P), General (G) Initial (I), Matching (M)	
Harper, Jack – Republican	6/24/2002	$16,185.00	P, I
Harper, Jack – Republican	9/5/2002	$1,634.64	P, M
Harper, Jack – Republican	9/6/2002	$3,850.00	P, M
Harper, Jack – Republican	9/12/2002	$4,050.82	P, M
Harper, Jack – Republican	9/12/2002	$1,310.00	G, I
	Candidate Total	**$27,030.46**	
Total For State Senator – District No. 4		$27,030.46	

State Senator – District No. 7		Primary (P), General (G) Initial (I), Matching (M)	
Bollerman, Jeff – Democrat	9/9/2002	$10,790.00	P, I
Bollerman, Jeff – Democrat	9/12/2002	$16,180.00	G, I
	Candidate Total	**$26,970.00**	
Marsh, Wesley – Republican	8/6/2002	$16,185.00	P, I
Marsh, Wesley – Republican	8/6/2002	$10,479.33	P, M
Marsh, Wesley – Republican	8/7/2002	$3,206.74	P, M
Marsh, Wesley – Republican	9/5/2002	$10,945.34	P, M
	Candidate Total	**$40,816.41**	
	Total For State Senator – District No. 7	$67,786.41	

State Senator – District No. 9		Primary (P), General (G) Initial (I), Matching (M)	
Donaldson, Blaine – Republican	6/11/2002	$10,790.00	P, I
Donaldson, Blaine – Republican	7/16/2002	$104.39	P, M
Donaldson, Blaine – Republican	8/1/2002	$122.27	P, M
Donaldson, Blaine – Republican	8/13/2002	$1,050.00	P, M
Donaldson, Blaine – Republican	8/21/2002	$1,667.34	P, M
Donaldson, Blaine – Republican	8/28/2002	$523.24	P, M

Donaldson, Blaine – Republican	8/29/2002	$7,775.51	P, M
Donaldson, Blaine – Republican	9/4/2002	$1,019.08	P, M
Donaldson, Blaine – Republican	9/10/2002	$666.75	P, M
	Candidate Total	**$23,718.58**	
Turner, Bart – Republican	8/1/2002	$16,185.00	P, I
Turner, Bart – Republican	8/29/2002	$5,848.05	P, M
Turner, Bart – Republican	9/4/2002	$1,019.08	P, M
Turner, Bart – Republican	9/10/2002	$666.75	P, M
Turner, Bart – Republican	11/1/2002	$3,960.00	P, M
	Candidate Total	**$27,678.88**	
	Total For State Senator – District No. 9	$51,397.46	

State Senator – District No. 10		Primary (P), General (G) Initial (I), Matching (M)	
Kennedy, Judy – Democrat	7/12/2002	$10,790.00	P, I
Kennedy, Judy – Democrat	9/12/2002	$16,180.00	G, I
Kennedy, Judy – Democrat	9/17/2002	$32,360.00	G, M
	Candidate Total	**$59,330.00**	
	Total For State Senator – District No. 10	$59,330.00	

State Senator – District No. 11		Primary (P), General (G) Initial (I), Matching (M)
Starky, Stuart – Democrat	9/6/2002	$10,790.00 P, I
Starky, Stuart – Democrat	9/12/2002	$16,180.00 G, I
Starky, Stuart – Democrat	10/16/2002	$4,215.09 G, M
Starky, Stuart – Democrat	10/30/2002	$1,955.78 G, M
Starky, Stuart – Democrat	10/31/2002	$7,580.00 G, M
Starky, Stuart – Democrat	11/1/2002	$1,180.00 G, M
Starky, Stuart – Democrat	11/5/2002	$400.00 G, M
	Candidate Total	**$42,300.87**
Total For State Senator – District No. 11		$42,300.87

State Senator – District No. 12		Primary (P), General (G) Initial (I), Matching (M)
Mahoney, Peter – Democrat	8/14/2002	$10,790.00 P, I
Mahoney, Peter – Democrat	9/12/2002	$16,180.00 G, I
Mahoney, Peter – Democrat	9/17/2002	$11,520.00 G, M
Mahoney, Peter – Democrat	9/19/2002	$1,670.00 G, M
Mahoney, Peter – Democrat	10/22/2002	$2,470.00 G, M
Mahoney, Peter – Democrat	10/30/2002	$5,000.00 G, M

Mahoney, Peter – Democrat	10/30/2002	$5,000.00	G, M
Mahoney, Peter – Democrat	11/1/2002	$6,700.00	G, M
	Candidate Total	**$59,330.00**	
Total For State Senator – District No. 12		$59,330.00	

State Senator – District No. 13		Primary (P), General (G) Initial (I), Matching (M)	
Miranda, Richard – Democrat	7/16/2002	$16,185.00	P, I
Miranda, Richard – Democrat	8/21/2002	$1,841.47	P, M
Miranda, Richard – Democrat	8/29/2002	$700.00	P, M
Miranda, Richard – Democrat	9/4/2002	$1,075.39	P, M
Miranda, Richard – Democrat	9/10/2002	$1,400.00	P, M
Miranda, Richard – Democrat	9/12/2002	$1,125.00	G, I
	Candidate Total	**$22,326.86**	
Total For State Senator – District No. 13		$22,326.86	

State Senator – District No. 14		Primary (P), General (G) Initial (I), Matching (M)	
Wilcox, Earl – Democrat	8/6/2002	$16,185.00	P, I
Wilcox, Earl – Democrat	9/9/2002	$252.09	P, M

Wilcox, Earl – Democrat	9/10/2002	$2,718.00	P, M
Wilcox, Earl – Democrat	9/10/2002	$560.00	P, M
Wilcox, Earl – Democrat	9/12/2002	$800.00	P, M
	Candidate Total	**$20,515.09**	
Total For State Senator – District No. 14		$20,515.09	

State Senator – District No. 15		Primary (P), General (G) Initial (I), Matching (M)	
Mitchell, Kathryn A. – Democrat	7/1/2002	$10,790.00	P, I
Mitchell, Kathryn A. – Democrat	8/19/2002	$1,288.48	P, M
Mitchell, Kathryn A. – Democrat	8/21/2002	$2,730.12	P, M
Mitchell, Kathryn A. – Democrat	9/6/2002	$550.86	P, M
Mitchell, Kathryn A. – Democrat	9/10/2002	$294.00	P, M
Mitchell, Kathryn A. – Democrat	9/10/2002	$707.82	P, M
	Candidate Total	**$16,361.28**	
Total For State Senator – District No. 15		$16,361.28	

State Senator – District No. 17		Primary (P), General (G) Initial (I), Matching (M)
Downing, Yuri – Libertarian	9/5/2002	$10,790.00 P, I
Downing, Yuri – Libertarian	9/12/2002	$16,180.00 G, I
Downing, Yuri – Libertarian	10/16/2002	$2,726.00 G, M
Downing, Yuri – Libertarian	10/29/2002	$3,750.00 G, M
Downing, Yuri – Libertarian	10/31/2002	$5,000.00 G, M
Downing, Yuri – Libertarian	11/1/2002	$1,097.50 G, M
Downing, Yuri – Libertarian	11/6/2002	$1,937.93 G, M
	Candidate Total	**$41,481.43**
Knaperek, Laura – Republican	7/11/2002	$10,790.00 P, I
Knaperek, Laura – Republican	9/12/2002	$16,180.00 G, I
Knaperek, Laura – Republican	10/16/2002	$2,726.00 G, M
Knaperek, Laura – Republican	10/29/2002	$3,750.00 G, M
Knaperek, Laura – Republican	11/1/2002	$1,097.50 G, M
	Candidate Total	**$34,543.50**
Mitchell, Harry – Democrat	8/7/2002	$10,790.00 P, I
Mitchell, Harry – Democrat	9/12/2002	$16,180.00 G, I

Mitchell, Harry – Democrat	10/31/2002	$5,000.00	G, M
Mitchell, Harry – Democrat	11/1/2002	$5,000.00	G, M
Mitchell, Harry – Democrat	11/4/2002	$1,937.93	G, M
	Candidate Total	**$38,907.93**	
Total For State Senator – District No. 17		$114,932.86	

State Senator – District No. 19		Primary (P), General (G) Initial (I), Matching (M)	
Cash, Paul – Democrat	8/5/2002	$10,790.00	P, I
Cash, Paul – Democrat	9/12/2002	$16,180.00	G, I
Cash, Paul – Democrat	9/17/2002	$2,015.00	G, M
Cash, Paul – Democrat	10/10/2002	$1,190.00	G, M
Cash, Paul – Democrat	10/24/2002	$540.00	G, M
	Candidate Total	**$30,715.00**	
Total For State Senator – District No. 19		$30,715.00	

State Senator – District No. 22		Primary (P), General (G) Initial (I), Matching (M)	
Brown, Brent W. – Democrat	7/29/2002	$10,790.00	P, I
Brown, Brent W. – Democrat	9/12/2002	$16,180.00	G, I
	Candidate Total	**$26,970.00**	
Dunham, Cynthia – Republican	6/18/2002	$16,185.00	P, I
	Candidate Total	**$16,185.00**	
Verschoor, Thayer – Republican	7/16/2002	$16,185.00	P, I
Verschoor, Thayer – Republican	9/17/2002	$10,785.00	G, I
	Candidate Total	**$26,970.00**	
Total For State Senator – District No. 22		$70,125.00	

State Senator – District No. 25		Primary (P), General (G) Initial (I), Matching (M)	
Stoddard, Dave – Independent	9/4/2002	$18,879.00	P, I
Stoddard, Dave – Independent	10/10/2002	$822.09	G, M
Stoddard, Dave – Independent	10/22/2002	$1,395.00	G, I
Stoddard, Dave – Independent	10/31/2002	$250.00	G, M
	Candidate Total	**$21,346.09**	
Total For State Senator – District No. 25		$21,346.09	

State Senator – District No. 27		Primary (P), General (G) Initial (I), Matching (M)	
Garcia, Jorge – Democrat	7/23/2002	$16,185.00	P, I
Garcia, Jorge – Democrat	9/12/2002	$10,785.00	G, I
	Candidate Total	**$26,970.00**	
Kromko, John – Democrat	8/7/2002	$16,185.00	P, I
	Candidate Total	**$16,185.00**	
Total For State Senator – District No. 27		$43,155.00	

State Senator – District No. 28		Primary (P), General (G) Initial (I), Matching (M)	
Swanson, Kimberly – Libertarian	9/6/2002	$10,790.00	P, I
Swanson, Kimberly – Libertarian	9/12/2002	$16,180.00	G, I
Swanson, Kimberly – Libertarian	9/17/2002	$15,894.00	G, M
Swanson, Kimberly – Libertarian	9/25/2002	$925.00	G, M
Swanson, Kimberly – Libertarian	10/17/2002	$4,765.00	G, M
Swanson, Kimberly – Libertarian	10/22/2002	$150.00	G, M
	Candidate Total	**$48,704.00**	
Total For State Senator – District No. 28		$48,704.00	

State Representative – District 1		Primary (P), General (G) Initial (I), Matching (M)
Camarot, Henry – Democrat	7/18/2002	$10,790.00 P, I
Camarot, Henry – Democrat	9/12/2002	$16,180.00 G, I
Camarot, Henry – Democrat	11/1/2002	$11,604.60 G, M
Camarot, Henry – Democrat	11/4/2002	$1,256.85 G, M
	Candidate Total	**$39,831.45**
Mason, Lucy – Republican	6/17/2002	$10,790.00 P, I
Mason, Lucy – Republican	6/28/2002	$5,395.00 P, I
Mason, Lucy – Republican	8/27/2002	$3,215.36 P, M
Mason, Lucy – Republican	8/28/2002	$1,660.92 P, M
Mason, Lucy – Republican	9/9/2002	$5,877.50 P, M
Mason, Lucy – Republican	9/12/2002	$10,785.00 G, I
Mason, Lucy – Republican	10/31/2002	$2,743.43 G, M
Mason, Lucy – Republican	11/1/2002	$6,245.60 G, M
Mason, Lucy – Republican	11/4/2002	$3,560.20 G, M
Mason, Lucy – Republican	11/5/2002	$5,225.00 G, M
	Candidate Total	**$55,498.01**

Strawn, Thom – Republican	8/28/2002	$16,185.00	P, I
Strawn, Thom – Republican	8/28/2002	$4,876.28	P, M
Strawn, Thom – Republican	9/9/2002	$5,877.50	P, M
	Candidate Total	**$26,938.78**	
Total For State Representative – District 1		$122,268.24	
State Representative – District 2	Primary (P), General (G) Initial (I), Matching (M)		
Cherry, Bill – Democrat	6/24/2002	$16,185.00	P, I
	Candidate Total	**$16,185.00**	
La Russo, Aresta – Democrat	7/30/2002	$16,185.00	P, I
	Candidate Total	**$16,185.00**	
Sedillo, James J. "Jim" – Democrat	7/18/2002	$16,185.00	P, I
	Candidate Total	**$16,185.00**	
Total For State Representative – District 2		$48,555.00	
State Representative – District 3	Primary (P), General (G) Initial (I), Matching (M)		
Capalby, Matthew – Democrat	8/5/2002	$10,790.00	P, I
Capalby, Matthew – Democrat	9/12/2002	$16,180.00	G, I
Capalby, Matthew – Democrat	11/5/2002	$3,188.18	G, M

	Candidate Total	**$30,158.18**	
Coburn, Maury – Republican	8/21/2002	$16,185.00	P, I
Coburn, Maury – Republican	9/10/2002	$885.81	P, M
	Candidate Total	**$17,070.81**	
Fabrizio, Lee – Republican	6/14/2002	$10,790.00	P, I
Fabrizio, Lee – Republican	8/5/2002	$5,395.00	P, I
	Candidate Total	**$16,185.00**	
Glancy, Richard – Democrat	8/27/2002	$10,790.00	P, I
Glancy, Richard – Democrat	9/12/2002	$16,180.00	G, I
	Candidate Total	**$26,970.00**	
Wagner III, Frederick William – Republican	7/1/2002	$16,185.00	P, I
Wagner III, Frederick William – Republican	9/12/2002	$10,785.00	G, I
Wagner III, Frederick William – Republican	11/5/2002	$3,188.18	G, M
	Candidate Total	**$30,158.18**	
Total For State Representative – District 3		$120,542.17	

State Representative – District 4		Primary (P), General (G) Initial (I), Matching (M)	
Boone, Tom – Republican	6/20/2002	$16,185.00	P, I
Boone, Tom – Republican	9/12/2002	$10,785.00	G, I
	Candidate Total	**$26,970.00**	
Burges, Judy M. – Republican	6/20/2002	$10,790.00	P, I
Burges, Judy M. – Republican	6/21/2002	$5,395.00	P, I
	Candidate Total	**$16,185.00**	
Cordova, Ephram – Republican	8/22/2002	$16,185.00	P, I
	Candidate Total	**$16,185.00**	
Hubbs, Carole – Republican	6/18/2002	$16,185.00	P, I
Hubbs, Carole – Republican	9/12/2002	$10,785.00	G, I
	Candidate Total	**$26,970.00**	
Mahaney Jr., John – Democrat	8/16/2002	$10,790.00	P, I
Mahaney Jr., John – Democrat	9/12/2002	$16,180.00	G, I
	Candidate Total	**$26,970.00**	
Total For State Representative – District 4		$113,280.00	

State Representative – District 5		Primary (P), General (G) Initial (I), Matching (M)
Brimhall, Debra – Republican	8/27/2002	$10,790.00 P, I
Brimhall, Debra – Republican	8/27/2002	$5,494.86 P, M
Brimhall, Debra – Republican	8/28/2002	$3,769.39 P, M
Brimhall, Debra – Republican	8/30/2002	$2,966.42 P, M
Brimhall, Debra – Republican	9/3/2002	$2,713.89 P, M
Brimhall, Debra – Republican	9/10/2002	$4,211.99 P, M
	Candidate Total	**$29,946.55**
Jeffers, Bill – Democrat	6/19/2002	$10,790.00 P, I
Jeffers, Bill – Democrat	9/12/2002	$16,180.00 G, I
Jeffers, Bill – Democrat	9/17/2002	$11,285.67 G, M
Jeffers, Bill – Democrat	10/17/2002	$3,455.00 G, M
Jeffers, Bill – Democrat	10/29/2002	$3,466.66 G, M
Jeffers, Bill – Democrat	10/31/2002	$2,310.00 G, M
Jeffers, Bill – Democrat	11/1/2002	$1,219.73 G, M
	Candidate Total	**$48,707.06**

Maestas, Claudia – Democrat	6/27/2002	$10,790.00	P, I
Maestas, Claudia – Democrat	9/12/2002	$16,180.00	G, I
Maestas, Claudia – Democrat	9/17/2002	$11,285.67	G, M
Maestas, Claudia – Democrat	10/17/2002	$3,455.00	G, M
Maestas, Claudia – Democrat	10/29/2002	$3,466.66	G, M
Maestas, Claudia – Democrat	10/31/2002	$2,310.00	G, M
Maestas, Claudia – Democrat	11/1/2002	$1,219.73	G, M
	Candidate Total	**$48,707.06**	
Total For State Representative – District 5		$127,360.67	

State Representative – District 6		Primary (P), General (G) Initial (I), Matching (M)	
Larson, Laurie – Democrat	7/18/2002	$10,790.00	P, I
Larson, Laurie – Democrat	9/12/2002	$16,180.00	G, I
Larson, Laurie – Democrat	10/4/2002	$1,121.00	G, M
Larson, Laurie – Democrat	10/28/2002	$1,410.00	G, M
Larson, Laurie – Democrat	10/31/2002	$2,020.00	G, M
Larson, Laurie – Democrat	11/5/2002	$150.00	G, M
	Candidate Total	**$31,671.00**	

Lindsay, Sharon – Democrat	9/18/2002	$16,180.00	G, I
Lindsay, Sharon – Democrat	10/4/2002	$1,121.00	G, M
Lindsay, Sharon – Democrat	10/28/2002	$1,410.00	G, M
Lindsay, Sharon – Democrat	10/31/2002	$2,020.00	G, M
Lindsay, Sharon – Democrat	11/5/2002	$150.00	G, M
	Candidate Total	**$20,881.00**	
Total For State Representative – District 6		$52,552.00	

State Representative – District 7		Primary (P), General (G) Initial (I), Matching (M)	
Barnes, Ray – Republican	8/7/2002	$16,185.00	P, I
Barnes, Ray – Republican	8/7/2002	$9,463.90	P, M
Barnes, Ray – Republican	8/9/2002	$757.50	P, M
Barnes, Ray – Republican	9/3/2002	$7,658.36	P, M
Barnes, Ray – Republican	9/6/2002	$6,753.00	P, M
Barnes, Ray – Republican	9/9/2002	$3,839.36	P, M
Barnes, Ray – Republican	9/17/2002	$10,785.00	G, I
	Candidate Total	**$55,442.12**	

Cain, Virgel – Democrat	8/27/2002	$10,790.00	P, I
Cain, Virgel – Democrat	9/12/2002	$16,180.00	G, I
	Candidate Total	**$26,970.00**	
Total For State Representative – District 7		$82,412.12	

State Representative – District 8	Primary (P), General (G) Initial (I), Matching (M)		
Chin, Ginny – Democrat	7/2/2002	$10,790.00	P, I
Chin, Ginny – Democrat	9/12/2002	$16,180.00	G, I
Chin, Ginny – Democrat	11/12/2002	$614.93	G, M
	Candidate Total	**$27,584.93**	
Ditchey II, Robert – Republican	8/12/2002	$16,185.00	P, I
Ditchey II, Robert – Republican	8/12/2002	$19,785.94	P, M
Ditchey II, Robert – Republican	8/15/2002	$12,584.06	P, M
	Candidate Total	**$48,555.00**	
Gillis, Kathleen – Republican	7/24/2002	$15,772.86	P, M
Gillis, Kathleen – Republican	7/24/2002	$16,185.00	P, I
Gillis, Kathleen – Republican	7/31/2002	$867.61	P, M

Gillis, Kathleen – Republican	8/7/2002	$3,145.47	P, M
Gillis, Kathleen – Republican	8/15/2002	$12,584.06	P, M
	Candidate Total	**$48,555.00**	
McCullagh, Ron – Republican	6/20/2002	$16,185.00	P, I
McCullagh, Ron – Republican	7/23/2002	$1,346.08	P, M
McCullagh, Ron – Republican	7/24/2002	$14,426.78	P, M
McCullagh, Ron – Republican	7/31/2002	$867.61	P, M
McCullagh, Ron – Republican	8/7/2002	$3,145.47	P, M
McCullagh, Ron – Republican	8/15/2002	$12,584.06	P, M
	Candidate Total	**$48,555.00**	
Rosati, Colette – Republican	8/1/2002	$16,640.47	P, M
Rosati, Colette – Republican	8/1/2002	$16,185.00	P, I
Rosati, Colette – Republican	8/7/2002	$3,145.47	P, M
Rosati, Colette – Republican	8/15/2002	$12,584.06	P, M
Rosati, Colette – Republican	9/17/2002	$10,785.00	G, I
Rosati, Colette – Republican	11/12/2002	$614.93	G, M
	Candidate Total	**$59,954.93**	
Total For State Representative – District 8		$233,204.86	

State Representative – District 9		Primary (P), General (G) Initial (I), Matching (M)	
Cuendet, Gerald L. – Republican	7/23/2002	$16,185.00	P, I
Cuendet, Gerald L. – Republican	8/14/2002	$1,458.57	P, M
Cuendet, Gerald L. – Republican	8/28/2002	$187.00	P, M
Cuendet, Gerald L. – Republican	9/4/2002	$4,801.69	P, M
Cuendet, Gerald L. – Republican	9/10/2002	$3,865.00	P, M
	Candidate Total	**$26,497.26**	
Hershfield, Peter – Democrat	8/2/2002	$10,790.00	P, I
Hershfield, Peter – Democrat	9/12/2002	$16,180.00	G, I
	Candidate Total	**$26,970.00**	
McAllister, Shirley – Democrat	8/2/2002	$10,790.00	P, I
McAllister, Shirley – Democrat	9/12/2002	$16,180.00	G, I
	Candidate Total	**$26,970.00**	
Total For State Representative – District 9		$80,437.26	

State Representative – District 10		Primary (P), General (G) Initial (I), Matching (M)
Cuthbertson, Bev – Republican	7/16/2002	$10,790.00 P, I
Cuthbertson, Bev – Republican	8/14/2002	$79.68 P, M
Cuthbertson, Bev Republican	8/27/2002	$2,475.57 P, M
Cuthbertson, Bev – Republican	8/29/2002	$6,662.11 P, M
Cuthbertson, Bev – Republican	9/6/2002	$2,166.42 P, M
	Candidate Total	**$22,173.78**
Frandsen, Christian – Democrat	8/30/2002	$10,790.00 P, I
Frandsen, Christian – Democrat	9/12/2002	$16,180.00 G, I
	Candidate Total	**$26,970.00**
Quelland, Doug – Republican	7/3/2002	$10,790.00 P, I
Quelland, Doug – Republican	8/14/2002	$79.68 P, M
Quelland, Doug – Republican	8/27/2002	$2,475.57 P, M
Quelland, Doug – Republican	8/29/2002	$6,662.11 P, M
Quelland, Doug – Republican	9/6/2002	$2,166.42 P, M
Quelland, Doug – Republican	9/12/2002	$16,180.00 G, I
	Candidate Total	**$38,353.78**

Thrasher, Jackie – Democrat	8/22/2002	$10,790.00	P, I
Thrasher, Jackie – Democrat	9/12/2002	$16,180.00	G, I
	Candidate Total	**$26,970.00**	
Total For State Representative – District 10		$114,467.56	

State Representative – District 11		Primary (P), General (G) Initial (I), Matching (M)	
Tully, Stephen – Republican	6/18/2002	$16,185.00	P, I
Tully, Stephen – Republican	7/9/2002	$13,691.45	P, M
Tully, Stephen – Republican	7/17/2002	$820.85	P, M
Tully, Stephen – Republican	7/18/2002	$586.00	P, M
Tully, Stephen – Republican	7/24/2002	$2,150.09	P, M
Tully, Stephen – Republican	7/31/2002	$288.83	P, M
Tully, Stephen – Republican	8/9/2002	$750.00	P, M
Tully, Stephen – Republican	8/14/2002	$7,802.90	P, M
Tully, Stephen – Republican	8/21/2002	$6,279.88	P, M
Tully, Stephen – Republican	9/17/2002	$10,785.00	G, I
Tully, Stephen – Republican	10/28/2002	$103.26	G, M
Tully, Stephen – Republican	10/30/2002	$1,500.00	G, M

Tully, Stephen – Republican	11/1/2002	$963.24	G, M
Tully, Stephen – Republican	11/5/2002	$550.00	G, M
	Candidate Total	**$62,458.50**	
Wercinski, Sam – Democrat	6/7/2002	$10,790.00	P, I
Wercinski, Sam – Democrat	9/12/2002	$16,180.00	G, I
Wercinski, Sam – Democrat	10/28/2002	$103.26	G, M
Wercinski, Sam – Democrat	11/1/2002	$963.24	G, M
Wercinski, Sam – Democrat	11/5/2002	$550.00	G, M
Wercinski, Sam – Democrat	11/12/2002	$735.00	G, M
	Candidate Total	**$29,323.50**	
Total For State Representative – District 11		$91,782.00	

State Representative – District 12		Primary (P), General (G) Initial (I), Matching (M)	
Murphree, Ted – Democrat	8/30/2002	$10,790.00	P, I
	Candidate Total	**$10,790.00**	
Total For State Representative – District 12		$10,790.00	

State Representative – District 14		Primary (P), General (G) Initial (I), Matching (M)
Atkins, John – Republican	9/3/2002	$10,790.00 P, I
Atkins, John – Republican	9/12/2002	$16,180.00 G, I
	Candidate Total	**$26,970.00**
McCune Davis, Debbie – Democrat	8/7/2002	$16,185.00 P, I
McCune Davis, Debbie – Democrat	8/7/2002	$9,021.85 P, M
McCune Davis, Debbie – Democrat	8/22/2002	$725.33 P, M
McCune Davis, Debbie – Democrat	9/5/2002	$4,940.93 P, M
McCune Davis, Debbie – Democrat	9/6/2002	$1,000.00 P, M
McCune Davis, Debbie – Democrat	9/10/2002	$6,770.02 P, M
McCune Davis, Debbie – Democrat	9/12/2002	$10,785.00 G, I
McCune Davis, Debbie – Democrat	9/12/2002	$522.09 P, M
	Candidate Total	**$49,950.22**
Meza, Robert – Democrat	6/26/2002	$16,185.00 P, I
Meza, Robert – Democrat	8/1/2002	$871.12 P, M
Meza, Robert – Democrat	8/7/2002	$8,150.73 P, M
Meza, Robert – Democrat	8/22/2002	$725.33 P, M

Meza, Robert – Democrat	9/5/2002	$4,940.03	P, M
Meza, Robert – Democrat	9/6/2002	$1,000.00	P, M
Meza, Robert – Democrat	9/10/2002	$6,770.02	P, M
Meza, Robert – Democrat	9/12/2002	$10,785.00	G, I
Meza, Robert – Democrat	9/13/2002	$522.09	P, M
	Candidate Total	**$49,949.32**	
Total For State Representative – District 14		$126,869.54	

State Representative – District 15		Primary (P), General (G) Initial (I), Matching (M)	
Clark, Ken – Democrat	6/11/2002	$16,185.00	P, I
Clark, Ken – Democrat	6/13/2002	($5,395.00)	P, I
Clark, Ken – Democrat	7/25/2002	$4,193.62	P, M
Clark, Ken – Democrat	8/15/2002	$2,044.62	P, M
Clark, Ken – Democrat	9/12/2002	$16,180.00	G, I
	Candidate Total	**$33,208.24**	

Sinema, Kyrsten – Independent	6/18/2002	$18,879.00	P, I
Sinema, Kyrsten – Independent	11/1/2002	$649.50	G, M
	Candidate Total	**$19,528.50**	
Total For State Representative – District 15		$52,736.74	

State Representative – District 16		Primary (P), General (G) Initial (I), Matching (M)	
Avelar, Carlos – Democrat	8/12/2002	$16,185.00	P, I
	Candidate Total	**$16,185.00**	
Landrum, Leah – Democrat	7/23/2002	$16,185.00	P, I
Landrum, Leah – Democrat	9/12/2002	$1,175.00	G, I
	Candidate Total	**$17,360.00**	
Miranda, Ben – Democrat	7/29/2002	$16,185.00	P, I
Miranda, Ben – Democrat	9/12/2002	$1,175.00	G, I
	Candidate Total	**$17,290.00**	
Total For State Representative – District 16		$50,835.00	

State Representative – District 17		Primary (P), General (G) Initial (I), Matching (M)	
Amorosi, Phillip – Democrat	6/24/2002	$10,790.00	P, I
	Candidate Total	**$10,790.00**	
Burton Cahill, Meg – Democrat	7/29/2002	$10,790.00	P, I
Burton Cahill, Meg – Democrat	9/12/2002	$16,180.00	G, I
	Candidate Total	**$26,970.00**	
Clevenger, Trevor O – Libertarian	9/9/2002	$10,790.00	P, I
Clevenger, Trevor O – Libertarian	9/12/2002	$16,180.00	G, I
Clevenger, Trevor O – Libertarian	10/29/2002	$3,750.00	G, M
Clevenger, Trevor O – Libertarian	11/1/2002	$1,097.50	G, M
	Candidate Total	**$31,817.50**	
DeDonati, Paul – Libertarian	9/5/2002	$10,790.00	P, I
DeDonati, Paul – Libertarian	9/12/2002	$16,180.00	G, I
DeDonati, Paul – Libertarian	10/29/2002	$3,750.00	G, M
DeDonati, Paul – Libertarian	11/1/2002	$1,097.50	G, M
	Candidate Total	**$31,817.50**	

Despain, Dale – Republican	6/7/2002	$10,790.00	P, I
Despain, Dale – Republican	9/12/2002	$16,180.00	G, I
Despain, Dale – Republican	10/29/2002	$3,750.00	G, M
Despain, Dale – Republican	11/1/2002	$1,097.50	G, M
	Candidate Total	**$31,817.50**	
Helm, Michelle – Republican	6/18/2002	$10,790.00	P, I
	Candidate Total	**$10,790.00**	
Pany, Darlene – Democrat	5/30/2002	$10,790.00	P, I
Pany, Darlene – Democrat	9/12/2002	$16,180.00	G, I
Pany, Darlene – Democrat	10/29/2002	$3,750.00	G, M
Pany, Darlene – Democrat	11/1/2002	$1,097.50	G, M
	Candidate Total	**$31,817.50**	
Shell, Geoffrey – Republican	6/26/2002	$10,790.00	P, I
	Candidate Total	**$10,790.00**	
Thompson, Mark – Republican	7/10/2002	$10,790.00	P, I
Thompson, Mark – Republican	9/12/2002	$16,180.00	G, I

Thompson, Mark – Republican	10/29/2002	$3,750.00	G, M
Thompson, Mark – Republican	11/1/2002	$1,097.50	G, M
	Candidate Total	**$31,817.50**	
Total For State Representative – District 17		$218,427.50	

State Representative – District 18		Primary (P), General (G) Initial (I), Matching (M)	
Johnson, Karen – Republican	6/20/2002	$16,185.00	P, I
	Candidate Total	**$16,185.00**	
Pearce, Russell – Republican	6/18/2002	$16,185.00	P, I
	Candidate Total	**$16,185.00**	
Total For State Representative – District 18		$32,370.00	

State Representative – District 19		Primary (P), General (G) Initial (I), Matching (M)	
Daggs, Louise – Republican	6/11/2002	$16,185.00	P, I
Daggs, Louise – Republican	8/28/2002	$2,158.59	P, M
Daggs, Louise – Republican	8/29/2002	$13,087.33	P, M

Daggs, Louise – Republican	9/4/2002	$3,371.22	P, M
Daggs, Louise – Republican	9/9/2002	$2,813.38	P, M
	Candidate Total	**$37,615.52**	
Total For State Representative – District 19		$37,615.52	

State Representative – District 20		Primary (P), General (G) Initial (I), Matching (M)	
Fan, John – Republican	5/30/2002	$10,790.00	P, I
Fan, John – Republican	6/5/2002	$5,395.00	P, M
Fan, John – Republican	9/9/2002	$2,708.79	P, M
	Candidate Total	**$18,893.79**	
Huppenthal, John – Republican	7/29/2002	$16,185.00	P, I
Huppenthal, John – Republican	9/9/2002	$2,708.79	P, M
Huppenthal, John – Republican	9/12/2002	$10,785.00	G, I
Huppenthal, John – Republican	10/10/2002	$556.21	G, M
	Candidate Total	**$30,235.00**	

McComish, John – Republican	6/18/2002	$16,185.00	P, I
McComish, John – Republican	9/9/2002	$2,798.79	P, M
	Candidate Total	**$18,983.79**	
Total For State Representative – District 20		$68,112.58	

State Representative – District 21		Primary (P), General (G) Initial (I), Matching (M)	
Moore, Ken – Democrat	6/7/2002	$10,790.00	P, I
Moore, Ken – Democrat	9/12/2002	$16,180.00	G, I
	Candidate Total	**$26,970.00**	
Nichols, Warde – Republican	7/18/2002	$16,185.00	P, I
Nichols, Warde – Republican	9/12/2002	$10,785.00	G, I
	Candidate Total	**$26,970.00**	
Plese, Tara – Republican	6/27/2002	$16,185.00	P, I
Plese, Tara – Republican	9/10/2002	$3,426.50	P, M
	Candidate Total	**$19,611.50**	

Yarbrough, Steve – Republican	7/16/2002	$16,185.00	P, I
Yarbrough, Steve – Republican	9/12/2002	$10,785.00	G, I
	Candidate Total	**$26,970.00**	
Total For State Representative – District 21		$100,321.50	

State Representative – District 22		Primary (P), General (G) Initial (I), Matching (M)	
Livesay, Roberta – Republican	6/24/2002	$16,185.00	P, I
Livesay, Roberta – Republican	9/6/2002	$4,049.50	P, M
Livesay, Roberta – Republican	9/9/2002	$972.01	P, M
	Candidate Total	**$21,206.51**	
Martin, Robert – Republican	7/23/2002	$16,185.00	P, I
Martin, Robert – Republican	9/6/2002	$4,049.50	P, M
Martin, Robert – Republican	9/9/2002	$972.01	P, M
Martin, Robert – Republican	9/10/2002	$661.84	P, M
	Candidate Total	**$21,868.35**	
Total For State Representative – District 22		$43,074.86	

State Representative – District 23		Primary (P), General (G) Initial (I), Matching (M)
Benedict, Brett – Republican	9/6/2002	$10,790.00 P, I
Benedict, Brett – Republican	9/12/2002	$16,180.00 G, I
	Candidate Total	**$26,970.00**
Bustamante, Ernest – Democrat	8/7/2002	$16,185.00 P, I
Bustamante, Ernest – Democrat	9/12/2002	$10,785.00 G, I
Bustamante, Ernest – Democrat	11/4/2002	$5,000.00 G, M
	Candidate Total	**$31,970.00**
Clark, Mark – Democrat	7/12/2002	$16,185.00 P, I
	Candidate Total	**$16,185.00**
Total For State Representative – District 23		$75,125.00

State Representative – District 24		Primary (P), General (G) Initial (I), Matching (M)
Kelly, Patty – Libertarian	9/18/2002	$16,180.00 G, I
Kelly, Patty – Libertarian	10/21/2002	$1,242.82 G, M

Kelly, Patty – Libertarian	10/23/2002	$4,470.00	G, M
Kelly, Patty – Libertarian	11/4/2002	$170.00	G, M
	Candidate Total	**$22,362.82**	
Total For State Representative – District 24		$22,362.82	

State Representative – District 25	Primary (P), General (G) Initial (I), Matching (M)		
Alvarez, Manuel – Democrat	8/9/2002	$16,185.00	P, I
Alvarez, Manuel – Democrat	9/12/2002	$10,785.00	G, I
	Candidate Total	**$26,970.00**	
Burns, Jennifer – Republican	9/10/2002	$10,790.00	P, I
Burns, Jennifer – Republican	9/12/2002	$16,180.00	G, I
	Candidate Total	**$26,970.00**	
Lugo, Bobby – Democrat	8/30/2002	$16,185.00	P, I
Lugo, Bobby – Democrat	9/12/2002	$10,785.00	G, I
	Candidate Total	**$26,970.00**	
Stevens, David – Republican	9/20/2002	$16,180.00	G, I
	Candidate Total	**$16,180.00**	
Total For State Representative – District 25		$97,090.00	

State Representative – District 26		Primary (P), General (G) Initial (I), Matching (M)
Watkins, Stuart – Republican	6/27/2002	$16,185.00 P, I
Watkins, Stuart – Republican	7/18/2002	$4,561.06 P, M
Watkins, Stuart – Republican	7/29/2002	$2,566.31 P, M
Watkins, Stuart – Republican	7/31/2002	$1,787.97 P, M
Watkins, Stuart – Republican	8/8/2002	$1,827.84 P, M
Watkins, Stuart – Republican	8/13/2002	$9,731.76 P, M
Watkins, Stuart – Republican	8/21/2002	$378.60 P, M
Watkins, Stuart – Republican	8/28/2002	$3,805.00 P, M
Watkins, Stuart – Republican	8/30/2002	$310.00 P, M
Watkins, Stuart – Republican	9/4/2002	$7,401.46 P, M
	Candidate Total	**$48,555.00**
Total For State Representative – District 26		$48,555.00

State Representative – District 27		Primary (P), General (G) Initial (I), Matching (M)
Cajero Bedford, Olivia – Democrat	7/1/2002	$16,185.00 P, I
Cajero Bedford, Olivia – Democrat	9/12/2002	$1,200.00 G, I
	Candidate Total	**$17,385.00**

George, Jesse – Democrat	6/27/2002	$16,185.00	P, I
	Candidate Total	**$16,185.00**	
Hormel, Peter – Democrat	6/10/2002	$16,185.00	P, I
	Candidate Total	**$16,185.00**	
Lopes, Phil – Democrat	6/10/2002	$16,185.00	P, I
Lopes, Phil – Democrat	9/17/2002	$1,245.00	G, I
	Candidate Total	**$17,430.00**	
Total For State Representative – District 27		$67,185.00	

State Representative – District 28		Primary (P), General (G) Initial (I), Matching (M)	
Bradley, David – Democrat	8/13/2002	$16,185.00	P, I
Bradley, David – Democrat	9/12/2002	$10,785.00	G, I
Bradley, David – Democrat	11/1/2002	$2,495.84	G, M
	Candidate Total	**$29,465.84**	
Downing, Ted – Democrat	8/1/2002	$16,185.00	P, I
Downing, Ted – Democrat	9/12/2002	$10,785.00	G, I
Downing, Ted – Democrat	11/1/2002	$1,500.00	G, M
	Candidate Total	**$28,470.00**	

Poelstra, Edward – Republican	9/4/2002	$10,790.00	P, I
Poelstra, Edward – Republican	9/12/2002	$16,180.00	G, I
	Candidate Total	**$26,970.00**	
Pyritz, Joe – Democrat	8/9/2002	$16,185.00	P, I
	Candidate Total	**$16,185.00**	
Ramirez, Sam – Democrat	9/4/2002	$16,185.00	P, I
	Candidate Total	**$16,185.00**	
Total For State Representative – District 28		$117,275.84	

State Representative – District 30		Primary (P), General (G) Initial (I), Matching (M)	
Langmead, Mike – Democrat	9/6/2002	$10,790.00	P, I
Langmead, Mike – Democrat	9/12/2002	$16,180.00	G, I
Langmead, Mike – Democrat	9/17/2002	$7,457.97	G, M
Langmead, Mike – Democrat	9/25/2002	$670.00	G, M
Langmead, Mike – Democrat	10/10/2002	$870.00	G, M
Langmead, Mike – Democrat	10/30/2002	$1,306.42	G, M
Langmead, Mike Democrat	11/1/2002	$310.00	G, M

Langmead, Mike – Democrat	11/4/2002	$1,204.35 G, M
Langmead, Mike – Democrat	11/6/2002	$226.00 G, M
	Candidate Total	**$39,014.74**
Schwartz, Bob – Democrat	7/16/2002	$10,730.00 P, I
Schwartz, Bob – Democrat	9/12/2002	$16,180.00 G, I
Schwartz, Bob – Democrat	9/17/2002	$7,457.97 G, M
Schwartz, Bob – Democrat	9/25/2002	$670.00 G, M
Schwartz, Bob – Democrat	10/10/2002	$870.00 G, M
Schwartz, Bob – Democrat	10/30/2002	$1,306.42 G, M
Schwartz, Bob – Democrat	11/1/2002	$310.00 G, M
Schwartz, Bob – Democrat	11/4/2002	$1,204.35 G, M
Schwartz, Bob – Democrat	11/6/2002	$226.00 G, M
	Candidate Total	**$39,014.74**
Total For State Representative – District 30		$78,029.48
	Grand Total	**$12,862,880.57**

TERRY GODDARD
Attorney General
Mary R. O'Grady (011434)
Solicitor General
Tanja K. Shipman (025205)
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2926
Telephone: (602) 542-3333
Facsimile: (602) 542-8308
Attorneys for Defendants Secretary of State Janice K. Brewer and Citizens Clean Elections Commission

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, AND TONY BOUIE,

Plaintiffs,

and

DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, AND ARIZONA TAXPAYERS ACTION COMMITTEE,

Plaintiff-Intervenors,

v.

JAN BREWER, in her official capacity as Secretary of State of the State of Arizona; and GARY

No. CV08-1550-PHX-ROS

DECLARATION OF DR. KENNETH R. MAYER

(Assigned to the Honorable Roslyn O. Silver)

(Filed Sep. 23, 2008)

SCARAMAZZO, ROYANN J.
PARKER, JEFFREY L.
FAIRMAN, DONALD
LINDHOLM and LORI S.
DANIELS, in their official
capacity as members of the
ARIZONA CITIZENS CLEAN
ELECTIONS COMMISSION,

Defendants.

* * *

EXHIBIT 2

I currently am a Professor of Political Science at the University of Wisconsin – Madison, and a faculty affiliate at the Lafollette School of Public Affairs, at the University. I joined the faculty in 1989. I teach courses on American politics, the presidency, Congress, campaign finance, election law, and electoral systems.

I have a Ph.D. in political science from Yale University, where my graduate training included courses in econometrics and statistics. My undergraduate degree is from the University of California, San Diego, where I majored in political science and have a minor in applied mathematics. My curriculum vitae is attached to this report.

My work has been published in the following peer-reviewed journals: *Journal of Politics*, *The American Journal of Political Science*, *Legislative Studies Quarterly*, *Presidential Studies Quarterly*, *Congress and the Presidency*, and *Public Administration Review*. I have also published in law reviews, including

the *Richmond Law Review* and the *UCLA Pacific Basin Law Journal*. My work on campaign finance has been published in *Legislative Studies Quarterly*, *Regulation*, *PS: Political Science and Politics*, *Richmond Law Review*, the Democratic Audit of Australia, and in an edited volume on electoral competitiveness published by the Brookings Institution Press.

My work on campaign finance has been cited by the Government Accountability Office, and by legislative research offices in Connecticut and Wisconsin. I have consulted on public funding issues with public officials in Seattle, WI and Madison. I am currently the chair of the Madison Blue Ribbon Commission on Campaign Finance Reform, charged with the Mayor to make recommendations on a public funding program for the city.

Since 2003, I have been the principal investigator on the Wisconsin Campaign Finance Project, an ongoing study of campaign finance and public funding programs at the state and local level. I have studied the public funding programs in Arizona, Hawaii, Maine, Minnesota, Nebraska, New York City, and Wisconsin.

I have served as a campaign advisor and consultant in several political campaigns, including candidates for the U.S. Senate (Russ Feingold, 1992 and 1998), the U.S. Congress (Rick Phelps, 1998), the Madison Mayor (Dave Cieslewicz, 2003), and Dane County Executive (Rick Phelps, 1993). In these races I offered strategic advice, reviewed polling data, and gave issue briefings.

In this report, I offer my view of the claims made in the declaration of Dick Carpenter about the effects of Clean Elections on privately funded candidates. My conclusions are based on recognized standards of social science empirical work generally, and on the social science literature on campaign finance. In addition to the data that Dr. Carpenter used to form his conclusions, I make use of my own data on campaign finance, which is publicly available at a web site that I maintain for use by academics interested in conducting research (http://campfin.polisci.wisc.edu/Index.asp)

I also offer my views about the effect of Arizona's Clean Elections law on electoral competitiveness, and on the preventive anti-corruption effect of public funding programs. These conclusions are based on my own peer-reviewed publications, as well as the academic literature on public funding, campaign contributions, and electoral competition.

I. Analysis of Carpenter Declaration

The declaration of Dick Carpenter offers inapt comparisons of campaign spending averages, uses inaccurate and incomplete data to calculate average spending levels, and fails to control for many of the factors that affect the amount of money candidates raise and spend. His comparison of candidate

* * *

senators running for reelection, 17 had a major party opponent, 7 ran in a competitive race, and 1 lost. The improvements are are similar for the House:

	House			Senate		
	Contested	Competitive	Reelected	Contested	Competitive	Reelected
1994	46.3%	24.4%	95.1%	26.3%	0.0%	100.0%
1996	41.9%	27.9%	93.0%	42.1%	25.0%	95.0%
1998	40.0%	22.2%	97.8%	20.8%	8.3%	95.8%
2000	38.9%	36.1%	91.7%	45.0%	30.0%	100.0%
2002	55.9%	47.5%	75.6%	40.0%	31.3%	81.3%
2004	46.5%	36.6%	83.3%	42.9%	23.8%	100.0%
2006	48.8%	32.6%	95.3%	70.8%	37.5%	95.8%

The trend is more noticeable if pre- and post-reform averages are compared[8]. In table 2, I calculate these averages. In every case, the post reform period shows more competition. In the Senate, the percentage of races contested by the major parties rose from 29.8% pre-reform to 49.7% in the post reform period. The percentage of Senate incumbents running in competitive elections nearly tripled, rising from from 11.1% to 30.6%. In both the House and Senate, incumbents are more likely to be defeated: the reelection rate for House incumbents dropped from 95.3% to 86.5%; for the Senate, the rate dropped from 96.9% to 94.3%.

[8] Unlike the case with Carpenter's misguided use of averages, these calculations use similar groupings of races; averages, therefore, are an appropriate way to compare them.

	House			Senate		
	Contested	Competitive	Reelected	Contested	Competitive	Reelected
1994-1998	42.7%	24.8%	95.3%	29.8%	11.1%	96.9%
2000-2006	49.3%	34.5%	84.5%	49.7%	30.6%	94.3%

The empirical question about the effect of public funding is largely settled: it has demonstrably increased the amount of competition in the electoral system.

B. Characteristics of Clean Elections Programs – Matching Funds

In order to succeed, public funding programs must enable participating candidates to keep pace with opposition fundraising. The most common condition for accepting public grants is that candidates must agree to limit their spending; privately funded candidates remain free to raise and spend as much as they desire. Arizona redresses this imbalance by offering matching funds that match, dollar for dollar, spending by privately funded candidates above the spending limit, and by independent expenditures.

These matching provisions are crucial to the success of clean elections programs. If candidates fear that they will easily be outspent by the opposition, or face large independent expenditures, they will decline to participate (or, in the case of candidates unable to raise large amounts of money, choose not to run at all). This is one reason participation rates for clean elections programs are higher than the rates in Wisconsin, which offers small grants with no possibility of matching funds.[9] In the 2006 election cycle, 60% of primary and general election candidates participated

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[9] Candidates for the state legislature are eligible for grants of up to $15,525 for the Senate, and $7,663 for the Assembly. These amounts have not changed since 1986. There is no provision for additional matching grants. Wisconsin statutes, 11.31, 11.50.

in Arizona's program.[16] In Wisconsin, out of 242 Assembly or Senate candidates in the 2006 cycle, only 37 took public funding, a participation rate of 15.3%.[17]

Matching funds have played an important role in allowing publicly funded candidates to remain competitive with their privately funded opponents. In 2006, 33 Senate candidates accepted public funds. Fifteen of these candidates received some matching funds, ranging from tiny amounts (10th district candidate Linda Gray, who received $243 in matching funds) to significant totals (26th district candidate Albert Melvin, who received $57,429). According to data from the Arizona Clean Elections Commission, seventy one candidates in 2006 received some matching funds, to counter either spending by a privately funded candidate, or independent spending against them.[18]

Eliminating matching funds would put publicly funded candidates at a serious disadvantage. Since candidates can raise no money after they qualify, they devote little or no time or resources to fundraising once they have received public grants (this is well established in the academic literature, and, from candidates' standpoint, is one of the positive features of such programs[19]). Many publicly funded candidates

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[16] http://www.ccec.state.az.us/ccecweb/ccecays/ccecPDF.asp?docPath=docs%2000%2006demographics.pdf

[17] http://campfin.polisci.wisc.edu/WisconsinData.asp

[18] http://www.ccec.state.az.us/ccecweb/ccecays/elections/disb2006.asp

[19] Paul Herrnson and Peter L. Francia, "The Impact of Public Finance Laws on Fundraising in State Legislative Elections," *American Politics Research*, 31:520-539 (No. 5, September 2003).

will lack the organizational capacity to raise money, and if forced to campaign without matching funds would quickly become overwhelmed.

C. Private Candidate Spending

In my view, matching fund provisions do not put privately funded candidates or independent expenditure groups at a disadvantage. I would advise privately-funded candidates that it is unreasonable for them not to spend money on his or her campaign, solely because this might result in increased expenditures for the competing candidates. The literature on campaign finance is nearly universal on this point: other things being equal, it is *always* in a candidate's interest to spend more money. The worst that can happen is that the additional expenditures will make no difference.[14]

* * *

[14] In the political science literature, there is a debate about whether incumbents see a benefit to increased spending. While there are scholars who argue that additional spending will not make a difference, there is no support for the position that additional spending hurts. Gary Jacobsen, *The Politics of Congressional Elections* 3rd edition (New York: Harper Collins Publishers, 1992); Donald Philip Green and Johnathan S. Krasno, "Salvation for the Spendthrift Incumbent: Reestimating the Effects of Campaign Spending in House Elections," *American Journal of Political Science* 32: 884-907 (No. 4, November 1988).

BRADLEY S. PHILLIPS (*pro hac vice*)
Brad.Phillips@mto.com
GRANT A. DAVIS-DENNY (*pro hac vice*)
Grant.Davis-Denny@mto.com
ELISABETH J. NEUBAUER (*pro hac vice*)
Elisabeth.Neubauer@mto.com
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

TIMOTHY M. HOGAN (004567)
ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST
202 E. McDowell Road, Suite 153
Phoenix, AZ 85004
Telephone: (602) 258-8850

Attorneys for Defendant-Intervenor
CLEAN ELECTIONS INSTITUTE, INC.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JOHN MCCOMISH, et al., Plaintiffs, and DEAN MARTIN, et al., Plaintiff-Intervenors, vs.	CASE NO. CV-08-1550-PHX-ROS (Assigned to the Honorable Roslyn O. Silver) **DECLARATION OF MEG BURTON CAHILL IN SUPPORT OF**

JAN BREWER, et al.,

Defendants,

and

CLEAN ELECTIONS INSTITUTE, INC.

Defendant-Intervenor.

DEFENDANT-INTERVENOR CLEAN ELECTIONS INSTITUTE, INC.'S OPPOSITION TO PLAINTIFFS' AND PLAINTIFF-INTERVENORS' MOTIONS FOR A PRELIMINARY INJUNCTION

(Filed Jun. 12, 2009)

I, Meg Burton Cahill, declare as follows:

1. I am currently a candidate for the Arizona State Senate in Legislative District 17. I make this declaration in support of Defendant-Intervenor's Opposition To Plaintiffs' And Plaintiff-Intervenors' Motions For A Preliminary Injunction. I have personal knowledge of the following facts, and would competently testify to them if called upon to do so.

2. I currently represent Legislative District 17 in the Arizona State Senate. I was first elected to the State Senate in 2007. I also served in the Arizona House of Representatives from 2001-2006.

3. I have run each of my state legislative campaigns as a participant in the Arizona Clean Elections public funding program. I successfully ran as a participating candidate in 2000 in a two-seat district against two incumbents, including the anticipated

Speaker of the Arizona House of Representatives and the future Chair of the House Appropriations Committee. If public funding had not been available in 2000, I would not have run for office against these two powerful incumbents.

4. As with my previous campaigns, I decided to run for office in 2008 as a participating candidate in the Clean Elections program. When I decided to accept Clean Elections funding and the program's spending limits, I assumed that matching funds would be provided if I faced a non-participating opponent who exceeded the spending limit or if I was targeted by independent expenditures. I never considered the possibility that matching funds would not be available in the 2008 election until I learned of this lawsuit in August 2008. By that time, I had already accepted public funds and I thus had no option to raise additional private funds if matching funds were enjoined.

5. Based on my 2004 campaign for the House of Representatives, the availability of matching funds is a critical factor in my decision to participate in the Clean Elections program. In that election, significant independent expenditures were made against me and I received $33,756.23 in matching funds as a result. My initial disbursement for the 2004 general election was only $16,980. Because 66% of the funds I received in the 2004 general election were matching funds, my speech would have been substantially reduced if matching funds were not available. Moreover, if

matching funds had not been available, I would not have been able to run a competitive campaign or provide information to the electorate in response to these independent expenditures.

6. In the 2008 general election, my major-party opponent is also a participating candidate. Based on the party registration of voters in Legislative District 17, this district is one of the most competitive in the state. I believe there is a significant potential for independent expenditure committees to target this race. If matching funds are not available to my opponent or me to respond to false or misleading attacks by independent groups, these interests could determine the outcome of this election.

7. Because I am a participating candidate in the Clean Elections program, I cannot accept private contributions, except limited early contributions and qualifying contributions.

8. The only money I have available for the general election is the money provided to my campaign through the Clean Elections program.

9. My ability to run a viable campaign in 2008 will be seriously and potentially irreparably harmed if matching funds are eliminated during this election cycle.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 23th day of September, 2008, at Tempe, Arizona.

/s/ M. Burton Cahill
M. Burton Cahill

[Certificate Of Service Omitted In Printing]

U.S. District Court for the District of Arizona

(Filed Jul. 17, 2009)

[Title Omitted In Printing]

State of Arizona

[SEAL]

Campaign Finance Report

Bouie for State Representative
Committee #: 200810141

Treasurer: Bouie, Allison Joy
3434 W Anthem Way, Ste 118-493,
Anthem, AZ 85086
Phone: (623) 551-7557
Email: campaign@tonybouie.com
Candidate Name: Bouie, Tony Vanderson
Office Sought: State Representative – District 6

2008 Post-Primary Election Report

Election Cycle: **2007-2008**
Date Filed: October 2, 2008
Reporting Period: August 14, 2008-September 22, 2008

Summary of Finances

Cash Balance at Beginning of Reporting Period:	$10,532.24
Total Cash Receipts this Reporting Period:	$13,520.00

Total Cash Disbursements this Reporting Period:	$18,645.02
Cash Balance at End of Reporting Period:	$5,407.22

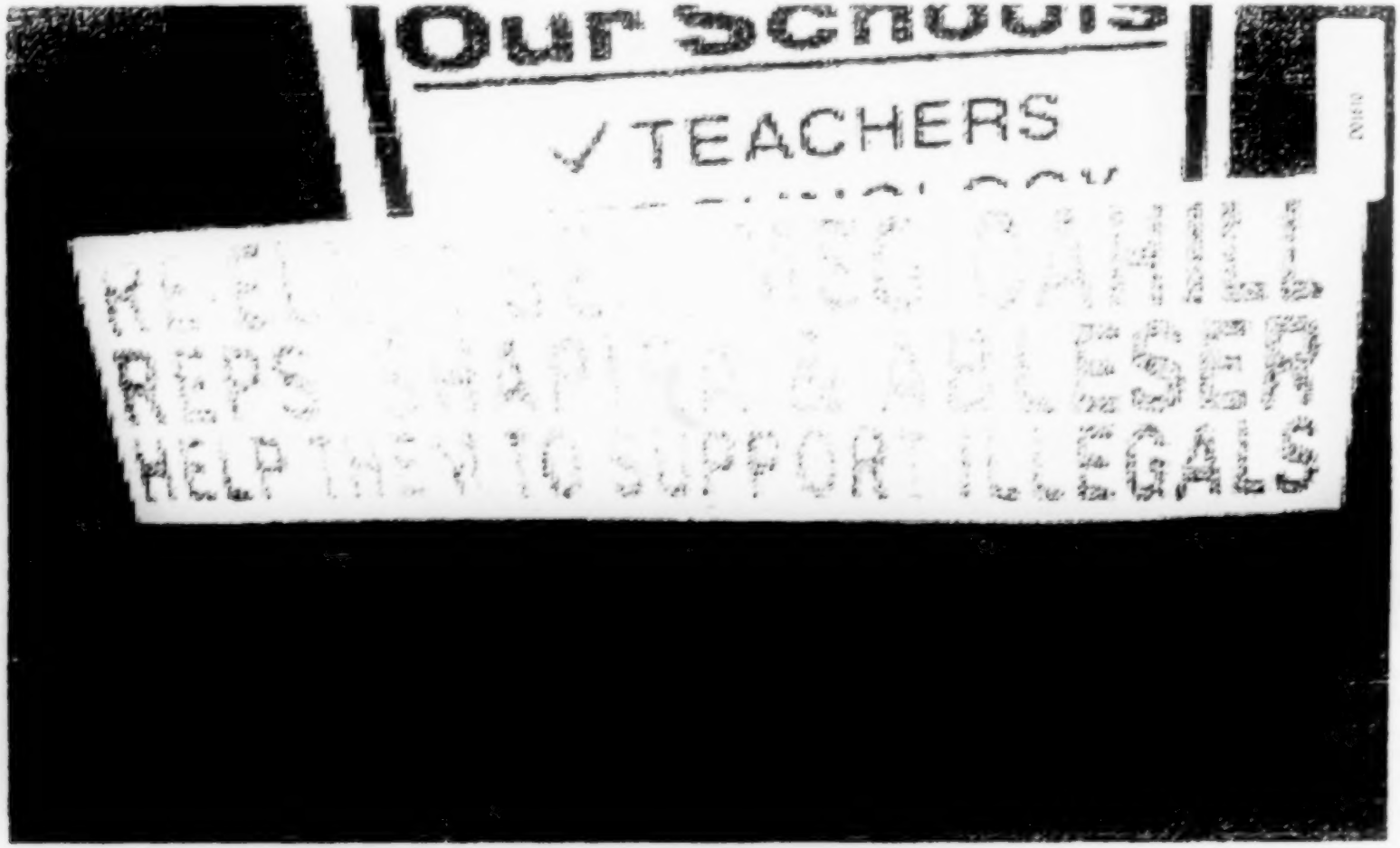
Report ID: 44811

200810141 Bouie for State Representative
Post-Primary Election Report
Covers 08/14/2008 to 09/22/2008

Schedule E1 – Operating Expenses

Name:	Circle K
Address:	4343 E Camelback Rd. # 1752, Phoenix, AZ 85018
Category:	Travel - Meals
Memo:	Sign Removal

	Date	Amount	Cycle to Date
	09/17/2008	$3.14 Cash	$151.66
Total of Operating Expenses		$12,795.02	
Total of Refunds, Rebates, and Credits Received		$0.00	
Net Total of Operating Expenses		$12,795.02	


Our Schools
TEACHERS

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

VICTORY 2008, a political committee registered with the Secretary of State; ARIZONANS FOR A HEALTHY ECONOMY, a political committee registered with the Secretary of State, Petitioners, v. CITIZENS CLEAN ELECTIONS COMMISSION, Respondent, v. DAVID STEVENS, Real Party in Interest	No. **DECLARATION OF MARIA WEEG**

1. I am the campaign manager for Victory 2008.

2. This declaration is made on my own personal knowledge and in support Petitioners' Complaint for Special Action, Declaratory and Injunctive Relief.

3. I learned that David Stevens, a participating candidate for the state house of representatives for district 25, failed to attend the required debate on September 24, 2008.

4. My attorneys informed me that the Citizens Clean Elections Commission ("CCEC") Executive Director informed them that Mr. Stevens had not submitted a timely request for reconsideration for his ineligibility to receive matching funds and that the Executive Director believed that Mr. Stevens was ineligible to receive matching funds.

5. Based on the CCEC's representations of Mr. Stevens' ineligibility for matching funds, Victory 2008 developed a plan for its campaign in legislative district 25.

6. On October 23, 2008, Victory 2008 sent voters in legislative district 25 a mailer advocating the election of Mr. Stevens' two Democratic opponents.

7. Had Mr. Stevens been eligible for matching funds, Victory 2008 would not have made any independent expenditures in legislative district 25.

8. Victory 2008's campaign efforts will be thwarted if its actions will result in Mr. Stevens receiving money that he is not eligible to receive based on the CCEC's own rules.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 24th day of October, 2008, in Phoenix, Arizona.

/s/ Maria Weeg
Maria Weeg

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

VICTORY 2008, a political committee registered with the Secretary of State; ARIZONANS FOR A HEALTHY ECONOMY, a political, committee registered with the Secretary of State, Petitioners, v. CITIZENS CLEAN ELECTIONS COMMISSION, Respondent, v. DAVID STEVENS, Real Party in Interest.	No. **MEMORANDUM OF LAW IN SUPPORT OF VERIFIED COMPLAINT FOR SPECIAL ACTION, DECLARATORY AND INJUNCTIVE RELIEF** **– AND –** **APPLICATION FOR TEMPORARY RESTRAINING ORDER AND INTERLOCUTORY STAY** **– AND –** **SUPPORTING MEMORANDUM**

* * *

B. Petitioners' Expenditures in Legislative District 25

Victory 2008 contacted the CCEC staff several times on or around October 2, 2008, regarding Mr. Stevens' failure to attend the debate. The CCEC informed Victory 2008 that Mr. Stevens had not

submitted a request for reconsideration for his ineligibility to receive matching funds, and that accordingly, the CCEC believed that Mr. Stevens was ineligible to receive matching funds. Based on the CCEC's representations of Mr. Stevens' ineligibility for matching funds, Victory 2008 developed a plan for its campaign in legislative district 25.

AFHE learned that Mr. Stevens failed to attend his debate and, based on its review of the CCEC rules regarding debates, concluded that Mr. Stevens would be ineligible for matching funds. Based on this understanding of the CCEC rules, AFHE developed a campaign plan that included mail pieces in legislative district 25 and removed campaign activity in legislative district 24.

Until the agenda for the CCEC's October 23, 2008 public hearing was posted on October 21, 2008, there was no public notice (or even any private notice to the Petitioners) that Mr. Stevens had made a request for reconsideration. By this time, however, Petitioners had either made independent expenditures in the district or had already made significant commitments to make such expenditures. Neither Petitioner would have made these independent expenditures had Mr. Stevens been eligible to receive equalizing funding.

* * *

III. PETITIONERS WILL BE IRREPARABLY HARMED

The Petitioners have developed and are implementing campaign plans based on the CCEC's clear

rules regarding a candidate's ineligibility to receive matching funds based on failure to participate in a required debate. The CCEC's decision to exempt Mr. Stevens and to award matching funds, if allowed to stand, will have a significant chilling effect on Petitioners' ability to implement its campaign plan effectively. Once equalizing funds are provided to Mr. Stevens, these funds will be spent, and the harm would be done.

* * *

Dated: October 24, 2008

PERKINS COIE BROWN & BAIN P.A.

By: /s/ Charles A. Blanchard
Charles A. Blanchard
Rhonda L. Barnes
Suite 2000
2901 North Central Avenue
Phoenix, AZ 85012-2788

COPPERSMITH GORDON SCHERMER & BROCKELMAN

Andrew S. Gordon
Suite 1000
2800 North Central Avenue
Phoenix, Arizona 85004

Attorneys for Petitioners Victory 2008 and Arizonans for a Healthy Economy

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

VICTORY 2008, a political committee registered with the Secretary of State; ARIZONANS FOR A HEALTHY ECONOMY, a political committee registered with the Secretary of State, Petitioners, v. CITIZENS CLEAN ELECTIONS COMMISSION, Respondent, v. DAVID STEVENS, Real Party in Interest.	No. **VERIFIED COMPLAINT FOR SPECIAL ACTION, DECLARATORY AND INJUNCTIVE RELIEF** **[ELECTIONS MATTER]**

For its Verified Complaint for Special Action, Declaratory and Injunctive Relief against Respondent and Real Party in Interest, Petitioners allege as follows:

* * *

Petitioners' Expenditures in Legislative District 25

29. Victory 2008 contacted the CCEC staff on or around October 3, 2008, regarding Mr. Stevens' failure to attend the debate and was informed that Mr. Stevens had not submitted a timely request for reconsideration for his ineligibility receive matching funds, and that accordingly, the CCEC believed that Mr. Stevens was ineligible to receive matching funds. [Declaration of James E. Barton II at ¶¶ 3-4, attached as Exhibit E]

30. Based on the CCEC's representations of Mr. Stevens' ineligibility for matching funds, Victory 2008 developed a plan for its campaign in legislative district 25. On October 23, 2008, Victory 2008 sent voters in legislative district 25 a mailer advocating for the election of Mr. Stevens' two Democratic opponents. [Declaration of Maria Weeg at ¶¶ 5-6, attached as Exhibit F]

31. AFHE learned that Mr. Stevens failed to attend his debate and, based the CCEC rules regarding debates, recognized that Mr. Stevens was ineligible for matching funds. [Declaration of Bill Whitaker at ¶ 3, attached as Exhibit G]

32. Because Mr. Stevens was ineligible for matching funds, AFHE developed a campaign plan that included mail pieces in legislative district 25 and removed mail pieces in legislative district 24. On or around October 23, 2008, AFHE sent voters in

legislative district 25 a mailer advocating for the election of Mr. Stevens' two Democratic opponents. [*Id.* at ¶¶ 4-5]

33. Had Mr. Stevens been eligible for matching funds, Victory 2008 would not have made any independent expenditures in legislative district 25 and AFHE would not have made independent expenditures on October 23, 2008, in legislative district 25. [Weeg Declaration at ¶ 7; Whitaker Declaration at ¶ 6]

* * *

The Effect of the CCEC's Actions

43. If the CCEC's decision not to apply A.R.S. § 16-956(A)(2) and R2-10-107 to Mr. Stevens stands, Mr. Stevens will receive $27,507.68 in matching funds for mailers that were sent to voters before there was any public notice that Mr. Stevens had even made a request for an exemption from his violation of the debate requirements. [Barnes Declaration at ¶ 11]

44. Further, based on the CCEC's decision, all independent expenditures made by Petitioners will be matched for Mr. Stevens.

45. Petitioners' campaign efforts will be thwarted if their actions will result in Mr. Stevens receiving money that he is not eligible to receive based on the CCEC's own rules. [Weeg Declaration at ¶ 8; Whitaker Declaration at ¶ 7]

* * *

Dated: October 24, 2008

PERKINS COIE BROWN & BAIN P.A.

By: /s/ Charles A. Blanchard
Charles A. Blanchard
Rhonda L. Barnes
Suite 2000
2901 North Central Avenue
Phoenix, AZ 85012-2788

COPPERSMITH GORDON SCHERMER & BROCKELMAN

Andrew S. Gordon
Suite 1000
2800 North Central Avenue
Phoenix, Arizona 85004

Attorneys for Petitioners Victory 2008 and Arizonans for a Healthy Economy

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

VICTORY 2008, a political committee registered with the Secretary of State; ARIZONANS FOR A HEALTHY ECONOMY, a political committee registered with the Secretary, of State, Petitioners, v. CITIZENS CLEAN ELECTIONS COMMISSION, Respondent, v. DAVID STEVENS,	No. **DECLARATION OF WILLIAM G. WHITAKER**

1. I am the treasurer for Arizonans for a Healthy Economy ("AFHE")

2. This declaration is made on my own personal knowledge and in support Petitioners' Complaint for Special Action, Declaratory and Injunctive Relief

3. I learned that David Stevens, a participating candidate for the state house of representatives in

district 25, failed to attend the debate required for legislative candidates and, based the Citizens Clean Elections Commission ("CCEC") rules regarding debates, recognized that Mr. Stevens was ineligible for matching funds.

4. Because Mr. Stevens was ineligible for matching funds, I developed a campaign plan that included mail pieces in legislative district 25 and removed mail pieces in legislative district 24.

5. On or around October 23, 2008, AFHE sent voters in legislative district 25 mailers advocating for the election of Mr. Stevens' two opponents.

6. Had Mr. Stevens been eligible for matching funds, AFHE would not have made independent expenditures on October 23, 2008, in legislative district 25.

7. AFHE's campaign efforts will be thwarted if its actions will result in Mr. Stevens receiving money that he is not eligible to receive based on the CCEC's own rules.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 24th day of October, 2008, in Phoenix, Arizona.

/s/ William G. Whitaker
William G. Whitaker

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

HONORABLE J. KENNETH MANGUM, JUDGE

VICTORY 2008, a political committee registered with the Secretary of State; et al.,	)	
Petitioners,	)	Superior Court
v.	)	CV 2008-026648
CITIZENS CLEAN ELECTIONS COMMISSION,	)	
Respondent,	)	
v.	)	
DAVID STEVENS,	)	
Real Party in Interest.	)	

Phoenix, Arizona
October 28, 2008
10:59 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Hearing)

KITTY K. LOVEJOY, RMR
OFFICIAL COURT REPORTER
CERTIFIED COURT REPORTER #50443

* * *

[10] And, again, it's important because people rely on this fact. The fact that Mr. Stevens had not complied with the rules was very important to both my client and Mr. Gordon's client as to whether or not they should make expenditures and when they should make them.

* * *

[16] In early October both my client, Victory 2008, and Mr. Gordon's client, the Arizonans for Healthy Economy on their own independently and without consulting with each other both came to the same conclusion that under the rules Mr. Stevens was ineligible to receive matching funds and therefore made plans to make expenditures that they otherwise would not have made.

* * *

[20] If – if they know there is going to be no consequence of matching funds, they are going to be more likely to make a decision to make an expenditure than if there are no – no – than if matching funds are going to be done, or they may make the decision to make late – late filings and expenditures where the other side has less opportunity to use the matching funds.

* * *

[26] A. It played a huge role. And Arizonans for a Healthy Economy conducted efforts in numerous districts. And we actually had more districts that we would like to be in. But because of matching-funds issue, there were decisions made to not advocate in

specific districts because – because of the matching-funds issue. That was one step.

The second step was other districts that we didn't want to go into – we didn't want to advocate in until very late because of the matching-funds issue. And then the first – the first set of districts had the matching funds –

* * *

[27] A. In LD 25 we were going to do one of two things:

Number one, not participate in at all. That was the first option.

The second option was to advocate in but very late in the campaign cycle.

Q. So you trigger – if you followed the second one, you trigger the matching funds later so Mr. Stevens would have less time to use it –

A. Yes, sir.

Q. – basically?

And did your decision-making process regarding LD 25 then change?

A. Yes.

Q. And what made it change?

A. When we were informed that Mr. Stevens would more than likely not receive matching funds,

that was 100 percent of our – our decision was based off 100 percent of that information.

Q. And you were told he wouldn't get matching funds because he hadn't showed up at the debate?

A. Because he hadn't showed up at the debate and then there was no action on October 10th.

* * *

[Court Reporter's Certification Omitted In Printing]

Political Signs

INSTITUTE FOR JUSTICE
Timothy D. Keller (019844)
Jennifer M. Perkins (023087)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
P: 480-557-8300/F: 480-557-8305

INSTITUTE FOR JUSTICE
William R. Maurer (WSBA 25451)[1]
101 Yesler Way, Suite 603
Seattle, WA 98104
P: 206-341-9300/F: 206-341-9311

Attorneys for Plaintiff-Intervenors

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*, Plaintiffs, and DEAN MARTIN, a citizen of the State Of Arizona, *et al.*, Plaintiff-Intervenors vs. JAN BREWER, in her official capacity as Secretary of State of the State of Arizona; *et al.*, Defendants, and	Civil Action No. 08-1550-PHX-ROS PLAINTIFF-INTERVENORS' RESPONSES TO DEFENDANTS' AND DEFENDANT-INTERVENOR'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION (Filed Jul. 2, 2009)

[1] Admitted *pro hac vice*.

CLEAN ELECTIONS INSTITUTE, INC.

Defendant-Intervenor.

(Assigned to the Honorable Roslyn O. Silver)

* * *

the "clean elections" program. In essence, the government is telling voters that participating candidates should be preferred over nonparticipating candidates.

Robert Burns

Because the matching funds provisions penalize privately funded candidates for raising contributions and spending money on political speech, Senator Burns has run every one of his campaigns since the adoption of the Clean Elections Act at a significant disadvantage compared to his publicly funded opponents.

The matching funds provision of the Clean Elections Act has forced Senator Burns to censor himself by forcing him to limit his speech by abiding by the Act's expenditure limits to avoid being outspent by his publicly funded opponents.

During the 2006 general election, Senator Burns focused on running a low cost campaign so as to not trigger a lot of matching funds to his publicly funded Democratic opponent.

In the 2006 general election Plaintiff-Intervenor Robert Burns had his speech curtailed because he stopped actively raising money so that he would not exceed the general election

spending limit and thereby trigger matching funds to his participating Democratic opponent.

In the 2008 campaign, Senator Burns' publicly funded Democratic opponent did not have any primary opposition, but still received the full cash primary disbursement amount of $12,921.00 which she was able to use against Senator Burns in the general election.

In the 2008 general election campaign, Senator Burns' publicly funded opponent received $17,707.44 in Candidate Equalization Disbursements and $10,543.98 in Independent Expenditure Disbursements, in addition to the $19,382.00 Initial General Election Disbursement, for a total public subsidy of $47,633.42 – which means that Senator Burns' publicly funded opponent had $7263.42 more than Senator Burns to run her campaign.

Senator Burns was further harmed by being labeled a "nonparticipating" candidate. The Commission engages in advertising to promote the Clean Elections Act and then labels traditionally funded candidates as nonparticipants in the "clean elections" program. In essence, the government is telling voters that participating candidates should be preferred over nonparticipating candidates.

Rick Murphy

Rick Murphy was coerced into accepting public funding in the 2004 campaign cycle because

the matching funds provision of the Act penalizes privately funded candidates.

In the 2006 general election Plaintiff-Intervenor Rick Murphy had his speech curtailed because he stopped actively raising money so that he would not exceed the general election spending limit and thereby trigger matching funds to his participating Democratic opponent.

Rick Murphy did not send out a mail piece in the 2008 primary election so as to conserve his resources for the 2008 general election in which Mr. Murphy would face three publicly financed candidates and therefore be vastly outspent.

Even though he estimated his fundraising potential to be close to $50,000, Rick Murphy decided not to actively fundraise in the 2008 general election because of the uncertainty surrounding independent expenditures and the possibility that if he had actively raised money he would have triggered $3 in matching funds for every $1 he raised beyond the general election spending limit for publicly financed candidates. Absent the matching funds provision, Mr. Murphy would have raised additional funds and thus could have engaged in any number of additional types of campaign speech, including, but not limited to additional mailings, expanding the universe of voters in the mailings he did send out, sending out larger mailings which could have contained more information and/or pieces that may have stood out more to the target audience, and hiring additional people to work at polling places.

In the 2008 general election, Rick Murphy faced three publicly funded candidates. He was penalized by the matching funds provision each time his three publicly funded opponents received matching funds based on independent expenditures. Two of his publicly funded opponents, Sheri Van Horsen and Debbie Lesko, received Independent Expenditure Disbursements of $38,764.00 for a total public subsidy of $58,146.00. His other publicly funded opponent, Shawn Hutchinson, received $6,818.76 in Independent Expenditure Disbursements for a total public subsidy of $26,200.76.

Rick Murphy was the target of an opposing independent expenditure by Victory 2008 on October 27, 2008, in the amount of $5555.47. Rick Murphy did not receive any matching funds based on this expenditure against his campaign.

Rick Murphy was the target of an opposing independent expenditure by Victory 2008 on October 27, 2008, in the amount of $435.65. Rick Murphy did not receive any matching funds based on this expenditure against his campaign.

Rick Murphy was the target of an opposing independent expenditure by Victory 2008 on October 29, 2008, in the amount of $5555.47. Rick Murphy did not receive any matching funds based on this expenditure against his campaign.

The Arizona Association of Realtors Leadership Committee made an independent expenditure in favor of Rick Murphy in the amount of $3,627.00 on October 21, 2008, for which

Mr. Murphy's three publicly funded opponents each received $3,627.00 in matching funds.

Rick Murphy's father and stepmother will not contribute to his campaigns because of the matching funds provision.

Rick Murphy was further harmed by the label "nonparticipating" candidate. The Commission engages in advertising to promote the Clean Elections Act and then labels traditionally funded candidates as nonparticipants in the "clean elections" program. In essence, the government is telling voters that participating candidates should be preferred over nonparticipating candidates.

* * *

The Plaintiff-Intervenors Arizona Taxpayers Action Committee decided not to speak in opposition to Tom O'Halleran in the Senate race in Legislative District 1 in the 2006 primary election because such speech would have triggered matching funds to O'Halleran.

Arizona Taxpayers Action Committee's based its decision of which races to participate in during the 2008 election cycle in part on whether any particular expenditure would trigger matching funds to a government funded candidate whom the Committee opposed. The triggering of matching funds reduced the chances that the Committee would speak or reduced the quantity of speech in order to avoid altogether or limit altogether the amount of matching funds to candidates whom the committee opposed.

> During the 2006 election cycle some prospective donors expressed concern that their contributions would trigger matching funds to candidates whom they did not support or opposed.
>
> In 2008, the Arizona Taxpayers Action Committee concentrated on making independent expenditures in campaigns that did not involve publicly funded candidates. For those races that did involve publicly funded candidates, the Arizona Taxpayers Action Committee limited their independent expenditures to trigger very little matching funds to candidates they opposed.

As demonstrated above, the Plaintiff-Intervenors have suffered specific restrictions, deprivations, and loss of First Amendment rights in their previous campaigns because the matching funds provisions were not enjoined. The Plaintiff-

* * *

supplement and/or amend these responses if and when they become aware of any additional responsive information or documents.

15. All documents constituting, showing, explaining, referring or otherwise relating to your allegation in Paragraph 50 of your Complaint Intervention that the Act "driv[es] private dollars out of the political arena."

Plaintiff-Intervenors are not aware of any additional documents beyond those already provided in their Initial Disclosures, prior responses to written

discovery requests, and those identified in their Privilege Log.

These responses are based on information that is currently known to Plaintiff-Intervenors and may not be conclusive. Investigation is continuing. Plaintiff-Intervenors reserve the right, and acknowledge their F.R.C.P. 26(e) obligation, to supplement and/or amend these responses if and when they become aware of any additional responsive information or documents.

Respectfully submitted this 16th day of January, 2009.

INSTITUTE FOR JUSTICE

s/ Timothy D. Keller

Timothy D. Keller (019844)
Jennifer M. Perkins (023087)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
P: 480-557-8300/F: 480-557-8305
INSTITUTE FOR JUSTICE
William R. Maurer (WSBA #25451)*
101 Yesler Way, Suite 603
Seattle, WA 98104
P: 206-341-9300/F: 206-341-9311

[Certificate Of Service Omitted In Printing]

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* *Admitted pro hac vice*

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, KEVIN GIBBONS, FRANK ANTENORI, TONY BOUIE, AND DOUG SPOSITO,

Plaintiffs,

and

DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, AND ARIZONA TAXPAYERS ACTION COMMITTEE,

Plaintiff-Intervenors,

vs.

JAN BREWER, in her official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Defendants.

No. CV08-1550-PHX-ROS

DEPOSITION OF

DEAN MARTIN

(Filed Jun. 12, 2009)
(Filed Jul. 2, 2009)

Phoenix, Arizona
January 23, 2009
9:11 a.m.

and)
)
CLEAN ELECTIONS)
INSTITUTE, INC.,)
)
Defendant-Intervenor.)
)

REPORTED BY:
CATHY J. TAYLOR, RPR
Certified Reporter
Certificate No. 50111

PREPARED FOR
ASCII/CONDENSED
(COPY)

* * *

[21] Q. Okay. So that the documents, just to sum up, related to when you would have held fundraisers?

A. When I would have held fundraisers. That's what I thought might be more – yesterday, that was the – I thought that might be more interesting, to show that difference. And then I remembered, wait a second, I don't think I did any fundraisers for treasurer because of the circumstances of the way Clean Elections did the match.

Q. Okay.

[22] A. I had stopped doing fundraising or I wasn't going to do fundraising if it just was going to give my opponent more of an advantage against me.

* * *

[26] Q. Approximately what amount was it?

A. Let me clarify that. It was the amount that he – my opponent, David Petersen, was going to get from Clean Elections. That he was going to get a check for $47,000 and change, and I had raised 47,000 plus. I had as much as he was going to get in his initial disbursement. And, therefore, I wouldn't – I would have – I wouldn't need to raise more money to catch up to what he'd already gotten.

And because of the way the law worked, there was a – a lot of punishment if you raised more, if you spent [27] more. Because, you know, every time you – you know, there's two things that exist on a campaign: Time and money. And both of those are – are in limited supply. And anything that I raised or spent above the amount he got, he just got that money without spending the time that it took to raise it.

So in every case where I had a Clean Elections opponent, potentially it was always all we need to do is get up to the minimum. And generally you don't want to – you don't want to spend more than that, because that puts you at a disadvantage.

Q. Have you –

A. So –

Q. Have you ever triggered matching funds?

A. I don't know. I'd have to look. I – we've – we've tried to keep our numbers from where they wouldn't. I know that – that once the Clean Elections was passed, if the – the – really everyone in the

political arena said, you know, you don't want to spend – you don't want to trigger matching funds unless you can do well more than three times the limit. You're – you're at a disadvantage unless you can raise and spend more than three times the limit.

In the treasurer's race, it's – I don't think it's possible. I don't think anyone's ever raised that much money in the history of the State.

[28] Q. The – just to clarify from that last answer, you don't know whether you've triggered matching funds before, is that correct?

A. Not off the top of my head.

Q. Okay.

A. I'd have to – I may have remembered that at one time, but not anymore.

Q. When did you make the decision to become a plaintiff in a lawsuit challenging the Clean Elections Act?

A. I don't remember. I don't remember when that was. I do remember after the lawsuit that Steve May was – that had – that finished, and then we went through the next election cycle. I believe that I was – I approached the Institute and said, this is a problem. I'd like to – would you guys like to represent me on this?

But I don't remember when that was. I'd have to look at when the case was originally filed.

Q. Okay. So you went to the Institute for Justice before the case was filed and said you thought there

was a problem with the Clean Elections Act, and you wanted to bring this constitutional challenge –

A. Yes.

* * *

---

[32] Q. Have you supported legislation to effectively get rid of the Clean Elections Act?

A. To limit, neuter or repeal in various shapes, I believe. At different times we had legislation to that effect that I supported, yes.

* * *

[36] Q. If – if the matching funds component of the Clean Elections Act was eliminated, would you still be opposed to the Clean Elections Act?

A. Yes.

* * *

[43] Q. And is it harder for challengers to raise money than it is for incumbents?

A. Oh, yes. Much harder.

Q. Okay.

A. Because you've got an existing legislator who can and did threaten other people that he would remember if they supported the challenger in the upcoming legislative session. And so a lot of people said, hey, I like you, but, you know, I can't cross this guy because I think he's going to win.

Q. Uh-huh. And that –

A. There were a few.

Q. You heard that from?

A. There were a few that did that, that did cross. That were willing to cross –

Q. Uh-huh.

A. – but not – not as many.

Q. But there was a practice of the – your opponent making threats that if –

A. He made it very –

Q. If you –

A. – clear to people.

Q. If you gave to my opponent, don't come looking to [44] me – don't come to me when it comes time for your legislation to come through the legislature, basically?

A. Yeah. I mean, he made it clear that – that you don't help – you know, anybody that supports my opponent is not going to be a friend of mine.

* * *

---

[69] Q. Did you in the 2006 campaign try to persuade others to not make independent expenditures?

A. In the 2006 campaign, I – it was – in every campaign, I made it very clear I don't want help. Because the – the greatest fear as a traditional candidate was someone would do an independent expenditure on your behalf. Good, bad or inept, it wouldn't help.

So I made it clear to, you know, everybody, you know, that, hey, I can handle this myself. And generally, I – a lot of people thought that I knew what I was doing in campaigns, and – and so they didn't worry about it. But I've always made it very clear to people, don't help me by doing independent expenditures.

Q. How did you make that clear to people?

A. Verbally. I mean, when you're talking to them at functions or events or they're – you know, wherever you see people.

Q. Okay. And were your instructions effective?

A. Never had an independent expenditure done on my [70] behalf, fortunately. So I avoided that problem of – of them giving my opponent more money.

Q. Okay. In the 2006 campaign, did you exceed your opposing candidate's expenditure limits?

A. I'd have to look at my records. Off the top of my head, I know the – the – the $72,000 number was the goal once we realized we can't go beyond that. Originally, we were going to go to the 120. And it was, okay, don't – it – we're punished to go farther than

that, so don't do more than that. We stopped fundraising, stopped actively soliciting. And that, for the most part, brought everything to a crawl on the fundraising side.

But I can't tell you off the top of my head that – that we got it down to the penny. I mean, we're – I know we're in the ballpark, but I don't know if we went over a little bit or not.

Q. By what date did you decide to stop soliciting contributions?

A. At which time we discovered that they were doing the – they were going to match anything I did over 72. And I don't know if I was – I think I might have already been over 72 at that point. I may have already been past that by a few thousand dollars. I'd have to look at my campaign finance reports to remember.

But at the point where we discovered they were [71] going to start matching my opponent, we said, okay, we can't do anymore because she's just going to get more and more money, and that's just – that's not helpful. You know, because it takes time to raise money. What we need to do now is spend our time doing other things and trying to be more efficient as opposed to spending time raising money. And the gap expanding between the two of us.

* * *

[Court Reporter's Certification Omitted In Printing]

U.S. District Court for the District of Arizona

(Filed Jul. 2, 2009)
(Filed Jul. 31, 2009)

[Title Omitted In Printing]

In the Matter of:

McComish and Martin v. Brewer

Chad Kirkpatrick

January 30, 2009

Griffin & Associates
3030 North Central Avenue
Suite 1102
Phoenix, AZ 85012
602-264-2230 or (888) 529-9990
pgriffin@griffinreporters.com
www.griffinreporters.com

* * *

[72] Do you recall how much money you had remaining in ATAC's, I guess, coffers, after the money spent on the District 6 litigation and the District 8 mailers.

A. I – hmm. I – I don't recall. I – I want to say it was around $2,000.

Q. Okay.

A. But that – maybe we had a debt of 2,000. I forgot which, so . . .

Q. Oh, okay. Alright. The - were there any races in 2006 that you had – besides what we've already described in District 6 and District 8, were there any [73] other races in 2006 that ATAC had contemplated becoming involved in?

A. Yes. We had a lot of discussions around the Senate – state Senate race. I believe it's District 1, which was, at the time, Tom O'Halloran, I believe, was the state senator.

Q. And what was the involvement that the – your – ATAC had discussed?

A. Primarily autodialers.

Q. Okay. And what type of involvement?

A. In the end we had no involvement. Yeah.

Q. Okay. But what was it – were you considering endorsing representative – I guess, candidate O'Halloran at the time?

A. No. It was in opposition to candidate O'Halloran.

Q. Okay. And, first of all, do you have an – do you know how much, approximately, autodialers cost?

A. At that time, I believe, our budget was around $.04 a call. Since then it's dropped by about half. But at the time, I believe, we were looking at $.04.

Q. Okay. Why has it dropped since then?

A. I think because everyone can buy them so cheap now.

Q. Oh, okay. And they were a little more expensive [74] in 2006?

A. I think it's the technology, because I know I have – I know people who have since bought their own.

Q. Oh, okay.

A. And so –

Q. Does ATAC own an autodialer?

A. No, we do not.

Q. Okay. So there's a company that will do that for you?

A. Correct. There's tons of companies.

Q. Oh, okay. What was the autodialer that you had contemplated? And you said it was in opposition to Candidate O'Halloran. Was it in support of another candidate? Or was it just simply in opposition to Candidate O'Halloran?

A. You know, I don't recall the specifics on if we were looking at just being purely negative against O'Halloran or in favor of another one, so . . .

Q. Okay. Do you recall the reasons why you were contemplating making those statements –

A. His voting record was awful.

Q. Oh, okay. That's – and if you could just – and I'm not looking for very specific – anything specific, but in general, what do you mean by "his voting record was awful"?

[75] A. He – he voted for higher spending, voted against tax cuts. Just things we stood against.

Q. Do you know if Candidate O'Halloran is a Republican or a Democrat?

A. Republican.

Q. Okay. Was it in the primary or the general that you were considering making the autodialers?

A. Primary.

Q. Okay. If – and why didn't you do that?

A. I think we – we were mostly afraid of triggering money for Candidate O'Halloran.

Q. Okay. And why did you think you would trigger money for Candidate O'Halloran?

A. Because – from what I recall, he was a participating candidate.

Q. And what was your understanding of how your negative adds would trigger money for representative O'Halloran –

A. Well, it was –

Q. – I mean, Candidate O'Halloran?

A. Yeah. As an independent expenditure we'd be making it, you know, against O'Halloran or in favor of his opponent, and so he would be matched with whatever we had spent.

* * *

[87] Q. All right. Do you – and do you know approximately when these autodialers ads ran?

A. I would say towards the end of October.

Q. Do you know if they triggered matching funds for any candidates?

A. They should have, and that's why we did it at the end of October.

* * *

---

[142] Q. Okay. Have you ever – or has ATAC ever not spent money on a campaign or for on behalf – or – sorry. Strike that.

Has ATAC ever not spent money because of a fear of triggering matching funds?

A. I would believe that that is part of the decision process. I – I do not feel that we said we cannot get involved in this case because of Clean Elections, but it's certainly top-of-mind issue.

[143] Q. Okay. So you have never not spent money because of the matching funds provision of the Clean Elections Act?

A. Correct. I mean, we never said, "Well, this candidate's participating; therefore we're going to stay out." But when someone is or is not participating, it's definitely an important factor in our decision.

* * *

[144] Q. Okay. And who were these donors who expressed concern?

A. Just people – some of the people we met at the fundraiser, and some others.

Q. Could you give me any names?

A. Well, actually, a check we did receive from a person, Mr. Dean Reason, is also — I think he's part of the Free Enterprise Club, which is part of the case, so – because he lives in Scottsdale.

Q. So he expressed concern to you about donations that he was going to make to ATAC in 2006 because of the matching funds provision?

A. He – no. I don't think we had a conversation where he said, "I don't like this." But I believe when he found out that we were – that we had sent a mailer – because I believe he had received our mailer because he lived in Scottsdale, that he was very pleased with that and sent us a check because of that.

Q. Okay. So he never expressed concern – or he never expressed an indication that he would not donate to ATAC because of the matching funds provision. Is that correct?

A. He never specifically said that. That is [145] correct. But he's a part of the lawsuit, so . . .

Q. Okay. But he never said that to you?

A. He never said that to me, yes.

Q. Okay. Thank you.

Can you recall any other donor who said – who would fall into this description as someone who expressed concern that their contributions would

trigger matching funds – that their contributions to ATAC would trigger matching funds?

A. I don't recall any names offhand.

* * *

[Court Reporter's Certification Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, KEVIN GIBBONS, FRANK ANTENORI, TONY BOUIE, AND DOUG SPOSITO,

Plaintiffs,

and

DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, AND ARIZONA TAXPAYERS ACTION COMMITTEE,

Plaintiff-Intervenors,

vs.

JAN BREWER, in her official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Defendants.

No. CV08-1550-PHX-ROS

DEPOSITION OF J. FIFE SYMINGTON, III

(Filed Jun. 12, 2009)

Phoenix, Arizona
February 4, 2009
9:20 a.m.

REPORTED BY:
PAMELA A. GRIFFIN, RPR
Certified Reporter
Certificate No. 50010

PREPARED FOR:
CONDENSED/ASCII
(Copy)

and)
CLEAN ELECTIONS)
INSTITUTE, INC.,)
Defendant-Intervenor.)

* * *

[99] Q. Was AzScam highly publicized in Arizona?

A. Yes, at the time, I think so, yeah.

IN THE DISTRICT COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

JOHN McCOMISH, et al., Plaintiffs, and DEAN MARTIN, a citizen of the State of Arizona, et al., Plaintiff-Intervenors, vs. KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, et al., Defendants, and CLEAN ELECTIONS INSTITUTE, INC., Defendant-Intervenor.	No. CV 08-550-PHX-ROS

DEPOSITION OF CONSTANTIN QUERARD

(Filed Jun. 12, 2009)
(Filed Jul. 17, 2009)

Phoenix, Arizona
Thursday, February 12, 2009
1:45 p.m.

REPORTED BY:
Kristin A. Woodall, RPR
Certified Court Reporter
Certificate No. 50196

PREPARED FOR:
ASCII
(Copy)

* * *

[32] Q. Still with this hypothetical, Clean Elections system without matching funds. As a political consultant on advising the candidate on whether to become a participating candidate, would you worry that without the matching funds your client would be placed at a disadvantage versus a non-participating candidate?

A. Absolutely.

Q. And if candidates couldn't receive matching funds, do you think they would be less likely to become participating candidates than under the present system?

A. Yes.

Q. So without matching funds, participation rates in the Clean Elections system would likely decline?

A. If the initial funding stays the same and there are no matching funds, then, yes, I would assume so. Candidates will know they get less money through that system which should make them less competitive so the system should be less attractive.

Q. And matching funds help in the sense promote candidate participation in the Clean Elections system; is that correct?

A. Yes. The more money you give them, the more of them will use the system.

* * *

[39] Q. Does the Clean Elections Act allow more candidates to run for office?

A. Yes.

Q. Do you personally know of candidates who were able to run for office because of the Clean Elections Act?

A. Yes.

* * *

[40] Q. I think you did say earlier that Clean Elections Act, the Clean Elections Act has allowed more candidates to run for office. In doing so, does it effectively increase the amount of campaigning that's taking place across Arizona?

A. I would think so.

Q. And in so doing, has the Clean Elections increased the amount of political dialogue that's taking place in campaigns across Arizona?

A. Likely. That is likely yes. I'm slow because I know one man's dialogue is another man's mudslinging, and some will view it as a plus or a negative. But, yes, if there's more money being spent on political message, whatever that message is, then there is

simply more message out there, and so I think that is the dialogue to which you're referring.

* * *

[61] Q. So you addressed my question from the perspective of a participating candidate. How about from a public policy perspective? Are there pluses to matching funds that you see?

A. I do.

Q. And what are they?

A. I appreciate the arguments against Clean Elections and can agree with some of them. I also am a – I do believe that they give you a freedom in essence to vote your conscience. It's not – and I have to be careful because it's not that you're going to not vote your conscience the other way. I don't want this to sound like again when you asked the questions about, I forget, contributions or something, it had almost a pay-to-play air to it, but you don't ever have to worry about will I be targeted or will the people that help me to get elected, you know, feel betrayed. You are free to vote your conscience.

* * *

[78] I think you said earlier that you have served as a campaign consultant for Rick Murphy?

A. Yes.

[79] Q. Did you consult with him on his 2004 campaign for the state legislature?

A. Yes.

Q. 2004 was Mr. Murphy's first time running for the state legislature?

A. I believe so.

Q. So he was running as a non-incumbent?

A. Yes. He was a challenger. I believe he was running against two incumbents.

Q. Did he face the typical fundraising disadvantages that non-incumbents would encounter setting aside Clean Elections?

A. Yes, yes.

Q. He would have had difficulty likely raising money from lobbyists for example?

A. Absolutely.

Q. He probably wouldn't have had contacts with wealthy donors?

A. Agreed. To get to the end, I think it's fair to say that in 2004 Rick Murphy would not have been elected if Clean Elections did not exist. I'm assuming that's the direction you're going.

Q. In 2004 he did choose to become a participating candidate?

A. Yes.

* * *

[84] Q. So what I want to clarify then is you've made the claim that there was selective enforcement essentially going on after the 2004 election. My question really is, is it your perception that that issue of selective enforcement has gone away?

A. Has selective enforcement gone away or did that particular issue from 2004 go away?

Q. Selective enforcement.

A. I actually think it has gotten much improved. We have new commissioners and new staff, and by and large I've been appreciative of the work they've done. They will take positions every once in a while that boggle the mind, but again, it makes for a great debate.

Q. Has Mr. Murphy been coerced into accepting public funding?

A. Coerced, I don't believe so. And he has been traditional the last couple of cycles.

* * *

[88] Q. Did you encourage Mr. Murphy during the 2008 general election to go out and raise more money from PACs?

A. To raise as much money from everywhere including PACs.

Q. You were urging him to do this during the general election period?

A. I don't remember. And remember, I had 17 legislative candidates in the general, which is a lot. So I'm [89] not going – I can't remember a lot of the specifics for any one. So whether it was during the primary or the general, at some point in time if he had told me, yeah, I'm PAC'd out, I would have stopped asking, but I couldn't tell you today if Rick ever PAC'd out or not because I couldn't keep track of all that for everybody.

Q. When you were urging him to raise more money or raise as much money as he could, what was his response to you?

A. It would generally be, you know, sure, I'm working on it, you know, always with that hint of quit bugging me.

Q. Was it ever I've stopped raising money?

A. No.

Q. Did you ever instruct Mr. Murphy to stop raising money?

A. No. I think I could lose my license for that if we had licenses. I guess I shouldn't joke when there's depositions. The written word, you can't tell if people are smiling or not.

* * *

---

[99] Q. – in the world of campaign consulting, is it fair to say broadly speaking as a campaign

consultant that the existence of matching funds affects the way that you strategize your campaigns for various clients?

MR. DAVIS-DENNY: Objection, form. Go ahead.

THE WITNESS: Yes. As I said, particularly with the traditional candidate in a multicandidate race where one or more is a Clean Elections candidate, it is a part of basically every spending decision that would put you over that minimum, and sometimes part of the decision is that don't because you know you only have so much to spend before you start to trigger. So you're always aware of the cost of spending that first incremental dollar.

* * *

[104] Q. (By Ms. Perkins) Let's assume for the sake of this hypothetical that the initial disbursement amount was increased, let's say up to the range you also discussed earlier to about $60,000. So your initial disbursement under this system was the amount that you had mentioned earlier, about $60,000, and there are no matching funds. What is your assessment of the potential increase of risks or potential for disadvantage under that type of system?

MR. DAVIS-DENNY: Objection, form.

THE WITNESS: I remember 60 is sort of like an [105] ideal number, and I think we talked about a lower number like 35 to 45 as still being a competitive sum. If the initial funding was that competitive sum, 45, 60, whatever it is, somewhere in

there, then I think the disadvantage or my concerns would go away.

In most cases in the absence of matching funds, I couldn't recommend clients to run Clean. I could probably construct a scenario under which it would be okay, but for serious candidates who are supposed to have a real serious chance of winning, it just takes more money than the initial funding. It's just not enough money.

If the initial funding is increased to, you know, to a much more reasonable amount, whether it's 45 or 60, wherever they go, then those concerns go away. In essence, it's almost an improvement over the current situation because you're getting the funding, but as a Clean Elections candidate you're freed from waiting for matching funds where your opponent can wait so long to spend that they give it to you at the last minute. You can't spend it. You can't be outstrategized by your opponent. That way you get yours from the get-go. You know you're going to have X dollars and you can plan accordingly.

So there would be a lot. Obviously, the more money you give the candidates, the more attractive Clean Elections is and the less concerns a consultant would have.

* * *

[Court Reporter's Certification Omitted In Printing]

IN THE DISTRICT COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

JOHN McCOMISH, et al., Plaintiffs, and DEAN MARTIN, a citizen of the State of Arizona, et al., Plaintiff-Intervenors, vs. KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, et al., Defendants, and CLEAN ELECTIONS INSTITUTE, INC., Defendant-Intervenor.	No. CV 08-1550-PHX-ROS

DEPOSITION OF RUSSELL SMOLDON

(Filed Jun. 12, 2009)

Tempe, Arizona
Tuesday, February 17, 2009
9:08 a.m.

REPORTED BY:
Kristin A. Woodall, RPR
Certified Court Reporter
Certificate No. 50196

PREPARED FOR:
ASCII
(Copy)

[45] So you said you knew all the politicians involved in AzScam?

A. Yes.

[46] Q. Were you surprised at the time?

A. Only by two of them. The rest of them I knew were on shaky ground.

Q. And which were the two that surprised you?

A. Jim Hardigan and Don Kenney.

Q. And why did you find it surprising?

A. Because Don Kenney, the things he said in the transcripts were unbelievable to me and was not the guy that I thought I knew. And the Jim Hardigan one was, I thought was kind of overbaked. It was a minor charge that he was facing and I just know him and have known him for many, many years and know him to be a pretty honorable guy. Just got caught up in a bundling situation.

Q. And why weren't you surprised by the others?

A. They just – it just doesn't surprise me knowing them and how they acted. They were always looking for something. So I was not surprised by it.

* * *

Q. So how well known was AzScam at the time it [47] happened, just in the general public?

A. You mean when it broke?

Q. Yeah.

A. Oh, huge.

* * *

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, KEVIN GIBBONS, FRANK ANTENORI, TONY BOUIE, AND DOUG SPOSITO,

Plaintiffs,

and

DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, and ARIZONA TAXPAYERS ACTION COMMITTEE,

Plaintiff-Intervenors,

vs.

JAN BREWER, in her official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS Clean Elections COMMISSION,

Defendants,

and

No. CV08-1550-PHX-ROS

ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION

30(b)(6) DEPOSITION OF DESIGNEE DANIEL RUIZ, II

(Filed Jun. 13, 2009)

Phoenix, Arizona
February 19, 2009
8:39 a.m.

CLEAN ELECTIONS INSTITUTE, INC.,
Defendant-Intervenor.

PREPARED FOR:
THE COURT
(ORIGINAL)

Reported by:
Sheryl L. Henke, RPR
Arizona CCR No. 50745

* * *

[77] BY MR. DRANIAS:

Q. You would agree that nothing in the procedures manual contains a word-to-word description of what specific steps the Commission must take to investigate an alleged unreported independent expenditure?

MS. SHIPMAN: Objection, form.

THE WITNESS: Correct.

BY MR. DRANIAS:

Q. And with respect to your eighth step, contacting vendors for an estimate of the amount of signage – let me rephrase that. With respect to your [78] eighth step in response to Representative Ableser's allegation of an unreported independent expenditure in District 17 during the 2008 general election, in which you represented that you would contact vendors for an estimate on the amount or cost

of signs, like the sign in question, isn't it true the Commission has nothing in writing that specifies in word-to-word fashion how you are supposed to appraise the value or cost of a sign, such as the one that was at issue in District 17 by virtue of Representative Ableser's allegations?

MS. SHIPMAN: Objection, form.

THE WITNESS: In word-to-word fashion, no. The procedures manual does say the campaign finance manager will determine whether the value of the communication triggers any matching funds.

MR. DRANIAS: You got his preceding statement as well?

THE REPORTER: Yes.

BY MR. DRANIAS:

Q. In other words, there is nothing in writing at the Commission that says, when confronted with an allegation that a sign was an unreported independent expenditure, you must consult the costs reported by any specific vendor?

MS. SHIPMAN: Objection, form.

[79] THE WITNESS: Not that I'm aware of.

BY MR. DRANIAS:

Q. Does the Commission have any sort of appraisal standards for estimating the costs associated with an unreported independent expenditure?

MS. SHIPMAN: Objection, form.

THE WITNESS: Not that I'm aware of.

BY MR. DRANIAS:

Q. Does the Commission have anything in writing that provides any guidance on how many estimates you should obtain of the cost of an unreported independent expenditure?

MS. SHIPMAN: Objection, form.

THE WITNESS: Not that I'm aware of.

BY MR. DRANIAS:

Q. Does the Commission have anything in writing that specifies the limitations and the jurisdictions you should look to in estimating the costs of an unreported independent expenditure?

MS. SHIPMAN: Objection, form.

THE WITNESS: Not that I'm aware of, no.

BY MR. DRANIAS:

Q. I'm assuming you were – let me ask you this question. At some point you were trained for your current position at the Commission, correct?

[80] A. Yes.

MS. SHIPMAN: Objection, form.

THE WITNESS: That's correct.

BY MR. DRANIAS:

Q. Who trained you?

MS. SHIPMAN: Objection, form.

THE WITNESS: Executive Director Lang and Deputy Director McGee.

BY MR. DRANIAS:

Q. Would you agree anything that you know about how to assess the value of an unreported independent expenditure was something you were trained to do by either Director Lang or Ms. McGee?

MS. SHIPMAN: Objection, form.

THE WITNESS: Yes.

BY MR. DRANIAS:

Q. Do you know when you were trained to engage in the process of assessing the value of an unreported independent expenditure?

MS. SHIPMAN: Objection, form.

THE WITNESS: During the beginning of my employment – employment in 2006.

BY MR. DRANIAS:

Q. Has – has anyone at the Commission ever made a mistaken estimation of the cost of an unreported [81] independent expenditure?

MS. SHIPMAN: Objection, form.

THE WITNESS: Yes.

* * *

[126] BY MR. DRANIAS:

Q. Okay. But as an ordinary part of your job at the Commission, you would be obligated to apply your understanding of what express advocacy constitutes to an independent expenditure to determine whether you should recommend it be treated as something that would trigger equalizing payments, correct?

MS. SHIPMAN: Objection; form, beyond the scope of designation.

THE WITNESS: Yes.

BY MR. DRANIAS:

Q. All right. And you would agree that express advocacy includes even publications that are made that do not use magic words, vote for, vote against, that it can be contextual, wouldn't you?

MS. SHIPMAN: Objection; form, exceeds scope of designation.

THE WITNESS: Yes.

BY MR. DRANIAS:

Q. You would agree that express advocacy can include positive statements or negative statements [127] against candidates that are made in the middle of an election season?

MS. SHIPMAN: Objection; form, exceeds the scope of designation.

THE WITNESS: Yes.

BY MR. DRANIAS:

Q. Please read Exhibit A to Exhibit 3. And I ask you –

MS. SHIPMAN: It's this.

BY MR. DRANIAS:

Q. I ask you to read the entire thing, applying your knowledge and understanding of what constitutes express advocacy, assuming that indeed the press release shown in Exhibit A was issued during the timeframe in which it's represented to have been issued. And when you're ready, tell me what your assessment is of whether or not what's shown in Exhibit A is express advocacy.

MS. SHIPMAN: Objection; form and beyond the scope.

THE WITNESS: I have read it.

BY MR. DRANIAS:

Q. Do you have an opinion?

A. I –

MS. SHIPMAN: Objection; beyond the scope [128] of designation, form.

THE WITNESS: I believe it represents State Representative Eddie Farnsworth in a positive light, and contains express advocacy for him, given the time of the letter – press release.

BY MR. DRANIAS:

Q. Let me ask you this question. Do you have any familiarity with Representative Farnsworth's reputation regarding his ideology or his philosophical positions on things?

MS. SHIPMAN: Objection; form and beyond the scope of designation.

THE WITNESS: I do not.

BY MR. DRANIAS:

Q. Okay. Let me ask you this hypothetically. Let's assume that for the sake of this question Representative Farnsworth is a Republican who is a very socially conservative Republican supported by very socially conservative Republicans, who are for good or ill depending on your perspective, very much against equal rights for homosexuals in any respect. Assume that.

Would that understanding in any way alter your analysis of whether or not Exhibit A constitutes express advocacy in favor of Representative Farnsworth?

[129] MS. SHIPMAN: Objection; form, beyond the scope of designation.

THE WITNESS: Yes.

BY MR. DRANIAS:

Q. Can you explain how it would affect your opinion regarding Exhibit A?

MS. SHIPMAN: Same objections.

THE WITNESS: If there was any doubt, and as a standard procedure the Commission would contact the candidate that's being mentioned and talk to them about this. It wouldn't be – the decision on whether or not it contains express advocacy for or against a candidate would be dependent on information from the candidates running for office.

BY MR. DRANIAS:

Q. Okay.

A. So I can tell you by reading it right now that it appears to present him in a favorable light. But under the circumstances where we would actually get information from Representative Farnsworth, we would be able to make a better determination of that.

Q. What does the Commission have in writing that provides a person in your position with guidance as to how far to conduct the investigation into the context of a document that presents a candidate in a positive [130] or negative light to determine whether, in fact, it is express advocacy?

MS. SHIPMAN: Objection; form, beyond the scope of designation.

THE WITNESS: Our mission statement says we have to uphold the law, and make sure that the Act is put into place and is followed through well. And that would lead me to make sure that all – before matching funds are issued, before any consideration whether express advocacy is included in this letter, that would – that would make me want to get all the information possible in order to make the best decision and uphold the Act.

BY MR. DRANIAS:

Q. Apart from the mission statement, apart from what's in the procedures manual from 2006, apart from what's in the word-for-word language of the Clean Elections Act, apart from the administrative rules implementing the Clean Elections Act, what does the Commission have in writing that would tell you when you've gathered enough context to fully understand whether or not something like Exhibit A is or is not express advocacy?

MS. SHIPMAN: Objection; form, beyond the scope of the designation.

[131] THE WITNESS: There is no word for-word procedure.

* * *

[Court Reporter's Certification Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, KEVIN GIBBONS, FRANK ANTENORI, TONY BOUIE, AND DOUG SPOSITO,

Plaintiffs,

and

DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, and ARIZONA TAXPAYERS ACTION COMMITTEE,

Plaintiff-Intervenors,

vs.

JAN BREWER, in her official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Defendants,

No. CV08-1550-PHX-ROS

DEPOSITION OF DAVID LUJAN

Phoenix, Arizona
February 19, 2009
8:37 a.m.

(Filed Jun. 12, 2009)

and)
)
CLEAN ELECTIONS)
INSTITUTE, INC.,)
)
Defendant-Intervenor.)

PREPARED FOR:
THE COURT
(ORIGINAL)

Reported by:
Sheryl L. Henke, RPR
Arizona CCR No. 50745

* * *

[7] Q. All right. Well, Representative Lujan, are you familiar with the article that I attached to the subpoena that was served on you?

A. Yes, I am.

* * *

[8] Q. Okay. Tell me what you recall about the article in the San Jose Mercury News dated September 6, 2005 attached to Exhibit 1?

A. If I recall, it was summer of 2005. I was requested to go over to California, because they were at the time considering a similar clean elections law as to what we currently have in Arizona. And so I was asked to go over to California as a clean elections candidate from Arizona and tell them my experiences as a candidate.

Q. Do you recall who asked you to go to California?

A. I knew you were going to ask me that question. It's the non-profit Clean Elections Institute. I don't know the specific name, but they're out of Washington, D.C., I believe.

* * *

[9] Q. Have you had a chance to review the article attached to the subpoena marked Exhibit 1?

A. Yes.

Q. Are you familiar with the contents of that article today?

A. Yes.

Q. Are you familiar with your reported answers to various questions in the article?

A. Yes.

Q. Is there anything in your answers that are [10] reported in the article attached to Exhibit 1 that you want to change today?

A. No, I think that they were all pretty much what I believed at the time, and I think still believe today.

* * *

Q. Would you read into the record what is ascribed to you as your statement?

A. Yes. "Arizona has actually brought the cost of the campaigns down. Before we had clean elections it was common to see $100,000 being spent in a legislative race. Now it's more common to spend around $40,000." Is that the one?

Q. Yes. Is that an accurate statement?

A. I believe so, yes. And, again, the subpoena [11] asks for documents. And I think when I made this statement it was based on my own perceptions. I don't think I did any independent research to determine that. That was just based on what I believed at the time.

Q. When you say based on your perceptions, you mean your perceptions as a politician?

A. Right.

Q. Okay. Can you describe your background as a politician?

A. Well, the first time I ran for the legislature was in 2002. I ran as a write-in candidate. I was also elected to the Phoenix Union High School District School Board in 2002. So those were probably my first two times running for political office. Prior to that I have been a staff person at the legislature; so I have been involved in politics from a staff person.

Q. What does – let me ask you this; when were you involved in politics as a staff person, what familiarity would you have developed with how much campaigns cost?

A. From about 2002 to 2004, I was the staff attorney for the senate judiciary committee, the Arizona Senate Judiciary Committee. So that committee handled all the election issues, including clean elections. And so I would have probably come up with [12] some familiarity in terms of campaigns and what was happening and campaigns through that position.

Q. Can you give me a list of the types of documents you would have reviewed as a staff attorney at the Arizona Senate Judiciary Committee that would have given you a perception of what was being spent on campaigns in Arizona?

A. I can't think of anything specific, but it may have been – and I don't remember specifically what legislation may have been going through the legislature at the time. But you get a number of documents that will talk about campaign finance in Arizona. And my thought would be perhaps I just garnered that perception just from reading various documents about Arizona elections and campaigns, probably also newspaper articles.

* * *

[14] Q. Okay. And when you said in the interview that's reflected in Exhibit 1 on page 3 of the article, when you said that it was common to see $100,000 being spent in a legislative race and now it's more common to spend around $40,000, what did you attribute that to specifically?

A. My understanding that prior to clean elections people would raise significantly more money. And then with the advent of clean elections, because the dollar amount you received from the clean election system is a fixed amount, that it usually kept the cost of those campaigns lower than what they had been in the past. And that was my perception.

* * *

[21] BY MR. DRANIAS:

Q. And when you say "weigh into," you mean it could discourage the traditional candidate from making that expenditure or engaging in that fund-raising?

A. Sure.

MS. SHIPMAN: Objection, form.

MS. SANDHU: Same objection.

MR. DRANIAS: Can I have the question read back, just so we have a clear record.

MS. SHIPMAN: Same objections.

(Requested portion of record read.)

BY MR. DRANIAS:

Q. Let me rephrase that question. Wouldn't you agree that a traditional candidate contemplating the impact of matching funds, matching any fund-raising or expenditures he or she might make, just might be discouraged in fund-raising or making expenditures?

A. Yes.

MS. SHIPMAN: Objection, form.

MS. SANDHU: Same objection.

BY MR. DRANIAS:

Q. Now, talking about the discouragement of fund-raising and expenditures by traditional candidates, have you ever had an opportunity to form an opinion as to whether that accounts for the [22] diminishment in the cost of campaigns post-clean elections?

MS. SHIPMAN: Objection, lacks foundation.

THE WITNESS: Yeah, I would think that that would certainly be a factor in why the – the cost of campaigns have gone down. Because I think more people have decided to run clean, because I think they see that that – I think that more people just decide that it's in their best interests to run as a clean elections candidate. And the more clean elections candidates you have, I think you're naturally going to see the cost of elections go down.

BY MR. DRANIAS:

Q. With respect to the possibility that the matching funds provisions of the Clean Elections Act discourage making independent expenditures by PACs and other types of committees, would you agree that that's a factor in the cost of campaigns going down post-clean elections?

A. I would agree, yes.

Q. In your statement in the article attached to Exhibit 1, the amount of $100,000 being spent before clean elections dropping to an amount of $40,000 after clean elections, I'm assuming that those are ballpark [23] estimates?

A. Yes. And I don't know if maybe at the time I had talked to other candidates, and they had said, well, this is what is typically spent in a legislative race, et cetera. It's also possible that the Clean Elections Institute, or whatever the national non-profit that had asked me to participate in this California interview session, I believe they also had provided me with talking points.

And so I don't know if they had provided me with some of that information prior to this. I didn't look prior to coming today to see if I had any sort of documents from – that they had given me, but I couldn't find any. But I do seem to recall that they gave me some talking points.

Q. Okay. So let me ask you this question. In terms of the magnitude of the reduction in the costs of campaigns after clean elections, you would agree that it's reasonably accurate to state that the cost of campaigns has dropped by more than half?

A. I would agree with that, yes.

Q. And when you say that it's reasonable, reasonably accurate to say that the costs of campaigns has dropped by more than half since the

enactment of clean elections, you would agree that a component of [24] the reduction in the cost of campaigns can be attributed to the effect that matching funds has in discouraging traditional candidates and independent expenditure committees from making expenditures in a campaign?

MS. SHIPMAN: Objection, form.

MS. SANDHU: Same objection.

THE WITNESS: Yes, I would agree with that.

BY MR. DRANIAS:

Q. And that's based on your experiences as a candidate as well as a staff attorney in the Arizona Senate Judiciary Committee?

A. Yes.

Q. And it's also based on talking points given to you by the Clean Elections Institute?

A. I believe so, yes.

MS. SANDHU: Actually, let me put in a caveat or an objection. You're not saying the Clean Elections Institute of Arizona, that's the defendant-intervenor in this case, you're saying the national organization?

THE WITNESS: Yes. And I don't even know if that was their name. It was – I think they still exist. They're in Washington, D.C. I believe it's

* * *

[25] Q. Okay. Let me direct your attention, if I could, to page 5 of Exhibit – let me rephrase that. Let me direct your attention to the article attached to Exhibit 1, specifically page 5 of that article. Towards the top where your statement begins with a bolded letter – or words "clean elections" are present. Do you see where I'm referring?

A. "In fact, independent expenditures have actually gone down since clean elections were enacted in Arizona . . . " Is that –

Q. Yes.

A. Yes.

Q. All right. I would ask you first to read what's ascribed to you as your statement, and when you're ready I will ask you some questions.

A. Sure. "In fact, independent expenditures have actually gone down since clean elections were enacted in Arizona because those people have found that the [26] impact is not as great as it used to be."

Q. The statement that you just read into the record, was it accurate at the time you gave it?

A. I think so.

Q. Is it accurate today?

A. I would say so, yes.

Q. Can you explain what you meant by it?

A. I believe it's similar to what we just talked about before, is that when somebody makes an independent expenditure, I think under clean elections they are less likely to make an independent expenditure if they see that the value of that independent expenditure is going to be weakened because it's matched by the clean elections system.

* * *

[Court Reporter's Certification Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JOHN MCCOMISH, ET AL.,	)	
Plaintiffs	)	
vs.	)	No. CV08-550 PHX-ROS
JAN BREWER, ET AL.,	)	
Defendants.	)	

DEPOSITION OF BASILIO AJA

(Filed Jul. 2, 2009)

Phoenix, Arizona
February 20, 2009
1:30 p.m.

REPORTED BY:

BARBARA H. STOCKFORD, CRR/RMR
Certified Court Reporter
Certificate No. 50463

PREPARED FOR:

(COPY)

* * *

[39] Q. And how do you make a decision to make an independent expenditure?

A. A couple of ways. Part of it would flow through that process I talked about earlier where there are interviews and that. And our boards would

get reports and they would say, "I really like this person. We should help them more."

Probably more generally, it comes from our [40] members talking to the board, or maybe in some instances it might be someone on the board that says, "This is a really good person out there, we need to support them."

And so those two ways, kind, of.

Q. And have you ever or has – have you ever considered the impact that your independent expenditure might have in terms of triggering matching funds in deciding whether or not to make an independent expenditure?

A. I can recall we've discussed it. We've discussed that. In the course of making determinations, someone might ask, Does that trigger something or do something. So yeah, I'd have to say I did, yes.

Q. About how many times would you say that happened?

A. Maybe a half a dozen.

Q. And when you say you discussed it, you know, maybe that might trigger something, what do you mean by that?

A. Well, when we're going through that process about we help, and the board, you know, is saying – somebody will say, Well, we should, you know, go get an IE – independent expenditure for this person, and then someone else will say, Well, isn't there – the

opponent running clean, does that trigger or give them money? [41] And I'll answer the question, say "yes" or "no," depending on whether they're a candidate or not – I mean a Clean Elections candidate or not.

And those are generally the way the discussion kind of transpires.

* * *

[Court Reporter's Certification Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, KEVIN GIBBONS, FRANK ANTENORI, TONY BOUIE, AND DOUG SPOSITO, Plaintiffs, and DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, and ARIZONA TAXPAYERS ACTION COMMITTEE, Plaintiff-Intervenors, vs. JAN BREWER, in her official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, Defendants.	No. CV08-1550-PHX-ROS ARIZONA CITIZENS CLEAN ELECTION COMMISSION 30(b)(6) DEPOSITION OF DESIGNEE COLLEEN MCGEE Phoenix, Arizona February 23, 2009 12:42 p.m. (Filed Jun. 13, 2009)

and)
CLEAN ELECTIONS)
INSTITUTE, INC.,)
Defendant-Intervenor.)

PREPARED FOR:
THE COURT
(ORIGINAL)
Reported by:
Sheryl L. Henke, RPR
Arizona CCR No. 50745

* * *

[162] Q. Going back to the issue of express advocacy, does the Commission have any best practices guidelines in writing that state how much investigation should be made of an unreported independent expenditure that doesn't use magic words, and therefore is something that must be contextually interpreted?

MS. SHIPMAN: Objection, form.

THE WITNESS: No.

* * *

[182] Q. Does the Commission have any policy, rule, or is there a law in the Act itself, and by Act I mean the Clean Elections Act, that precludes the Commission from considering mass e-mails as unreported independent expenditures?

MS. SHIPMAN: Objection, form.

THE WITNESS: No.

BY MR. DRANIAS:

Q. Do you have any understanding of how the Commission might calculate the value of a mass e-mail? Would it be something unprecedented and different from all the ways that it calculates the value of other unreported independent expenditures, or is there some set formula?

MS. SHIPMAN: Objection, form.

THE WITNESS: We don't have a set formula.

* * *

[185] BY MR. DRANIAS:

Q. Okay. Isn't there anything in writing that provides guidance to someone on staff at the Commission as to how to approach the question of what costs they should consider when assessing the value of an unreported independent expenditure?

MS. SHIPMAN: Objection; form, argumentative.

THE WITNESS: It would be contained in our procedures on implementing the election of 2002, 2004 and 2006.

BY MR. DRANIAS:

Q. And that's it?

A. That's it.

Q. Does it concern you as a representative of the Commission considering the complicated cost issues that can arise in trying to assess the value of an independent expenditure, that there is nothing besides the procedure manuals, the Act itself, and the rules promulgated under the Act?

MS. SHIPMAN: Objection; form, and beyond the scope of designation.

THE WITNESS: The majority of the issues [186] that are unreported, the individual or entity gives us that information. So we don't need to value it ourselves. That entity gives us the value for – tells us exactly what the cost was.

* * *

[187] BY MR. DRANIAS:

Q. With respect to Exhibit 3, the declaration of Barbara, I think it's McCullogh, on behalf of Equality Arizona, it's true that no matching fund contribution was made as a result of the communication that Equality Arizona made, correct?

MS. SHIPMAN: Objection; form, beyond the scope of designation.

THE WITNESS: I'm not aware of this. This is the first time I've seen this. So I'm not aware of any matching funds was produced for this news release.

BY MR. DRANIAS:

Q. Okay. Wouldn't you agree that determining whether or not an unreported independent expenditure constitutes express advocacy is a difficult decision?

A. Yes.

MS. SHIPMAN: Objection, form. Go ahead.

[188] THE WITNESS: Yes.

BY MR. DRANIAS:

Q. Wouldn't you agree that reasonable people, particularly when magic words are not used, can disagree over what constitutes express advocacy in an unreported independent expenditure?

MS. SHIPMAN: Objection; form, beyond the scope of designation.

THE WITNESS: Yes.

BY MR. DRANIAS:

Q. Doesn't that concern you as a representative of the Commission, that the Commission can grant matching funds based on a determination that reasonable people can disagree over?

MS. SHIPMAN: Objection; form, beyond the scope of designation.

THE WITNESS: No.

BY MR. DRANIAS:

Q. Why not?

A. Because the law gives us the guidelines to follow by issuing matching funds. And it doesn't have to have the trigger words for it to be considered matching funds. It leads the reader to believe one way or the other regarding the information. That's – to me it's not that difficult. I mean, it's an issue that

* * *

[191] BY MR. DRANIAS:

Q. When the Commission takes the testimony they hear into consideration in ruling whether or not an independent expenditure is express advocacy or not, are they governed by any written standards, apart from the procedures manual, the Clean Elections Act, and the rules and policies promulgated pursuant to the Act?

MS. SHIPMAN: Objection; form, beyond the scope of designation.

THE WITNESS: They have legal advice. They can seek legal advice.

BY MR. DRANIAS:

Q. And that's it?

MS. SHIPMAN: Objection, same objections.

THE WITNESS: As far as I know, yes.

BY MR. DRANIAS:

Q. As far as you know, yes?

A. Yes. As far as I know, that is their only information that would be available to them.

Q. Right.

A. Our attorney might have more information that [192] they could give to the commissioners.

Q. Okay. Let me try to wrap this up. You would agree that Commission staff, such as Mr. Ruiz, when confronted with an alleged unreported independent expenditure that requires more context than just looking at its words, that there is no policy in place requiring that staff member to go and contact constituents of the candidate in question?

MS. SHIPMAN: Objection, form.

THE WITNESS: That's correct; we do not contact the constituents.

BY MR. DRANIAS:

Q. Okay. Let's go back to the open borders example, or the – I understand there were a couple of signs out there. Pick either one of them, open borders, raise taxes, whatever. If a candidate's constituency in fact supports raising taxes and open borders, is it really a sufficient methodology to determine whether or not an independent expenditure is really supportive or against that candidate not to ask his constituents how they feel about it?

MS. SHIPMAN: Objection; form, beyond the scope of designation.

THE WITNESS: The issue of the signs on open borders, the independent expenditure, we contacted [193] the candidate that said candidate A, vote for candidate A if you like open borders. And we asked them, is this – is this your issue. I mean, do you agree with open borders. And, of course, they came to us, and they said no, this is a hit piece. Of course no one would want open borders in Arizona.

So it's very obvious that that was not their issue, open borders was not their issue. And it was, in fact, a hit piece against them. They were hoping that that issue would defeat that candidate. At least that's what the candidate felt when they told us their side of the story.

BY MR. DRANIAS:

Q. I understand that. All I'm saying is this; wouldn't you agree that the candidate who stands to gain from matching funds just might take that position on an ambiguous situation so they can get matching funds?

MS. SHIPMAN: Objection; form, beyond the scope, incomplete hypothetical. Go ahead.

THE WITNESS: I think the candidates have a little bit higher standard than that.

BY MR. DRANIAS:

Q. Well, does the Commission ever consider that when they ask a candidate who stands to gain matching [194] funds from its decision, that maybe they should not weigh that candidate's opinions as much as the person who has nothing to gain?

MS. SHIPMAN: Objection; form, beyond the scope of the designation.

THE WITNESS: I wouldn't be able to answer that question.

BY MR. DRANIAS:

Q. All right. Let me put it this way. Does the Commission have any policy in place to control for bias of the people that they ask about unreported independent expenditures?

MS. SHIPMAN: Objection; form, beyond the scope of the designation.

THE WITNESS: No.

* * *

[Court Reporter's Certification Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, KEVIN GIBBONS, FRANK ANTENORI, TONY BOUIE, AND DOUG SPOSITO,

Plaintiffs,

and

DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, and ARIZONA TAXPAYERS ACTION COMMITTEE,

Plaintiff-Intervenors,

vs.

JAN BREWER, in her official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS Clean Elections COMMISSION,

Defendants,

and

No. CV08-1550-PHX-ROS

DEPOSITION OF LORI DANIELS

(Filed Jun. 13, 2009)
(Filed Jul. 17, 2009)

Phoenix, Arizona
February 25, 2009
10:07 a.m.

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant-Intervenor.

PREPARED FOR:
(copy)

Reported by:
Sheryl L. Henke, RPR
Arizona CCR No. 50745

* * *

[6] Q. Commissioner Daniels, what is your current precise title and responsibility at the Arizona Citizens Clean Elections Commission?

A. I am a commissioner. And my responsibility is to attend meetings and set policy and make sure that the Clean Elections law is enacted as according to statute.

* * *

[67] Q. You would agree that whether or not an unreported expenditure such as one like the Project for Arizona's Future constitutes express advocacy is a difficult question over which reasonable minds can disagree?

MS. SHIPMAN: Objection, form.

THE WITNESS: Yes.

BY MR. DRANIAS:

Q. You would agree that the availability of matching funds can influence whether a candidate makes or doesn't make expenditures?

MS. SHIPMAN: Objection, form.

THE WITNESS: Yes.

BY MR. DRANIAS:

Q. You would agree that the availability of matching funds can influence whether an independent expenditure committee makes or doesn't make expenditures?

MS. SHIPMAN: Objection, form.

THE WITNESS: Yes.

BY MR. DRANIAS:

Q. You would agree that the availability of matching funds influences whether or not ordinary citizens make or don't make contributions to [68] candidates?

MS. SHIPMAN: Objection, form.

THE WITNESS: Yes.

BY MR. DRANIAS:

Q. Wouldn't you agree that if reasonable minds can disagree over how to characterize something that is being alleged to be an unreported campaign expenditure or independent expenditure, that it could

chill the willingness of people to make those expenditures for fear of triggering matching funds?

MS. SHIPMAN: Objection, form.

THE WITNESS: Yes.

BY MR. DRANIAS:

Q. Did that come through? The objection didn't obscure anything?

And when I use the word "chill," explain to me what you understood that to mean.

A. I would understand that people would hesitate to spend money on an outside expenditure expressly advocating that a candidate get elected if they know that the other candidate is going to get matching funds in order to be able combat whatever it was that was presented.

* * *

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[71] BY MR. DRANIAS:

Q. Okay. When Executive Director Lang has advised the Commission that Judge Silver has now twice ruled, albeit preliminarily, that in her opinion the matching funds provisions of the Clean Elections Act violate the First Amendment, did you ever have any conversation with other members of the Commission about that?

MS. SHIPMAN: Objection: form, asked and answered.

THE WITNESS: We were updated. Other commissioners may have – I think we all are aware that if matching funds go away, the chance of candidates running as Clean Elections probably would stop or would put a real damper on that. But I don't know that anybody personally said, well, this is horrible, this is a bad ruling. I don't ever remember that conversation, although there may be some in the minutes. I guess to me it was just this is a judge's ruling and we have to just see where we go from there.

* * *

[74] Q. Do you – well, and I don't mean to be flippant in asking you this. Here you are on a body that has as its responsibility the enforcement of laws that you regard as unconstitutional. Can you explain how that affects your decision making?

MS. SHIPMAN: Objection, form.

THE WITNESS: Absolutely. I, at my second meeting, made it very clear where I stood as far as Clean Elections. I don't believe in publicly funding elections. I'm not an advocate of this in any way, shape or form. But it is the law and it was voted on by the people.

And I moved on to this Commission and was appointed to it with the whole idea that I wanted to make sure that candidates that choose to run Clean Elections don't fall into the pitfalls of making

mistakes and getting thrown off the ballot, getting in trouble, getting fined.

So my role as a commissioner is not only to set policy and make sure that the law as it is on the books right now is enforced, but to help candidates who are going to take this road to make sure they knew what they was doing.

[75] So, no, do I like the system? No. And there isn't a person on the Commission or on the staff that aren't aware of that.

* * *

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[81] Q. Okay. You're aware of the allegations in this case and perhaps by others, I don't know, that 6 per cent is not a reasonable estimate of the value of both the time and the expense involved in fund-raising as a traditional candidate?

A. Yes.

Q. What's your opinion on that issue?

A. I do believe that Clean Elections sets it up unfairly when you're running against a traditional candidate as far as what the cost is on running for office. In other words, you have a fund-raiser that's a dinner, and the expense of the dinner is there. And depending on how matching funds work, the Clean Elections candidate gets the matching funds. And, yes, [82] I think that is a chilling effect, and I've always felt that way.

Q. Okay. You said the word "traditional candidate" at the beginning, and I think you meant "participating"?

A. Yes.

Q. Why don't we have the answer read back, because I don't want to put words in your mouth and you just tell me if my sense was correct. If we can have the question and answer read back.

(Requested portion of record read.)

BY MR. DRANIAS:

Q. Okay. When you said when you're running against a traditional candidate in that answer, you meant when you're running against a participating candidate?

A. Yes. What I meant was the traditional candidate running against the participating one, yes, I think it has a chilling effect.

Q. All right. So you would agree that the true cost in resources for a traditional candidate in fundraising to support his campaign is greater than 6 per cent of the dollar cost of any particular expenditure or contribution?

MS. SHIPMAN: Objection, form.

[83] THE WITNESS: The majority of the time, absolutely.

BY MR. DRANIAS:

Q. Okay. Now, I share your opinion. I suspect you have more reasons to have your opinion than I do. What do you base your opinion on?

A. As far as the cost for campaigning?

Q. Yes.

A. Oh, just in particular having run as a traditional candidate, you have a reception, you have a dinner. The costs are – it wouldn't be unusual to have a campaign fund-raiser where you raised $5,000 and it cost you a thousand to have it. And that's personal experience.

You're only allowed so much – you know, people to offer up food and drink. The rest are expenses. There's expenses of sending out invitations. There is expenses of the cost of food, all of that, and it's obviously more than 6 per cent.

Q. And we haven't even gotten to the cost or the time value of the time expended by the candidate, correct?

MS. SHIPMAN: Objection, form.

THE WITNESS: Correct.

* * *

[89] Q. But then at the beginning of your answer, you said there was no chilling effect in –

A. Well, it is not no chilling effect. I'm saying that – you said there is always a chilling effect. And I wouldn't say that, because I have to be real honest. When I ran for office, money was not – money may have been the reason I lost, but it was never a number one priority. Debates, meeting with people, [90] doing all that was my priority. I never liked raising money. So matching funds, participating candidates didn't really play into what I was thinking when I was running for office.

Q. Okay.

A. So there was no chilling effect for me personally. So when you say there's always a chilling effect, maybe I'm the exception. Maybe that's why I'm not in office anymore.

Q. Well, let me ask you this, this way. For those individuals who are aware of the impact of matching funds and for those individuals who are engaged in decisions about fund-raising or expenditures in support of their campaign, wouldn't you agree that there would always be a chilling effect of some magnitude on their fund-raising and expenditure decisions?

MS. SHIPMAN: Objection, form.

THE WITNESS: Again, you use the word "always," and, again, I will think of one other candidate that I don't know that it would have a chilling effect on, and that would be president Bob Burns. He would always run traditional. And I don't think whatever matching funds were there had an effect on

what he did. And I could be wrong. I've known Bob [91] for over a decade.

But that's when you use the word "always," you're going to lose me. The majority of the time, is it a chilling effect with matching funds, yes.

BY MR. DRANIAS:

Q. Okay. When Tony Bouie in his testimony has said that when he didn't fully understand the system as a traditional candidate, he didn't understand just how disadvantageous matching funds made him, would you think that's an unreasonable and unusual position to take?

MS. SHIPMAN: Objection; form, misstates the Mr. Bouie's testimony. Go ahead.

THE WITNESS: I don't – I wouldn't know. I met Mr. Bouie once in a public meeting so I – it could. I don't know him. So I don't know what he said. I can tell you why I think he lost, and I don't think it was the matching funds.

BY MR. DRANIAS:

Q. Well, I'm not asking that question.

A. Okay.

Q. Well, you would agree, though, when Tony Bouie testifies in his declarations that his decisions on whether to raise or spend money were affected by the presence and availability of matching funds to his

[92] competitor, that there is nothing inherently incredible about that?

MS. SHIPMAN: Objection; form, lack of foundation. She has no idea what the intent of Mr. Bouie was or was not in making this – any kind of declarations. Go forward.

THE WITNESS: If he stated that it had an effect on him, then – I'm going to give everybody the benefit of the doubt and believe him.

BY MR. DRANIAS:

Q. But it's not just an arbitrary decision to give Mr. Bouie the benefit of the doubt; you yourself have just said that the majority of the time matching funds has a chilling effect, right?

MS. SHIPMAN: Objection, form.

THE WITNESS: Yes.

* * *

[97] Q. Let me ask you it this way. In the past eight years, how many candidates have you met with whom you would be familiar of their candidate and candidacy strategies?

MS. SHIPMAN: Objection, form.

THE WITNESS: 10.

BY MR. DRANIAS:

Q. Out of those 10 individuals how many of them would have not been chilled by the presence of matching funds?

MS. SHIPMAN: Objection, form.

THE WITNESS: It would be a guess, but I would say two out of the ten.

BY MR. DRANIAS:

Q. You would agree that in your experience, to the best of your knowledge and recollection over the past eight years, at least 80 per cent of the candidates whose strategies you knew as a candidate [98] would be chilled by matching funds?

MS. SHIPMAN: Objection, form.

THE WITNESS: That would be an estimate, yes.

BY MR. DRANIAS:

Q. It would be a reasonable estimate?

MS. SHIPMAN: Objection, form.

THE WITNESS: Yes.

BY MR. DRANIAS:

Q. Okay. None of those are my clients, are they?

A. That's privileged.

Q. Is it?

A. No.

Q. No, seriously –

MS. SHIPMAN: Who are your clients?

BY MR. DRANIAS:

Q. Do you know – my clients are John McComish, –

A. I know Mr. McComish.

Q. – Tony Bouie and Nancy McLean.

A. I don't know Nancy McLean at all. I've met Tony Bouie once. I know John McComish, but I wasn't involved with his campaign in any way. So I don't know where he would be coming from, but –

Q. Okay. So you have no reason to dispute the [99] claims of my clients that they have been chilled by matching funds?

MS. SHIPMAN: Objection, form.

THE WITNESS: Absolutely. I would say that there would be – there would be no reason for them to lie. If they're stating that, I believe them completely.

BY MR. DRANIAS:

Q. Okay. And there's nothing inherently incredible about my clients' testimony that they have been chilled by matching funds in the course of their candidacies?

MS. SHIPMAN: Objection, form.

THE WITNESS: That's correct.

* * *

[130] Q. To make it more concrete, you would agree that the presence of matching funds can operate as an influence on independent groups such as PACs, to change the content of their messages so as to avoid express language that is obviously express advocacy?

MS. SHIPMAN: Objection, form.

THE WITNESS: Yes.

BY MR. DRANIAS:

Q. You would also agree that when it comes to a communication that's meant to support or oppose a candidate, it's generally more effective to say so plainly?

MS. SHIPMAN: Objection, form.

THE WITNESS: Yes.

BY MR. DRANIAS:

Q. You would agree that one of the influences that matching funds creates on independent groups such as PACs then is to render their messages of support for a candidate less effective?

MS. SHIPMAN: Objection, form.

THE WITNESS: Yes.

* * *

[183] Q. Wouldn't you agree, though, that the instance of the sign that says "Support Ableser – Open Borders" is an instance of someone using misleading signage to actually have the opposite effect of what it's exhorting people to read the sign to do?

MS. SHIPMAN: Objection; misstates contents of sign at issue, form.

THE WITNESS: I would say in both participating candidates and traditional candidates that that happens on a regular basis during campaigns. That you miss – that you state something in hopes of defeating that candidate, not in support of that candidate. That's been a campaign tactic since campaigns began.

BY MR. DRANIAS:

Q. Now, that campaign tactic, has it ever been used for the purpose of triggering matching funds?

MS. SHIPMAN: Objection, form.

[184] THE WITNESS: Not that I'm aware of. But I wouldn't say it hasn't happened; it's just not what I'm aware of.

BY MR. DRANIAS:

Q. Is there anything apparently incredible about the idea that campaign expenditures or independent expenditures might be made less than honestly for the purpose of triggering matching funds?

MS. SHIPMAN: Objection, form.

THE WITNESS: It could happen.

BY MR. DRANIAS:

Q. In particular, though, when the Commission was considering the complaint – I think it was brought by Mr. Ableser; isn't that correct?

MS. SHIPMAN: Objection, form.

THE WITNESS: I'm pretty sure it's correct, but again – I have the transcript but I don't have my documentation from the agenda. But I think that's who brought it, but I wouldn't want to state absolutely that that's the case.

BY MR. DRANIAS:

Q. Okay. The complaint that was brought by whoever regarding the posting of signage stating "Support Ableser – Open Borders," as shown on page 28, line 12, wouldn't you agree that that complaint is an [185] instance of someone gaming the system in general?

MS. SHIPMAN: Objection, form. Again, it misstates the contents of the sign at issue.

THE WITNESS: I don't think it's gaming the Clean Elections system. I think it's just gaming the campaign system in general. When I say that – because I don't think this is unique to whether Clean Elections occurs or not. People try to game the system all the time.

I mean, push, pull, that state, you know, well, would you support this candidate if you knew that they're against fire and police. You know, it's a push, pull type thing. It misstates what is accurate in the campaign. And I think it probably happens as much in traditional campaigns as it does in Clean Elections.

BY MR. DRANIAS:

Q. All right. But the difference in a Clean Elections system is that when someone uses the gaming that you've just described, it has the potential of the government deciding to trigger matching funds?

MS. SHIPMAN: Objection, form.

THE WITNESS: I agree.

BY MR. DRANIAS:

Q. Right. Whereas in the absence of the Clean [186] Elections system, gaming through deceptive methods such as appearing to support someone when saying things that will obviously bring opposition to that candidate, will only have the effect of diminishing their political support?

MS. SHIPMAN: Objection, form.

THE WITNESS: Yes.

BY MR. DRANIAS:

Q. Wouldn't you agree that the availability of matching funds magnifies the impact of gaming

strategies such as was at issue in the case that was brought by Mr. Ableser?

MS. SHIPMAN: Objection, form.

THE WITNESS: That would – I can't agree with that, because that would state that I thought this instance was gaming the system. And I think this instance was strictly trying to get Mr. Ableser unelected, not reelected. That's where I think this one was coming from. I don't think it was a gaming of the system to trigger the matching funds. Yes, it did trigger matching funds, I would agree with that, but I don't think that was a gaming of the system in this instance.

BY MR. DRANIAS:

Q. But you would agree that, leaving aside the [187] Ableser circumstance, the fact that matching funds might be triggered by something that appears to engage in express advocacy, gives people an incentive to try to create express advocacy that is not meant to support a candidate even though it appears to, so that they have the double whammy of both triggering matching funds to their preferred candidate and harming the political support for the candidate who was the subject of the message?

MS. SHIPMAN: Objection, form.

THE WITNESS: I'm sure there are some devious people out there that probably would do that.

BY MR. DRANIAS:

Q. Well, it's par for the course in politics, isn't it?

MS. SHIPMAN: Objection, form.

THE WITNESS: I personally will tell you that that's not anything I would have ever done, and I was in politics far a long time. So there are good players and bad players.

BY MR. DRANIAS:

Q. But you would agree that there are some aggressive campaign strategies used in politics, correct?

MS. SHIPMAN: Objection, form.

[188] THE WITNESS: I think there are some unethical ones also.

BY MR. DRANIAS:

Q. Of course. And you would agree that the incentive to use misleading expressions of support for a candidate is enhanced by the presence of matching funds that they could trigger?

MS. SHIPMAN: Objection, form.

THE WITNESS: Sure.

BY MR. DRANIAS:

Q. In general, though, with respect to the Ableser decision that did ultimately arise, to me it looked like a tortured decision. It didn't seem to be an

open and shut case, even though you seemed to summarize it that way. Is my impression incorrect?

MS. SHIPMAN: Objection, form.

THE WITNESS: No, I don't think it was – it wasn't an open and shut case. Because some people do advocate open borders and there are some people that would support that. And I think that was in the back of some people's minds. But it came down to the conclusion of the Commission that, no, this was not trying to get people to support Mr. Ableser, it was trying to get them to not support them.

BY MR. DRANIAS:

[189] Q. As I read the transcript dealing with the Ableser signage issue, it seemed to me that the only written standard that the Commission considered and that was argued from was found in the Act, the Clean Elections Act itself?

MS. SHIPMAN: Objection.

BY MR. DRANIAS:

Q. Is that a correct impression?

MS. SHIPMAN: Objection, form.

THE WITNESS: I believe so.

BY MR. DRANIAS:

Q. To your knowledge, with respect to the Ableser circumstance of a misleading expression of

support for a candidate, are there any other written standards that the Commission has ever consulted?

A. Not that –

MS. SHIPMAN: Objection; form, asked and answered.

THE WITNESS: Not that I'm aware of.

BY MR. DRANIAS:

Q. Are you aware that the staff when it investigates misleading expressions of support or, for that matter, misleading expressions of opposition, that it does not customarily conduct an investigation of the opinions of the constituency of the affected candidate?

[190] MS. SHIPMAN: Objection, form.

THE WITNESS: If you're asking does a staff go out and talk to the constituents to see if what they were advocating is true or false, it's not my understanding that they would. And I don't think we have the manpower to do that.

BY MR. DRANIAS:

Q. Okay. Let me put some more meat on that bone. You would agree that Mr. Ableser is in a Democrat-dominated district?

MS. SHIPMAN: Objection, form.

THE WITNESS: Actually, my understanding is that 17 was – it's been Republican a lot. It's a real swing district. You've had Laura Knaperek. It is

– in the last couple of years has swung more towards the Democrats. But it's been Republican for a number of years too. So that's one of the more swing districts than a lot of the all Democrat or all Republican.

BY MR. DRANIAS:

Q. Okay, fair enough. You certainly would know that better than I.

Let me ask you this hypothetically then. Assuming you have a Democrat-dominated district, legislative district. Assume further that, again only [191] hypothetically, overwhelmingly Democratic party members support open borders. Assume in that context a sign was sent out to support the Democrat candidate in that Democrat dominant district where the majority of Democrat voters support open borders, said the same thing as the sign at issue in Ableser. How do you think the Commission would come down on it?

MS. SHIPMAN: Objection; form, incomplete hypothetical.

THE WITNESS: I don't think that unless there was a complaint the Commission would ever even look at it. And if you're in a Democratic district that supports open borders and somebody puts up a sign saying that, I don't know that anybody would bring a complaint to the Commission regarding it. So I don't think it would be an issue ever dealt with by the Commission.

I think this was definitely dealt with because this is a swing district. And there are a number of people

in that area that don't support open borders. You know, that's – that's what I think is the reason here.

If a complaint was brought forward I think the Commission would look at it at that point in time and see if, you know, we felt like matching funds [192] should be issued or not. That's a hard – because it's hypothetical, I can't always answer it.

But I don't know that in a Democratic district anybody would have a problem with that any more than in a Republican district, if you had somebody who was pro life and you put pro life in front of them, that that would trigger matching funds necessarily either, because I don't know that there would be a complaint.

BY MR. DRANIAS:

Q. Well, what I'm getting at is this. You would agree that when the Commission tries to understand the impact of a statement such as was contained on the signage affecting Mr. Ableser, as shown in Exhibit 7, one of the things it has to assess is the constituency of that candidate and whether they support messages like this?

MS. SHIPMAN: Objection, form.

THE WITNESS: That's a difficult one again to answer. And the reason I'm saying that is, I think if it was a Democratic group and somebody did come up forward with the complaint, we would look at it very seriously. Whether or not we would take into accounts that constituency, I don't think we can guess

what the voters are going to do. I think that's beyond [193] our boundaries.

So my guess is, and again it's hypothetical, that if somebody from an open border Democratic district put the signs up and then brought a compliant, we would probably in that instance issue matching funds the same way if, you know, we felt like it was an advocacy position.

I know that sounds kind of contradictory, but I don't think we have the right as a commission to say, this is all Democrat, they all support open borders. This isn't going to fly. I don't think that's a decision we make. I think that's what whoever is filing that complaint is saying. This is really going hurt me in my district, even though it's Democratic, because they don't want open borders, they're tired of the illegals. You never know.

There is a lot of rural Democratic districts that probably an open border sign could really hurt a Democratic candidate, if you're along one of those border towns where the illegals are coming through all the time.

BY MR. DRANIAS:

Q. On the other end if you're Mr. Saban running in Guadalupe, a sign like was used for Mr. Ableser could have an entirely different effect, correct?

[194] A. Mm-hm.

MS. SHIPMAN: Objection, form.

THE WITNESS: Yes.

BY MR. DRANIAS:

Q. Which begs the question of how is it that the Commission can assess whether a sign is truly supportive or not without considering the constituency of the candidate in the district that it affects?

MS. SHIPMAN: Objection; form, asked and answered.

THE WITNESS: That's when the Commission would look at who made - who filed the complaint and if there was any counter-complaint. In other words, in this circumstance Mr. Ableser was the only one there. If there had been somebody that came in and said, no, I put those signs here, because I want him to get elected and this isn't negative, we probably would have looked at it differently.

All we can look at is the facts that are in front of us. And that's when a complaint is filed and the information is given at that time. It was a matter of public record that this was on our agenda. So if somebody had come forward and said, I put this out here because he does support open borders and I think that will help him. And I think this may be the [195] one that they did that, actually.

And so we look both ways to see – I would think as commissioners we're like anybody else. You look at the facts and you decide who you want to believe. And it's like a jury or any other board; you sometimes make decisions that sometimes they may be wrong, sometimes they're right. You do what you believe is

the best thing to do and the right thing to do, according to where the rules are and the clean air – the Clean Elections Act.

* * *

[240] Q. Tell me what you now recall.

A. Well, I recall, because I looked at the sign in the memorandum, that there – I don't remember how many signs there were or anything else, but that they promised to raise taxes. Again, this is the same thing I would get back to in support of illegals.

That I don't see too many Democrats [241] saying I want to raise your taxes. I see them say I want to do away with tax loopholes. We need to quit doing tax credits. But anybody in their right mind that wants to get elected isn't going to admit that they want to raise your taxes.

Q. Going back to Exhibit 12, wouldn't you agree that the request for matching funds came from a representative of Jeff Dial?

MS. SHIPMAN: Objection, form.

THE WITNESS: Yes.

BY MR. DRANIAS:

Q. Yes?

A. Yes.

Q. Okay. Wouldn't you agree that there is no indication in Exhibit 12, which is Todd Lang's

recommendation memorandum, that Mr. Maish or Ms. Waters requested matching funds?

MS. SHIPMAN: Objection, form.

THE WITNESS: Yes.

BY MR. DRANIAS:

Q. Wouldn't you agree that the recommendation made by Todd Lang to issue matching funds for Ted Maish and Rae Waters was made by him independently of any request by Mr. Maish or Ms. Waters?

MS. SHIPMAN: Objection, form.

[242] THE WITNESS: By Maish or Waters, correct. But there was an action asked to be taken by the Commission in the request from Ryan Ducharme. So the Commission acted in response to that request.

BY MR. DRANIAS:

Q. But in effect a request by a candidate in competition with Mr. Maish and Ms. Waters for matching funds resulted in an issuance of matching funds for Mr. Maish and Ms. Waters without any requests by them to do so?

MS. SHIPMAN: Objection, form.

THE WITNESS: That's correct. Be careful what you ask for.

* * *

[293] Q. Okay. So as you understand it, the Clean Elections Act does not prohibit the voluntary bundling of five-dollar qualifying contributions?

MS. SHIPMAN: Objection, form.

THE WITNESS: If there is something in the Act that there is a qualification on numbers, I'm not aware of it. And maybe that's my ignorance. There could be. I just know that I personally have gotten out and I will help eight or nine candidates. And I'll get everybody in my family to give five dollars to each candidate and collect the money. And every friend I've got to do that. And I hope I haven't been doing anything illegal.

* * *

[294] Q. Okay. Is that practice an unusual one that only you engage in, or do you see a lot of people doing it?

MS. SHIPMAN: Objection, form.

THE WITNESS: I think most people do it that way. If you're going to – most people go, oh, five bucks, no big deal. And if you have four candidates, they will give, you know, five dollars for each one.

* * *

[302] Q. The bottom line is that the Clean Elections system and its method of qualifying candidates for access to public financing is not more likely to reduce corruption or the appearance of corruption than the traditional way of fund-raising?

MS. SHIPMAN: Objection, form.

THE WITNESS: I've publicly stated that, so that's not anything I wouldn't agree with. I have publicly stated that I don't think that Clean Elections or traditional elections takes the dirty politics out of it. It is what it is when it's dirty, and when it's not, then it's what it's supposed to be.

BY MR. DRANIAS:

Q. And so if one of the purposes of the Clean Elections Act is to reduce the degree of corruption or the appearance of corruption that exists under a traditional fund-raising system, it's not going to achieve that purpose?

MS. SHIPMAN: Objection, form.

THE WITNESS: I do agree.

* * *

[Court Reporter's Certification Omitted In Printing]

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

CITIZENS CLEAN ELECTION COMMISSION

10 YEARS of CLEAN ELECTIONS in ARIZONA

2008 Annual Report

Chair

Gary Scaramazzo

Commissioners

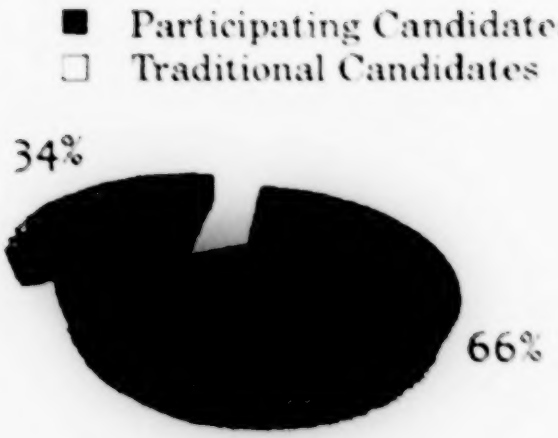
Royann J. Parker
Jeffrey L. Fairman
Donald W. Lindholm
Lori Daniels

1616 W. Adams St. Phoenix, Arizona 85007
telephone: 602-364-3477 | toll free: 1-877-631-8891
www.azcleanelections.gov | ccec@azcleanelections.gov

2008 Election Statistics

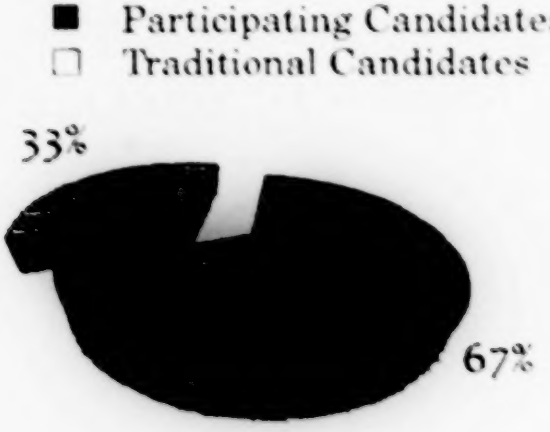
Primary Election

In the 2008 Primary Election a total of 190 candidates sought election to a State or Legislative office. Of the 190 candidates, 126 chose to participate in the Clean Elections system. A total of $3.3 million was distributed to participating candidates during the Primary Election cycle.



General Election

In the 2008 General Election a total of 160 candidates sought election to a State or Legislative office. Of the 160 candidates, 107 were candidates who chose to participate in the Clean Elections system. A total of $4.5 million was distributed to participating candidates during the General Election cycle.



IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, NANCY MCLAIN, KEVIN GIBBONS, FRANK ANTENORI, TONY BOUIE, AND DOUG SPOSITO,

Plaintiffs,

and

DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, AND ARIZONA TAXPAYERS ACTION COMMITTEE,

Plaintiff-Intervenors,

vs.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, et al.,

Defendants,

and

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant-Intervenor.

No. CV 08-1550-PX-ROS

DEPOSITION OF STEPHEN JAMES VOELLER

(Filed Jul. 17, 2009)

Phoenix, Arizona
February 26, 2009
9:07 a.m.

REPORTED BY:
WILMA A. WEINREICH, CSR, RPR
Certified Reporter
Certificate No. 50530

PREPARED FOR:
(ASCII/MUS/CD/ETRAN)

* * *

[52] Q. So in practice, the PAC donates money to Arizonans For a Sound Economy, which to turn makes the independent expenditures; is that correct?

A. That is correct.

* * *

[60] Q. Did you make an independent expenditure –

MR. KELLER: Thank you.

BY MS. NEUBAUER:

Q. – on behalf of Sylvia Allen's campaign knowing that it would trigger matching funds for her opposition?

A. Yes.

Q. The next paragraph reads: Arizonans For a Sound Economy made an independent expenditure in opposition to Bill Jeffer's campaign for state senator in District 5 in the amount of $4,875 which triggered – on October 27th, 2008, which triggered matching funds to a candidate the Arizona Free Enterprise Club's Freedom Club PAC opposed.

Is that correct?

A. Yes.

Q. Did you make the decision to donate 4,087 – sorry, did you make a decision to make an independent expenditure in the amount of $4,875 on behalf of Bill Jeffer's campaign?

A. Yes. And just to clarify, it's one expenditure of the combined total. But the law requires you, if the [61] piece has both people, you divide it in two.

Q. So they were running as a slate?

A. No. They were running – the piece had both – featured both of them. They were running against each other.

Q. So Bill Jeffer and Sylvia Allen were running against each other?

A. Correct

Q. But you supported both of them?

A. No.

Q. Sorry. I see what you're saying.

You supported Sylvia Allen; is that correct?

A. That's correct.

Q. And you opposed Bill Jeffer?

A. That's correct.

Q. And your expenditure in opposition to Bill Jeffer triggered matching funds for Bill Jeffer?

A. That is correct.

Q. And you made that expenditure knowing it would trigger matching funds?

A. That is correct.

Q. The next paragraph starting at Line 19 reads: Arizonans For a Sound Economy made an independent expenditure in opposition to Nancy Young Wright's campaign for state representative in District 26 in the amount of [62] $17,250 on October 27th, 2008, which triggered matching funds to a candidate the Arizona Free Enterprise Club's Freedom Club PAC opposed.

Is that correct?

A. That is correct.

Q. Did you make the decision to spend $17,250 in opposition to Nancy Wright's campaign?

A. Yes. In conjunction with other folks who supported that effort.

Q. Who else was involved in that decision?

A. Tom Farley from Realtors.

Q. From?

A. The Realtors PAC.

Q. So did the Realtors PAC also participate in that same independent expenditure?

A. Yes.

Q. So it was a joint independent expenditure by two PACs; is that correct?

A. It was paid for by the Freedom Club PAC and the Realtors PAC.

Q. Thank you.

Did you make that independent expenditure knowing it would trigger matching funds for Ms. Wright?

A. Yes.

Q. If you will look at the next paragraph, starting [63] at – I promise this will be over soon. Line 25 on Page 42: Arizonans For a Sound Economy made an independent expenditure in opposition to Cheryl Cage's campaign for state senator in District 26 in the amount of $17,250 on October 27th, 2008, which triggered matching funds to a candidate the Arizona Free Enterprise Club's Freedom Club PAC opposed.

A. That is correct.

Q. Did you make that decision to spend $17,250 in opposition to Ms. Cage?

A. Yes.

Q. And was that decision also made in conjunction with the Realtors Association?

A. Yes.

Q. Did you make that expenditure knowing it would trigger matching funds for Ms. Cage?

A. Yes.

Q. Let's move on to the next paragraph on Page 43, beginning at Line – between Lines 3 and 4 that states: Arizonans For a Sound Economy made an

independent expenditure in opposition to Cheryl Cage's campaign for state senator in District 26 in the amount of $17,250 on October 29th, 2008, which triggered matching funds to a candidate the Arizona Free Enterprise Club's Freedom Club PAC opposed.

[64] Is that accurate?

A. Yes.

Q. Did you make the decision to spend $17,250 in opposition to Ms. Cage?

A. Yes.

Q. Did you make that decision knowing it would trigger matching funds for Ms. Cage's campaign?

A. Yes.

Q. Have you ever decided not to make an independent expenditure through either the PAC or Arizonans For a Sound Economy because of your fears that you would trigger matching funds for a candidate you did not support?

A. I don't recall ever making a decision not to spend money. I do recall having it determined when we spend money.

* * *

[76] Q. Did the PAC ever not donate to Arizonans For a Sound Economy because of fears of triggering matching funds?

A. No.

Q. Now, you say you have lived in Arizona all your life with the exception of the year in D.C.; is that correct?

A. Correct.

Q. Are you aware of a scandal that occurred in the State of Arizona called AzScam?

A. I'm aware.

Q. And what's AzScam?

A. I'm aware because I have heard it, but it was a little before my time of paying attention. The best of my recollection, it was a bribery sting where lawmakers were filmed taking cash in exchange for I believe favorable votes or legislation or something.

* * *

INSTITUTE FOR JUSTICE
Timothy D. Keller (019844)
Jennifer M. Perkins (023087)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
P: 480-557-8300/F: 480-557-8305

INSTITUTE FOR JUSTICE
William R. Maurer (WSBA 25451)[1]
101 Yesler Way, Suite 603
Seattle, WA 98104
P: 206-341-9300/F: 206-341-3911

Attorneys for Plaintiff-Intervenors

FEB 27 2009

SOLICITOR GENERAL'S OFFICE

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*,

Plaintiffs,

and

DEAN MARTIN, a citizen of the State of Arizona, *et al.*,

Plaintiff-Intervenors

vs.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; *et al.*,

Defendants,

Civil Action No. 08-1550-PHX-ROS

PLAINTIFF-INTERVENORS' RESPONSES AND OBJECTIONS TO DEFENDANTS' FIRST REQUEST FOR ADMISSIONS AND SECOND REQUEST FOR PRODUCTION

(Filed Jun. 12, 2009)

---

[1] Admitted *pro hac vice*.

and	)	(Assigned to the
	)	Honorable
CLEAN ELECTIONS INSTITUTE, INC.	)	Roslyn O. Silver)
	)	
Defendant-Intervenor.	)	

GENERAL OBJECTIONS

1. Plaintiff-Intervenors object to the instructions, definitions, and each of the requests to the extent that they are overly broad as to time and/or scope, vague, ambiguous, and unduly burdensome or purport to impose obligations on Plaintiff-Intervenors that exceed or differ from those imposed by the Federal Rules of Civil Procedure and the applicable rules of this Court.

2. Plaintiff-Intervenors further object to every request to the extent it calls for, or could be construed as calling for, information protected from discovery under the attorney-client privilege, the work product doctrine, the associational privilege protected under the First Amendment, or any other applicable privilege or protection from discovery.

3. Subject to and without waiving the foregoing objections, and subject to the specific objections set forth below, Plaintiff-Intervenors respond as follows:

REQUESTS FOR ADMISSION

1. Admit that Plaintiff Rick Murphy was a participating candidate when he ran for a seat as an Arizona State Representative of District 9 in 2004.

Admit.

2. Admit that Plaintiff Rick Murphy had not run for election to the Arizona State House of Representatives or Arizona State Senate prior to the 2004 election cycle.

Admit.

3. Admit that Plaintiff Rick Murphy received Matching Funds in his 2004 election campaign for a seat as an Arizona State Representative of District 9.

Admit.

4. Admit that Plaintiff Rick Murphy was elected to a seat as an Arizona State Representative of District 9 in 2004.

Admit.

5. Admit that Plaintiff Rick Murphy was an incumbent when he ran for election to a seat as an Arizona State Representative of District 9 in 2006.

Admit.

6. Admit that Plaintiff Rick Murphy chose not to run as a participating candidate in his 2006

election campaign for a seat as an Arizona State Representative of District 9.

Admit.

7. Admit that Plaintiff Rick Murphy was elected to a seat as an Arizona State Representative of District 9 in 2006.

Admit.

8. Admit that Plaintiff Rick Murphy was an incumbent when he ran for election to a seat as an Arizona State Representative of District 9 in 2008.

Admit.

9. Admit that Plaintiff Rick Murphy chose not to run as a participating candidate in his 2008 election campaign for a seat as an Arizona State Representative of District 9.

Admit.

10. Admit that Plaintiff Rick Murphy was elected to a seat as an Arizona State Representative of District 9 in 2008.

Admit.

11. Admit that Plaintiff Bob Burns held office as an Arizona State Representative for District 17 from 1989 until 2000.

Admit.

12. Admit that Plaintiff Bob Burns chose not to run as a participating candidate in his 2002 election campaign for Arizona State Senator of District 9.

Admit.

13. Admit that Plaintiff Bob Burns triggered matching funds for his democratic opponent in the 2002 primary election for Arizona State Senator of District 9.

Deny. Robert Burns did not have a democratic opponent in the 2002 primary election for Arizona State Senator in District 9.

14. Admit that Plaintiff Bob Burns was elected the Arizona State Senator of District 9 in 2002.

Admit.

15. Admit that Plaintiff Bob Burns chose not to run as a participating candidate in his 2004 election campaign for Arizona State Senator of District 9.

Admit.

16. Admit that Plaintiff Bob Burns was an incumbent when he ran for election for the seat as the Arizona State Senator of District 9 in 2004.

Admit.

17. Admit that Plaintiff Bob Burns triggered matching funds for his democratic opponent in the 2004 general election for Arizona State Senator of District 9.

Admit.

18. Admit that Plaintiff Bob Burns was elected the Arizona State Senator of District 9 in 2004.

Admit.

19. Admit that Plaintiff Bob Burns chose not to run as a participating candidate in his 2006 election campaign for Arizona State Senator of District 9.

Admit.

20. Admit that Plaintiff Bob Burns was an incumbent when he ran for election for the seat as the Arizona State Senator of District 9 in 2006.

Admit.

21. Admit that Plaintiff Bob Burns triggered matching funds for his democratic opponent in the 2006 general election for Arizona State Senator of District 9.

Admit.

22. Admit that Plaintiff Bob Burns was elected the Arizona State Senator of District 9 in 2006.

Admit.

23. Admit that Plaintiff Bob Burns chose not to run as a participating candidate in his 2008 election campaign for Arizona State Senator of District 9.

Admit.

24. Admit that Plaintiff Bob Burns was an incumbent when he ran for election for the seat as the Arizona State Senator of District 9 in 2008.

Admit.

25. Admit that Plaintiff Bob Burns triggered matching funds for his democratic opponent in the 2008 general election for Arizona State Senator of District 9.

Admit.

26. Admit that Plaintiff Bob Burns was elected the Arizona State Senator of District 9 in 2008.

Admit.

* * *

U.S. District Court for the District of Arizona

[Title Omitted In Printing]

[LOGO]

NATIONAL CONFERENCE of STATE LEGISLATURES

The Forum for America's Ideas

State Limits on Contributions to Candidates
Updated March 2, 2009

	Individual → Candidate Contributions	State Party → Candidate Contributions	PAC → Candidate Contributions	Corporate → Candidate Contributions	Union → Candidate Contributions
Alabama § 17-22A-1 et seq	Unlimited	Unlimited	Unlimited	$500/candidate/election[44]	Unlimited
Alaska § 15.13.065 to .070	$500/candidate/year Aggregate amounts candidates may accept from non-residents: $20,000/year/ gub candidate $5,000/year/ senate candidate $3,000/year/ house candidate	$100,000/year/ gub candidate $15,000/year/ senate candidate $10,000/year/ house candidate	$1,000/office/year Contributions from out-of-state PACs prohibited	Prohibited	Prohibited

Source: National Conference of State Legislatures
Last updated in full March 2009
For more info, contact Jennie Drage Bowser at 303-364-7790

Arizona[1] § 16-901 et seq.	Limits for the 2009-2010 election cycle: $840/statewide candidates $410/legislative candidates An individual may not contribute an aggregate amount in excess of $5,450 per calendar year to candidates and committees that give to candidates. *Amounts are per election cycle*	Limits for the 2009-2010 election cycle: Aggregate contributions accepted from all political parties and organizations cannot exceed: $83,448 – statewide candidates $8,352 – legis. candidates	Limits for the 2009-2010 election cycle: "Super" PACs: $4,176/statewide candidate $1,664/legislative candidate Regular PACs: $840/statewide candidate $410/legislative candidate Aggregate contributions accepted from PACs cannot exceed: $83,448 – statewide candidates $13,464 – legis. candidates *Amounts are per election cycle*	Prohibited[2]	Prohibited[3]
Arkansas § 7-6-201 et seq.	$2,000/candidate/election.[4]	$2,500/election.[5]	$2,000/candidate/election.[6]	Same as individual limits	Same as individual limits

California[1] Gov. Code § 85300 et seq.	For elections held on or after January 1, 2009 $25,900/gubernatorial candidate $6,500/statewide candidate $3,900/legislative candidate *Amounts are per election*[2]	Unlimited	For elections held on or after January 1, 2009 "Small Contributor" Limits[3] $25,900/gubernatorial candidate $12,900/statewide candidate $7,800/legislative candidate Regular PACs Same as individual limits *Amounts are per election*[2]	Same as individual limits	Same as individual limits

Colorado[1] Constitution Art XXVIII	Limits effective 2007-2010 $525/gub. candidate $525/other statewide cand. $200/legis. candidate *Amounts per election*[2]	Limits effective 2007-2010 $530,900/gub. candidate $106,900/other statewide cand. $19,080/senate candidate $13,780/house candidate Note: Political parties are prohibited from contributing to any candidate more than 20% of the voluntary expenditure limits, which are adjusted every 4 years. *Amounts are per applicable election cycle*	Limits effective 2007-2010 "Small Donor" Committees: $5,300/gub. & statewide cand. $2,125/legis. cand. Regular PACs: Same as individual limits	Prohibited[3]	Prohibited[3]

Connecticut[a] § 9-611 et seq	$3,500/gub candidate $1,000/senate candidate $250/house candidate $15,000 aggregate/ individual to all candidates and committees *All amounts are per election*[b]	$50,000/gub candidate $10,000/senate candidate $5,000/house candidate *All amounts are per election*[b]	$5,000/gubernatorial candidate $1,500/state senate candidate $750/state house candidate Aggregate limits on contributions by PACs to candidates: $100,000/election by a PAC established by a business entity $50,000/election by a PAC established by an organization *All amounts are per election*[b]	Prohibited[c] §9-613	Same as individual limits[d]
Delaware § 15-8010 to 8013	$1,200/statewide candidate $600/other candidate *All amounts per election cycle*	$75,000/gub candidate $5,000/senate candidate $3,000/house candidate *All amounts per election cycle*	Same as individual limits	Same as individual limits	Same as individual limits
Florida § 106.08	$500/candidate/ election.[e]	Same as individual limits	Same as individual limits	Same as individual limits	Same as individual limits

Georgia[1] § 21-5-41 to 43	Limits effective as of 2/24/09: Statewide candidates: $6,100/primary election $3,600/primary run-off $6,100/general election $3,600/general run-off Legislative candidates: $2,400/primary election $1,200/primary run-off $2,400/general election $1,20/general run-off	Same as individual limits	Same as individual limits	Same as individual limits	Same as individual limits

Hawaii § 11-200 to 207	$6,000/statewide candidate $4,000/senate candidate $2,000/house candidate Contributions from a candidate's immediate family are limited to $50,000 in an election cycle, including loans. *All amounts are per election cycle*	Same as individual limits	Same as individual limits	Same as individual limits	Same as individual limits
Idaho § 67-6610A	$5,000/statewide candidate $1,000/leg candidate *Amounts are per election*[a]	$10,000/statewide candidate $2,000/legislative candidate *Amounts are per election*[a]	Same as individual limits	Same as individual limits	Same as individual limits
Illinois 10 ILCS 5/9-1 et seq.	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited

Indiana § 3-9-1-1 et seq.	Unlimited	Unlimited	Unlimited	$5,000 in the aggregate to statewide candidates $2,000 in the aggregate to senate candidates $2,000 in the aggregate to house candidates *All amounts are per year*	Same as corporate limits unless made by the union's PAC, in which case there are no limits
Iowa § 68A.503	Unlimited	Unlimited	Unlimited	Prohibited	Unlimited
Kansas § 25-4153	$2,000/statewide candidate $1,000/senate candidate $500/house candidate *Amounts are per election*"	For a contested primary election, same as individual limits. Unlimited in uncontested primaries and general elections	Same as individual limits	Same as individual limits	Same as individual limits

Kentucky § 121.150	$1,000/candidate/ election*	Unlimited* Except for gubernatorial slates, no candidate can accept party contributions which in the aggregate exceed 50% of total contributions or $10,000 (whichever is greater) in an election cycle.	Same as individual limits Aggregate Limits: - Except for gubernatorial slates, no candidate can accept PAC contributions which in the aggregate exceed 50% of total contributions or $10,000 (whichever is greater) in an election cycle. – Gubernatorial slates that accept public financing may not accept more than 25% of their contributions from PACs – Other gubernatorial slates may not accept more than 25% or $150,000 (whichever is less) of contributions from PACs	Prohibited	Same as individual limits

Louisiana § 18:1481 to 1532	$5,000/statewide candidate $2,500/legislative candidate *Both amounts are per election*[a]	Unlimited	Regular PACs: Same as individual limits "Big" PACs[f]: Double the amount of individual limits Candidates subject to following aggregate limits on all PAC contributions accepted for the primary and general elections combined: $80,000/statewide candidate $60,000/legislative candidate	Same as individual limits	Same as individual limits
Maine[b] Tit. 21-A, § 1001 to 1128	$500/gub candidate/election[a] $250/other candidate/election[a] Individuals limited to $25,000 aggregate contributions to all campaign finance entities per calendar year.	Same as individual limits	Same as individual limits	Same as individual limits	Same as individual limits

Maryland Election Law § 13-226	$4,000/candidate $10,000 aggregate to all candidates *Both amounts are per 4-year election cycle (1/1/-07-12/31/10)*	Transfer limit: $6,000/4-year election cycle In-Kind Contributions: Limited to an amount equal to $1 for every two registered voters in the state, regardless of political affiliation. Limit is per 4-year election cycle.	$6,000/candidate/ 4-year election cycle	Same as individual limits	Same as individual limits
Massachusetts Ch. 55, § 6, 6A, 7A and 8	$500/candidate $12,500/individual aggregate limit on contributions to all candidates Registered lobbyists may only contribute up to $200/candidate *All amounts are per calendar year.*	$3,000/candidate/year No limit on in-kind contributions	Regular PAC: $500/candidate People's Committee:[9] $500/candidate Candidates cannot accept aggregate PAC contributions that exceed the following amounts: $150,000/gub candidate $18,750/senate candidate $7,500/house candidate *All amounts per calendar year.*	Prohibited	Same as PAC limits

Michigan § 169.252	$3,400/statewide candidate $1,000/senate candidate $500/house candidate *All amounts are per election cycle*	$68,000/statewide candidate $10,000/senate candidate $5,000/house candidate *All amounts are per election cycle*	Political Committees: Same as individual limits. Independent Committees[h]: $34,000/statewide candidate $10,000/senate candidate $5,000/house candidate *All amounts are per election cycle*	Prohibited[d]	Prohibited[d]

Minnesota § 10A.27	Election year limits: $2,000/gub candidate $500/legislative candidate Non-election year limits: $500/gub candidate $100/legislative candidate Aggregate contributions from PACs, lobbyists, political funds and individuals who contribute or loan more than ½ the yearly contribution limit cannot exceed 20% of spending limits. For 2007, those amounts are: $95,800/gub candidate $2,400/senate candidate $1,200/house candidate *All amounts are per calendar year.*	Party committees may contribute up to 10 times the limits imposed on individuals	Same as individual limits	Prohibited	Same as individual limits
Mississippi § 23-15-801 et seq. § 79-13-15	Unlimited	Unlimited	Unlimited	$1,000/candidate/ calendar year	Unlimited

Missouri § 130.031	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
Montana[a] § 13-37-216	$630/gubernatorial $310/other statewide candidate $160/legislative candidate Limits will be adjusted in 1/10 *Amounts are per election*[a]	$22,500/gubernatorial slate $8,150/other statewide cand $1,300/senate candidate $900/house candidate Limits will be adjusted in 1/10 *Amounts are per election*[a]	Same as individual limits Candidates limited to total contributions from all PACs: $2,450 senate candidates $1,500 house candidates Limits will be adjusted in 1/10 *Amounts are per election*[a]	**Prohibited**[a]	Same as individual limits

Nebraska[a] § 32-1608	Unlimited	Candidates limited to maximum amount of aggregate contributions that can be accepted in an election period from PACs, corporations, labor unions, associations, other candidate committees, political parties, and other organizations. Once the limit is reached, candidates may accept only individual contributions. Limit for 2010: $46,000/legislative candidate (No statewide races in 2010)	Same as party contribution limits	Candidates may not accept funds totaling more than 40% of the voluntary spending limit for their office	Same as party contribution limits
Nevada §294A.100 and Const. Art. 2 §10	$5,000/candidate/election[a]	Same as individual limits	Same as individual limits	Same as individual limits	Same as individual limits
New Hampshire § 664:4	To candidates not agreeing to abide by spending limits: $1,000/election[a] To candidates agreeing to abide by spending limits: $5,000/election[a]	To candidates not agreeing to abide by spending limits: $1,000/election[a] Unlimited to candidates who agree to expenditure limits	Same as party limits	Same as individual limits[a]	Prohibited

New Jersey[a] § 19:44A-11.3	$3,400/gubernatorial candidate $3,000/legislative candidate Both amounts are per election.[b]	No limit on contributions by state & county committees National party committee: $9,300/election.[c]	$9,300/candidate/election.[d]	Same as individual limits	Same as individual limits
New Mexico § 1-19-25 to 36	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited

New York[1] Election Law, § 14-114	For 2005: Gubernatorial Candidates Primary – Product of number of enrolled voters in candidate's party in state x $.005, but not less than $6,000 or more than $18,100 General – $37,800 Legislative Candidates Primary – $6,000/senate candidate $3,800/house candidate General – $9,500/senate candidate $3,800/house candidate Maximum contributions by individual cannot exceed $150,000 in the aggregate	Prohibited in primary election Unlimited in general election	Same as individual limits	Corporations are limited to $5,000 per year in aggregate contributions to NY state candidates and committees	Same as individual limits

	Separate limits apply for contributions from all family members in the aggregate. Generally, this limit is based on the formula of total number of enrolled voters in the candidate's party in the state x $0.025. For legislative candidates, this amount may not exceed $100,000. "Family" is defined as a child, parent, grandparent, brother, sister, and the spouses of those persons. *All amounts per calendar year*				
North Carolina § 163-278.6 et seq	$4,000/candidate/election*	Unlimited	Same as individual limits	Prohibited*	Prohibited*
North Dakota § 16.1-08.1	Unlimited	Unlimited	Unlimited	Prohibited*	Prohibited*

Ohio[1] § 3517.102(B)(1)(a) and 3599.03	Limits effective 2/25/09 $11,395.56/candidate/election[2]	$642,709.58/statewide cand $128,200.05/senate candidate $63,815.14/house candidate In-kind contributions unlimited *All amounts are per election*[3]	Same as individual limits	Prohibited[4]	Prohibited[4]
Oklahoma 21 OS § 187.1 et seq. and Ethics Commission Rules §257:1-1-1 et seq. and §257:10-1-2 et seq.	$5,000/candidate/campaign [5]This limit applies to an entire family, defined as an individual, his spouse, and all children under 18 living in the same household.	$50,000/gubernatorial cand[6] $25,000/other statewide cand[6] $1,000/legislative candidate *All amounts per calendar year*	Same as individual limits	Prohibited[7]	Prohibited[7]
Oregon § 260.160 to 174	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
Pennsylvania 25 Pa. Stat § 3241 to 3260a	Unlimited	Unlimited	Unlimited	Prohibited[8]	Prohibited[8]

Rhode Island § 17-25-10.1	$1,000/candidate or $2,000/candidate if candidate qualifies for public funding and agrees to abide by spending limits *Both amounts are per calendar year.* Individuals limited to $10,000 in aggregate contributions to candidates, PACs and party committees per year	$25,000/candidate/year In-kind contributions unlimited	$1,000/candidate/calendar year or $2,000/candidate/year if candidate qualifies for public funding and agrees to abide by spending limits Annual aggregate limit of $25,000 to all recipients	Prohibited	Prohibited
South Carolina § 8-13-1314 to 1316	$3,500/statewide candidate $1,000/legislative candidate Both amounts are per election*	Candidates may not accept more than the following from parties during an election cycle: $50,000/statewide candidate $5,000/other candidate	Same as individual limits	Same as individual limits	Same as individual limits
South Dakota § 12-27-7	$4,000/statewide candidate $1,000/legislative candidate *Both amounts are per calendar year*	Unlimited	Unlimited	Prohibited	Prohibited*

Tennessee § 2-10-302	$2,500/statewide candidate $1,000/legislative candidate *Both amounts are per election*[*]	Candidates limited to aggregate amount from all political party committees: $250,000/statewide candidate $40,000/senate candidate $20,000/house candidate *All amounts are per election*[*]	$7,500/statewide candidate $7,500/senate candidate $5,000/other candidates No more than 50% of a statewide candidate's or $75,000 of a legislative candidate's total contributions may come from PACs *All amounts are per election*[*]	Prohibited	Same as individual limits
Texas Election Code, § 253	Unlimited	Unlimited	Unlimited	Prohibited[*]	Prohibited[*]
Utah § 20A-11-101	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
Vermont[*] 17 VSA §2805	$1,000/candidate/election[*] Contributions from immediate family members are unlimited.	Unlimited	$3,000/candidate/election[*]	Same as individual limits	Same as individual limits
Virginia § 24.2-900 et seq	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited

Washington[5] RCW § 42.17.610 et seq. WAC § 390-05-400	Adjusted limits effective 12/28/08: $1,600/gub candidate $800/legislative candidate Both amounts are per election* During the 21 days before the general election, no contributor may donate more than $50,000 in the aggregate to a statewide candidate or $5,000 in the aggregate to any other candidate. This includes a candidate's personal contributions to his/her campaign.	Aggregate contributions from a state party central committee to a statewide or legislative candidate may not exceed $.80 x number of registered voters in candidate's district. This limit applies to the entire election cycle.	Same as individual limits A PAC that has not received contributions of $10 or more from 10 or more WA registered voters during the past 180 days is prohibited from making contributions.	Prohibited for corporations not doing business in Washington state. Same as individual limits for Washington corporations.	Prohibited for unions that have fewer than 10 members who reside in Washington. Same as individual limits for Washington unions.
West Virginia § 3-8-8 to 12	$1,000/candidate/election*	Same as individual limits	Same as individual limits	Prohibited[6]	Same as individual limits

Wisconsin § 11.01 et seq.	$10,000/statewide candidate $1,000/senate candidate $500/house candidate *Above amounts are per election campaign* An individual may not contribute more than $10,000 in a calendar year to any combination of Wisconsin candidates or political committees.	Aggregate limit on amount candidates may accept from all committees, including party committees, in an election campaign: $700,830/gub. candidate $22,425/senate candidate $11,213/house candidate	$43,128/gub candidate $1,000/senate candidate $500/house candidate Aggregate limit on amount candidates may accept from all committees, excluding party committees, in an election campaign: $485,190/gub. candidate $15,525/senate candidate $7,763/house candidate *All amounts are per election cycle*	Prohibited	Prohibited
Wyoming § 22-25-102	$1,000/candidate/election[a] No individual may make more than $25,000 in total contributions during a two-year election cycle.	Unlimited	Unlimited	Prohibited	Prohibited

(a) Primary and general are considered separate elections; stated amount may be contributed in each election.
(b) Candidates participating in "Clean Elections" public financing may not accept contributions after qualifying for public funds. Limits listed are for candidates not participating in public financing program.
(c) In Arizona, a PAC that has received contributions from 500 or more individuals in amounts of $10 or more in a one-year period may qualify as a "Super PAC." Qualification is valid for two years. (Ariz. Rev. Stat. §16-905(I))

(d) Direct corporate and/or union contributions are prohibited and/or use of treasury funds and/or dues is prohibited. In these states, the law specifically says that nothing prevents the employees or officers of a corporation from making political contributions through a PAC, using funds from an account that is separate and segregated from corporate accounts. Such contributions are subject to the same limitations placed on other PACs.

(e) Full public financing is available to qualifying candidates for governor and lieutenant governor. A candidate who wishes to receive public funding may not solicit or accept any private contributions except qualifying contributions.

(f) In Louisiana, a "Big PAC" is a PAC with over 250 members who contributed over $50 to the PAC during the preceding calendar year and has been certified as meeting that membership requirement.

(g) In California, a "small contributor committee" is a committee which has been in existence for at least six months, receives contributions from 100 or more persons in amounts of not more than $200 per person, and makes contributions to five or more candidates. (Cal. Govt. Code §85203)

(h) In Michigan, an "independent committee" must have filed a statement of organization at least 6 months before the election in which the committee wishes to make contributions; must have supported or opposed 3 or more candidates for nomination or election; and must have received contributions from at least 25 persons.

(i) In Colorado, a "small donor committee" means any political committee that has accepted contributions only from natural persons who each contributed no more than $50 in the aggregate per year.

(j) Any public utility regulated by the Public Service Commission is prohibited from making political contributions (Ala. Code §10-2A-70.1)

(k) The text of the statute on contribution limits (KRS §121A.050(1)) states that party contributions to candidates are limited to $1,000 per election. However, the Kentucky Registry of Election Finance's web site states that party contributions to candidates are unlimited (http://www.state.ky.us/agencies/kref/contlmt.htm, see footnote 4).

(l) Vermont's attempt to limit out-of-state contributions to 25% of a candidate's total contributions received was declared unconstitutional on August 18, 2004, by the U.S. 2nd Circuit Court of Appeals (Landell v. Sorrell, 382 F.3d 91 (2004))

(m) While these limits are specified in Oklahoma's Ethics Rules, statutes have not been changed to reflect this limit. According to the statutes, any contribution in excess of $5,000 would constitute a criminal violation.

(n) Corporations are no longer prohibited from making political contributions under New Hampshire law despite the language of NH RSA 664:4. That ban was declared unconstitutional by a federal district court in 1999. A June 6, 2000 letter from Deputy Attorney General Steven M. Houran indicates that the limits on individual contributions now apply to corporate contributions as well.

(o) In Massachusetts, a "People's Committee" is a PAC that has been in existence for six months, has received contributions from individuals of $140 (adjusted biennially; this amount is for 2006-2007) or less per year, and has contributed to five candidates. It is unclear what advantage there would be to converting to a People's Committee, since the contribution limits are the same.

(p) Contribution limits are adjusted for inflation at the beginning of each campaign cycle.

U.S. District Court for the District of Arizona

(Filed Jul. 17, 2009)

[Title Omitted In Printing]

Participating Primary Winner Candidates for the 2008 General Election

Total Number of Participating Candidates = 107

Office Sought / Candidate Name	Committee	Party	Part?	General Initial Disbursement	Candidate Equalizing Disbursement	Independent Exp. Disbursement	Total Disbursement
CORPORATION COMMISSIONER							
KENNEDY, SANDRA	200810092	Democratic	X	$124,020.00	$117,716.09	$9,301.30	$251,037.39
MC CLURE, MARIAN	200893575	Republican	X	$124,020.00	$117,716.09	$0.00	$241,736.09
NEWMAN, PAUL	200810131	Democratic	X	$124,020.00	$117,716.09	$9,301.30	$251,037.39
STUMP, BOB	200893576	Republican	X	$124,020.00	$117,716.09	$0.00	$241,736.09
WONG, BARRY	200810033	Republican	X	$124,020.00	$117,716.09	$0.00	$241,736.09
		Office Totals:		**$620,100.00**	**$588,580.45**	**$18,602.60**	**$1,227,283.05**
STATE SENATOR - DISTRICT NO. 2							
JENKINS, ROYCE	200893585	Republican	X	$19,382.00	$0.00	$0.00	$19,382.00
		Office Totals:		**$19,382.00**	**$0.00**	**$0.00**	**$19,382.00**
STATE SENATOR - DISTRICT NO. 3							
LANDAHL, MARY	200810086	Democratic	X	$19,382.00	$0.00	$0.00	$19,382.00
		Office Totals:		**$19,382.00**	**$0.00**	**$0.00**	**$19,382.00**
STATE SENATOR - DISTRICT NO. 4							
BOEHLKE, ROBERT	200893628	Democratic	X	$19,382.00	$0.00	$0.00	$19,382.00
HARPER, JACK	200893548	Republican	X	$12,921.00	$0.00	$0.00	$12,921.00
		Office Totals:		**$32,303.00**	**$0.00**	**$0.00**	**$32,303.00**

STATE SENATOR – DISTRICT NO. 5							
JEFFERS, BILL	200810208	Democratic	X	$19,382.00	$0.00	$17,900.74	$37,282.74
		Office Totals:		**$19,382.00**	**$0.00**	**$17,900.74**	**$37,282.74**
STATE SENATOR – DISTRICT NO. 6							
LARSON, JIM	200893633	Democratic	X	$19,382.00	$13,526.45	$0.00	$32,908.45
		Office Totals:		**$19,382.00**	**$13,526.45**	**$0.00**	**$32,908.45**
STATE SENATOR – DISTRICT NO. 7							
BLACK, LISA	200893635	Democratic	X	$19,382.00	$38,764.00	$0.00	$58,146.00
		Office Totals:		**$19,382.00**	**$38,764.00**	**$0.00**	**$58,146.00**
STATE SENATOR – DISTRICT NO. 9							
PRICE, KAREN	200893612	Democratic	X	$19,382.00	$17,707.44	$10,543.98	$47,633.42
		Office Totals:		**$19,382.00**	**$17,707.44**	**$10,543.98**	**$47,633.42**
STATE SENATOR – DISTRICT NO. 10							
GRAY, LINDA	200893587	Republican	X	$19,382.00	$0.00	$21,640.36	$41,022.36
MONROE, MARTIN JAMES	200893582	Democratic	X	$19,382.00	$0.00	$0.00	$19,382.00
		Office Totals:		**$38,764.00**	**$0.00**	**$21,640.36**	**$60,404.36**
STATE SENATOR – DISTRICT NO. 11							
WALLACK, ANN	200810073	Democratic	X	$19,382.00	$38,764.00	$0.00	$58,146.00
		Office Totals:		**$19,382.00**	**$38,764.00**	**$0.00**	**$58,146.00**
STATE SENATOR – DISTRICT NO. 12							
COTERA, ANGELA	200893659	Democratic	X	$19,382.00	$13,186.12	$6,147.56	$38,715.68
		Office Totals:		**$19,382.00**	**$13,186.12**	**$6,147.56**	**$38,715.68**
STATE SENATOR – DISTRICT NO. 16							
LANDRUM, LEAH	200893607	Democratic	X	$12,921.00	$0.00	$0.00	$12,921.00
VERES, DANIEL	200810026	Republican	X	$19,382.00	$0.00	$0.00	$19,382.00
		Office Totals:		**$32,303.00**	**$0.00**	**$0.00**	**$32,303.00**

STATE SENATOR – DISTRICT NO. 17							
BURTON-CAHILL, MEG	20081001g	Democratic	X	$19,382.00	$0.00	$438.66	$19,820.66
HERNANDEZ, JESSE	20081014d	Republican	X	$19,382.00	$0.00	$0.00	$19,382.00
		Office Totals:		**$38,764.00**	**$0.00**	**$438.66**	**$39,202.66**
STATE SENATOR – DISTRICT NO. 18							
NATIVIO, JUDAH	20083360f	Democratic	X	$19,382.00	$0.00	$0.00	$19,382.00
PEARCE, RUSSELL	20043302g	Republican	X	$12,921.00	$0.00	$0.00	$12,921.00
		Office Totals:		**$32,303.00**	**$0.00**	**$0.00**	**$32,303.00**
STATE SENATOR – DISTRICT NO. 20							
HUPPENTHAL, JOHN	20083358g	Republican	X	$19,382.00	$0.00	$38,764.00	$58,146.00
MAISH, TED	20083363l	Democratic	X	$19,382.00	$0.00	$12,119.16	$31,501.16
		Office Totals:		**$38,764.00**	**$0.00**	**$50,883.16**	**$89,647.16**
STATE SENATOR – DISTRICT NO. 23							
CAMPOS, ANDRE	20081017i	Republican	X	$19,382.00	$0.00	$3,538.04	$22,920.04
RIOS, REBECCA	20081005f	Democratic	X	$19,382.00	$0.00	$3,441.18	$22,823.18
		Office Totals:		**$38,764.00**	**$0.00**	**$6,979.22**	**$45,743.22**
STATE SENATOR – DISTRICT NO. 24							
AGUIRRE, AMANDA	20083365o	Democratic	X	$19,382.00	$0.00	$0.00	$19,382.00
		Office Totals:		**$19,382.00**	**$0.00**	**$0.00**	**$19,382.00**
STATE SENATOR – DISTRICT NO. 25							
ALVAREZ, MANNY	20083359d	Democratic	X	$19,382.00	$0.00	$1,894.10	$21,276.10
BLACK, MARY ANN	20083365k	Republican	X	$19,382.00	$0.00	$5,660.76	$25,042.76
		Office Totals:		**$38,764.00**	**$0.00**	**$7,554.86**	**$46,318.86**

STATE SENATOR - DISTRICT NO. 26							
CAGE, CHERYL A	200810150	Democratic	X	$19,382.00	$0.00	$38,764.00	$58,146.00
MELVIN, AL	200836559	Republican	X	$19,382.00	$0.00	$38,764.00	$58,146.00
		Office Totals:		**$38,764.00**	**$0.00**	**$77,528.00**	**$116,292.00**
STATE SENATOR - DISTRICT NO. 27							
GARCIA, JORGE LUIS	200810038	Democratic	X	$19,382.00	$0.00	$0.00	$19,382.00
WESTERMAN, ROBERT	200810008	Republican	X	$19,382.00	$0.00	$0.00	$19,382.00
		Office Totals:		**$38,764.00**	**$0.00**	**$0.00**	**$38,764.00**
STATE SENATOR - DISTRICT NO. 30							
VALLE, GEORGETTE	200810024	Democratic	X	$19,382.00	$38,764.00	$0.00	$58,146.00
		Office Totals:		**$19,382.00**	**$38,764.00**	**$0.00**	**$58,146.00**
STATE REPRESENTATIVE - DISTRICT 1							
GRITTNER, DENNIS JOEL	200810232	Democratic	X	$19,382.00	$399.75	$0.00	$19,781.75
		Office Totals:		**$19,382.00**	**$399.75**	**$0.00**	**$19,781.75**
STATE REPRESENTATIVE - DISTRICT 2							
CHABIN, TOM	200810071	Democratic	X	$1,215.00	$0.00	$0.00	$1,215.00
DESCHENE, CHRISTOPHER	200810172	Democratic	X	$1,245.00	$0.00	$0.00	$1,245.00
		Office Totals:		**$2,460.00**	**$0.00**	**$0.00**	**$2,460.00**
STATE REPRESENTATIVE - DISTRICT 3							
DURBIN, PAMELA LYNN	200810068	Democratic	X	$19,382.00	$0.00	$0.00	$19,382.00
GOODALE, DORIS	200836619	Republican	X	$12,921.00	$0.00	$0.00	$12,921.00
		Office Totals:		**$32,303.00**	**$0.00**	**$0.00**	**$32,303.00**
STATE REPRESENTATIVE - DISTRICT 4							
BOONE, TOM	200836523	Republican	X	$19,382.00	$0.00	$0.00	$19,382.00
BURGES, JUDY	200836563	Republican	X	$19,382.00	$0.00	$0.00	$19,382.00

DOLPHIN, SUE	200893604	Democratic	X	$19,382.00	$0.00	$0.00	$19,382.00
FORSTER, PAULA	200893644	Democratic	X	$19,382.00	$0.00	$0.00	$19,382.00
		Office Totals:		**$77,528.00**	**$0.00**	**$0.00**	**$77,528.00**
STATE REPRESENTATIVE – DISTRICT 5							
BROWN, JACK	200893580	Democratic	X	$19,382.00	$32,535.56	$6,228.44	$58,146.00
		Office Totals:		**$19,382.00**	**$32,535.56**	**$6,228.44**	**$58,146.00**
STATE REPRESENTATIVE – DISTRICT 6							
CONRAD, TERI	200810039	Democratic	X	$19,382.00	$0.00	$0.00	$19,382.00
DOODY, JACK	200893601	Democratic	X	$19,382.00	$0.00	$0.00	$19,382.00
SEEL, CARL	200810146	Republican	X	$12,921.00	$0.00	$0.00	$12,921.00
		Office Totals:		**$51,685.00**	**$0.00**	**$0.00**	**$51,685.00**
STATE REPRESENTATIVE – DISTRICT 7							
LUNN, JEANNE	200893648	Democratic	X	$19,382.00	$4,724.29	$0.00	$24,106.29
		Office Totals:		**$19,382.00**	**$4,724.29**	**$0.00**	**$24,106.29**
STATE REPRESENTATIVE – DISTRICT 8							
KAVANAGH, JOHN	200810012	Republican	X	$19,382.00	$38,764.00	$0.00	$58,146.00
RIMMER, STEPHANIE	200810097	Democratic	X	$19,382.00	$38,764.00	$0.00	$58,146.00
		Office Totals:		**$38,764.00**	**$77,528.00**	**$0.00**	**$116,292.00**
STATE REPRESENTATIVE – DISTRICT 9							
HUTCHINSON, SHAWN	200810003	Democratic	X	$19,382.00	$0.00	$6,818.76	$26,200.76
LESKO, DEBBIE	200893630	Republican	X	$19,382.00	$0.00	$38,764.00	$58,146.00
VAN HORSEN, SHERI	200893598	Democratic	X	$19,382.00	$0.00	$38,764.00	$58,146.00
		Office Totals:		**$58,146.00**	**$0.00**	**$84,346.76**	**$142,492.76**
STATE REPRESENTATIVE – DISTRICT 10							
DALE, MARGARITE	200810181	Green	X	$19,382.00	$38,764.00	$0.00	$58,146.00
LOVEJOY, LAMONT	200893642	Democratic	X	$19,382.00	$38,764.00	$0.00	$58,146.00

QUELLAND, DOUG	200893566	Republican	X	$19,382.00	$38,764.00	$0.00	$58,146.00
THRASHER, JACKIE	200893625	Democratic	X	$19,382.00	$38,764.00	$0.00	$58,146.00
		Office Totals:		**$77,528.00**	**$155,056.00**	**$0.00**	**$232,584.00**
STATE REPRESENTATIVE - DISTRICT 11							
ALTMANN, JON	200893647	Republican	X	$19,382.00	$0.00	$38,764.00	$58,146.00
DRIGGS, ADAM	200893626	Republican	X	$19,382.00	$0.00	$38,764.00	$58,146.00
MEYER, ERIC	200810211	Democratic	X	$19,382.00	$0.00	$18,786.16	$38,168.16
		Office Totals:		**$58,146.00**	**$0.00**	**$96,314.16**	**$154,460.16**
STATE REPRESENTATIVE - DISTRICT 12							
CASTORENA, CELESTE M	200810165	Green	X	$19,382.00	$0.00	$38,764.00	$58,146.00
MONTENEGRO, STEVE	200893584	Republican	X	$19,382.00	$0.00	$38,764.00	$58,146.00
NUNEZ, EVE	200810002	Democratic	X	$19,382.00	$1,457.09	$2,834.82	$23,673.91
SCANLON, DAVID	200893655	Democratic	X	$19,382.00	$1,457.09	$7,085.47	$27,924.56
		Office Totals:		**$77,528.00**	**$2,914.18**	**$87,448.29**	**$167,890.47**
STATE REPRESENTATIVE - DISTRICT 13							
SCHWARTZ, TIMOTHY PAUL	200810187	Republican	X	$19,382.00	$21,622.70	$0.00	$41,004.70
		Office Totals:		**$19,382.00**	**$21,622.70**	**$0.00**	**$41,004.70**
STATE REPRESENTATIVE - DISTRICT 15							
HEDGES, ED	200810154	Republican	X	$19,382.00	$0.00	$0.00	$19,382.00
LUJAN, DAVID	200893571	Democratic	X	$19,382.00	$0.00	$0.00	$19,382.00
SINEMA, KYRSTEN	200893610	Democratic	X	$19,382.00	$0.00	$0.00	$19,382.00
		Office Totals:		**$58,146.00**	**$0.00**	**$0.00**	**$58,146.00**
STATE REPRESENTATIVE - DISTRICT 16							
MIRANDA, BEN	200810101	Democratic	X	$12,921.00	$0.00	$0.00	$12,921.00
		Office Totals:		**$12,921.00**	**$0.00**	**$0.00**	**$12,921.00**

STATE REPRESENTATIVE - DISTRICT 17							
ABLESER, ED	200893656	Democratic	X	$19,382.00	$0.00	$9,214.73	$28,596.73
SCHAPIRA, DAVID	200893634	Democratic	X	$19,382.00	$0.00	$9,747.48	$29,129.48
THOMPSON, MARK	200810085	Republican	X	$19,382.00	$0.00	$2,068.00	$21,450.00
WADDLE, WESLEY	200810081	Republican	X	$19,382.00	$0.00	$8,368.82	$27,750.82
		Office Totals:		**$77,528.00**	**$0.00**	**$29,399.03**	**$106,927.03**
STATE REPRESENTATIVE - DISTRICT 18							
ASH, CECIL	200810064	Republican	X	$12,921.00	$0.00	$0.00	$12,921.00
COURT, STEVE	200810090	Republican	X	$12,921.00	$0.00	$0.00	$12,921.00
PURSLEY, TAMMIE	200893649	Democratic	X	$19,382.00	$0.00	$3,205.40	$22,587.40
		Office Totals:		**$45,224.00**	**$0.00**	**$3,205.40**	**$48,429.40**
STATE REPRESENTATIVE - DISTRICT 19							
CRANDALL, RICH	200893636	Republican	X	$19,382.00	$38,764.00	$0.00	$58,146.00
ROMANO, KATHY	200810102	Democratic	X	$19,382.00	$38,764.00	$0.00	$58,146.00
		Office Totals:		**$38,764.00**	**$77,528.00**	**$0.00**	**$116,292.00**
STATE REPRESENTATIVE - DISTRICT 20							
DIAL, JEFF	200893565	Republican	X	$12,921.00	$0.00	$25,842.00	$38,763.00
WATERS, RAE	200810140	Democratic	X	$19,382.00	$0.00	$25,873.80	$45,255.80
		Office Totals:		**$32,303.00**	**$0.00**	**$51,715.80**	**$84,018.80**
STATE REPRESENTATIVE - DISTRICT 21							
HETTMANSPERGER, PHIL	200893620	Democratic	X	$19,382.00	$0.00	$8,515.82	$27,897.82
NICHOLS, WARDE	200893600	Republican	X	$19,382.00	$0.00	$38,764.00	$58,146.00
YARBROUGH, STEVE	200893595	Republican	X	$19,382.00	$0.00	$38,764.00	$58,146.00
		Office Totals:		**$58,146.00**	**$0.00**	**$86,043.82**	**$144,189.82**

STATE REPRESENTATIVE – DISTRICT 22							
HENDRIX, LAURIN	200810163	Republican	X	$12,921.00	$0.00	$0.00	$12,921.00
RAY, GLENN	200810061	Democratic	X	$19,382.00	$0.00	$0.00	$19,382.00
		Office Totals:		**$32,303.00**	**$0.00**	**$0.00**	**$32,303.00**
STATE REPRESENTATIVE – DISTRICT 23							
BUSTAMANTE, ERNEST	200810083	Democratic	X	$19,382.00	$0.00	$12,926.57	$32,308.57
FILLMORE, JOHN	200893570	Republican	X	$19,382.00	$0.00	$33,455.13	$52,837.13
MC GUIRE BARBARA	200810025	Democratic	X	$19,382.00	$0.00	$12,816.89	$32,198.89
PRATT, FRANK	200893661	Republican	X	$19,382.00	$0.00	$24,079.39	$43,461.39
		Office Totals:		**$77,528.00**	**$0.00**	**$83,278.28**	**$160,806.28**
STATE REPRESENTATIVE – DISTRICT 24							
JONES, RUSS	200810098	Republican	X	$19,382.00	$0.00	$37,851.68	$57,233.68
PANCRAZI, LYNNE	200810023	Democratic	X	$19,382.00	$0.00	$25,102.36	$44,484.36
ULMER, THERESA	200810022	Democratic	X	$19,382.00	$0.00	$6,056.60	$25,438.60
		Office Totals:		**$58,146.00**	**$0.00**	**$69,010.64**	**$127,156.64**
STATE REPRESENTATIVE – DISTRICT 25							
BOYER, RICHARD	200893663	Democratic	X	$12,921.00	$0.00	$0.00	$12,921.00
FLEMING, PATRICIA	200893651	Democratic	X	$19,382.00	$0.00	$0.00	$19,382.00
STEVENS, DAVID	200893608	Republican	X	$19,382.00	$0.00	$38,764.00	$58,146.00
		Office Totals:		**$51,685.00**	**$0.00**	**$38,764.00**	**$90,449.00**
STATE REPRESENTATIVE – DISTRICT 26							
JORGENSEN, DONALD	200893639	Democratic	X	$19,382.00	$7,035.67	$25,004.81	$51,422.48
WRIGHT, NANCY YOUNG	200810030	Democratic	X	$19,382.00	$7,035.67	$31,728.33	$58,146.00
ZERULL, MARILYN	200893569	Republican	X	$19,382.00	$164.70	$38,599.30	$58,146.00
		Office Totals:		**$58,146.00**	**$14,236.04**	**$95,332.44**	**$167,714.48**

STATE REPRESENTATIVE – DISTRICT 27							
CAJERO BEDFORD, OLIVIA	2008935579	Democratic	X	$12,921.00	$0.00	$0.00	$12,921.00
LOPES, PHIL	2008935586	Democratic	X	$12,921.00	$0.00	$0.00	$12,921.00
SOLBERG, KENT	2008101182	Green	X	$19,382.00	$0.00	$0.00	$19,382.00
		Office Totals:		**$45,224.00**	**$0.00**	**$0.00**	**$45,224.00**
STATE REPRESENTATIVE – DISTRICT 28							
FARLEY, STEVE	2008935599	Democratic	X	$0.00	$0.00	$0.00	$0.00
		Office Totals:		**$0.00**	**$0.00**	**$0.00**	**$0.00**
STATE REPRESENTATIVE – DISTRICT 29							
HEINZ, MATT	2008936643	Democratic	X	$12,921.00	$0.00	$0.00	$12,921.00
PATTERSON, DANIEL	2008936616	Democratic	X	$12,921.00	$0.00	$0.00	$12,921.00
		Office Totals:		**$25,842.00**	**$0.00**	**$0.00**	**$25,842.00**
STATE REPRESENTATIVE – DISTRICT 30							
DALESSANDRO, ANDREA	2008936862	Democratic	X	$19,382.00	$1,145.54	$14,837.33	$35,364.87
GOWAN, DAVID	2008936574	Republican	X	$12,921.00	$4,012.54	$21,829.46	$38,763.00
		Office Totals:		**$32,303.00**	**$5,158.08**	**$36,666.79**	**$74,127.87**
		Total:		**$2,438,002.00**	**$1,140,995.06**	**$985,972.99**	**$4,564,970.05**

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, et al., Plaintiffs, and DEAN MARTIN, a citizen of the State of Arizona, et al., Plaintiff-Intervenors, vs. KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; et al., Defendants, and CLEAN ELECTIONS INSTITUTE, INC., Defendant-Intervenor.	No. 08-1550-PHX-ROS

TELEPHONIC DEPOSITION OF
LOUIS J. HOFFMAN

Phoenix, Arizona
March 6, 2009
10:05 a.m.

(Filed Jun. 12, 2009)
(Filed Jun. 12, 2009)

REPORTED BY:
Debra Riggs Torres, RPR
Certified Reporter
Certificate No. 50647

PREPARED FOR:
The Court
(Original)

* * *

[19] Q. BY MR. MAURER: And in your mind, the Mecham impeachment was one of the events that motivated the Clean Elections Act?

A. There were a number of practices that motivated the Clean Election – a number of events and occurrences that motivated the Clean Elections Act or caused people to get worked up about it, that led to the Clean Elections Act, and those included AzScam and the Mecham situation and a number of procedures that were common in fundraising at the time.

Q. Could you tell me what those procedures are?

A. There was a number of – there was a lot of influence – influence-buying by people giving campaign contributions. There was bundling of contributions that was done within various organizations, where people were – would collect groups of people to – that they [20] were involved with, to try to get significant size money provided to particular candidates, and some of that was legal and some of it was arguably legal and some of it was illegal.

But that was – that kind of procedure and the general concern about people, in effect, buying elections or buying access to politicians was something that was of great concern in – in motivating the Clean Elections Act.

* * *

[38] Q. BY MR. MAURER: And you referred to the purposes of the matching funds provision. Can you tell me what those or that, if it's one or more, and what they are?

[39] MR. DAVIS-DENNY: Objection. Form.

THE WITNESS: Sure. I can tell you what I – what I believe those purposes are, and there were – you're quite right – many.

We wanted to provide – when I refer to "we," I'm talking about myself and various other people who were involved in crafting the language of and the spirit of the Clean Elections Act.

MR. DAVIS-DENNY: Louis, I just want to interrupt real quick. I would instruct the witness to the extent that your – please don't disclose communications with members of the Clean Elections Institute or with ACE that were given in the context of providing legal advice.

But with that caveat, please go ahead and answer.

MR. MAURER: Okay.

THE WITNESS: Okay. So we had a number of problems with respect to – in crafting the Act, and one of the problems was that there was a wide disparity in the number of – in the amount of money that was spent on various races.

There are 30 legislative districts in particular in Arizona, and approximately 25 of them are – at the

time of the Act, were either uncontested – probably about 20 of them were uncontested entirely, and [40] another five were contested, but not very likely to switch party or switch candidate. In other words, there was not strong chances of a minority party taking over the seat or the seats in those districts.

There were maybe five competitive districts in Arizona out of 30 at the time, and – you know, five or six. These are approximate figures. In the noncompetitive or non – you know, in the districts in which – the majority of districts in which there was very little or unlimited competition, there was also relatively small amounts of money spent. On the other hand, there was relatively high amounts of money spent in the competitive districts.

So just to put some numbers on it, we did some research and found out that in the years preceding the drafting and passage of the Clean Elections Act, approximately $10,000 or less was the amount that was spent per candidate in something like 80 percent of the races. On the other hand, in the competitive districts, candidates would spend $30,000 or so, on average, and – 20- or $30,000, or something like that, and there was one or two races in which there had been like $80,000 spent by a candidate.

So we felt that we wanted to not have a situation in which people could – one candidate could buy [41] elections by having lots more money and spending lots more money than an opposing candidate. And if we kept the dollar amount given to the Clean

Elections Act candidates at a, say, 10,000-dollar amount, then we could have a situation where it would be too easy to outspend the Clean Elections candidate and no one would run as a Clean Elections candidate.

On the other hand, if we set the Clean Elections allocation at $30,000, so as to cover the bulk of the competitive races as well, where you wanted to have – people have the opportunity to run as a Clean Elections candidate, then we would have an enormous waste of government money because those – that same amount would be given to a lot of candidates in noncompetitive districts who really wouldn't be – have any – historically weren't spending that amount anyway, so there would be millions of dollars of wasted Arizona money. And, in addition, we would encourage, excessively encourage candidates to run as Clean Elections Act candidates, because, you know, they would be getting such a large amount of money that they would be unduly pressured into becoming – unduly in our view – pressured into becoming a Clean Elections candidate.

And so as a result, one of the purposes of the matching funds provision was to set – be able to [42] allow us to set the bar at the low amounts that would be needed for the bulk of campaigning, and yet allow it to flow upwards in which there was a competitive race in which the candidate was opposing a well-funded opponent.

On the other hand, we didn't want to allow that to continue indefinitely, because, again, out of concern about the public cost, so we didn't want to make it – matching funds go up, you know, no matter how much was spent by the other side, we thought at some point there was – you would have enough money to get out your message. And if the nonparticipating candidate outspent you, so be it. And that's why we allowed matching funds going from one times to three times the initial allocation. So that's one reason why the matching funds provision was written the way it was in the Act.

Another reason was to allow candidates to participate in the Act without – as I said earlier – without fear that they would – could easily be outspent and not have enough money to respond to messages provided by the other opposing candidates.

Our view was that the more speech and more ability for people to get out their message, the better, especially in cases where there was strong competition and strong fights over particular – can you guys turn off the speakerphone, it's really distracting me – where there [43] was fights over the key races that were going to make the difference, and we wanted to allow candidates to – have a greater variety of candidates and a greater number of candidates to make races more competitive, and to have more citizens participate in the political process through running for office, and allowing matching funds achieved that purpose, to provide a – a greater variety of candidates and a greater number of candidates as well.

The matching funds also facilitated the overall purpose of the Act in letting candidates not be allowed to – not have to spend enormous time raising funds. One of the alternatives that we discussed was that if a candidates was outspent, they could be – they would be released to do fundraising. So if a participating candidate was outspent by a nonparticipating candidate, that instead of the state providing them matching funds, they could go out and raise their own money, but that would defeat the – or play against the purpose of the Act, to make Clean Elections Act candidates not have to raise funds and not waste their time speaking to people about money, as opposed to speaking to voters about issues of interest, and it would also discourage candidates from running who are not fundraising-oriented and not interested in running because of the issue of fundraising, which is something that a number of candidates have said.

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[111] Q. BY MR. MAURER: Are there any narrow special interests that you can identify in Arizona in 2009?

MR. DAVIS-DENNY: Objection. Form.

THE WITNESS: Well, sure. I mentioned, you know, a couple of categories of narrow special interests [112] just a few minutes ago in giving you examples. Those are interests that are – that are there in any given – you know, over time.

Q. BY MR. MAURER: But who are they? You mentioned categories. I want to know – I'd like to know some names.

MR. DAVIS-DENNY: Objection. Form.

THE WITNESS: I – I honestly don't know who the players are in, you know, the current – you know, the big issue in Arizona right now is the budget debates and whether taxes are going to be raised and, you know, who is going to be exempt from that, and I'm not sure who's playing in that field right now, quite honestly.

In other areas, you know, I'm not sure what the legislature is looking at, because they're still early in their session, so – I guess I can't answer it for 2009.

Q. BY MR. MAURER: Okay. How about when you were drafting the Act, were you – did you – were you aware of any specific narrow special interests when you were drafting the Act?

A. Yeah. There was – there were issues that had come up involving developers, whether they were going to be permitted to expand development in – outside of cities and on what conditions. There were issues of – revolving [113] around transportation, as to whether there was going to be – the freeways and where they would run, light rail, whether there was – there was the issue involving Indian gaming and gaming in general, which, you know, I mentioned was played out in the AzScam thing was still relevant in the time we were drafting the Act.

There was – I don't know. Those are what comes to mind. I'm sure there were many other issues involving tax breaks for individual businesses or corporations. There was issues involving trying to attract certain companies to set up plants in Arizona, that were obviously special interests. It was issues involving land swaps of state land versus – so you would give the state certain land in a remote area and try to swap that for land close to a city in which you intended to do development.

Those are some of the ones I can think of that were around the time that were discussed.

Q. Are you able to identify any specific entities that fit within those categories you just described?

MR. DAVIS-DENNY: Objection. Form.

THE WITNESS: Well, I recall that in the '80s, and maybe to some extent '90s, there was a group called the Phoenix 40 that were a group of business people that were, you know, reported to be kingmakers of [114] politicians and, you know, would help them get – raise enough money. And in sort of Arizona history, these were sort of the insiders who were – had certain – had particular business interests and were trying to, you know, maintain political influence. And while their influence may have waned with Arizona's growing population, there was – you know, at some period of time before then, they were specific individuals reputed to have a lot of power in sort of king-making Arizona politicians, so that was one type of area.

There was a lot of talk about certain developers being fat-cat individuals, which this phrase "narrow special interest" and "fat-cat individuals" were a bunch of private developers who had an enormous amount of money and were very active in giving political donations or directing political donations to Arizona politicians. That was kind of known at the time.

I mentioned a bundling issue earlier in the deposition, and some of those were – were – some of those developers were implicated or known to be involved in that kind of practice.

Q. BY MR. MAURER: And who were those developers?

A. I know there was a guy named Bob Gosnell, who was a major hotel-type person in Arizona who was – I had heard was involved in some bundling practices and [115] politicians.

There was – I know that a famous developer in Arizona was Fyfe Symington, who was involved and became governor in the few years before the Act and was involved in that.

There was several others who I couldn't name.

Q. Okay. So there was the developers –

A. And that would be individuals and corporations, by the way, of course.

Q. And did any of these overlap with the Phoenix 40 that you mentioned?

MR. DAVIS-DENNY: Objection. Form.

THE WITNESS: Yeah. Yes, I believe that the Phoenix 40 was a group of business interests that included development interests and developers.

Q. BY MR. MAURER: And –

A. I don't know who exactly the 40 are, and don't ask me to name them.

Q. Okay. Can you name any of them?

A. No. I – I really was not – I didn't pay enough attention to know exactly who they are. I didn't move in those circles.

Q. Okay. Are there any other narrow special interests or fat-cat individuals that you can identify [116] from 1997 that you were – had in mind when you drafted the Act?

MR. DAVIS-DENNY: Objection. Form.

THE WITNESS: Well, I don't know that I sat there drafting the Act with particular special interests or ones in mind. We were trying to set a policy that would apply globally, regardless – not against particular individuals.

I do know that there had been interests that – you know, for example, Charles Keating, who was a banker, had been involved in certain federal level matters, and had, you know, certain private interests that he had been able to get politicians to accomplish on his behalf.

And, you know, there was – that was of concern to people in the public at the time, and, you know, it was an issue that had come up, a name that had been mentioned in that context.

In addition, there was special interests on both sides of the political spectrum, all sides of the political spectrum, that had particular policy goals. There was, you know, a pro-life and pro-choice and – that would, you know, be interested in a particular point of view on that. There were people who were in favor of gun control and people who were against gun control. And [117] there were people who are in favor of more religion in schools and people who were very strong at – you know, like the ACLU in opposing religion in schools.

There was – you know, you pick any issue, and there are particular interest groups on either side, in terms of, you know, who might be – there were unions that had special interests in unionizing, and there were certain corporations that had very strong interests in busting unions.

So there are, you know, any number of issues and interests that people were involved, and the idea was – of the Act was to, you know, not have such individuals and interest groups being able to control the – go get, you know, their people on, but to get good candidates who could decide on those important public interests without being beholden to one particular side and could decide what is the best policy for the state of Arizona.

Q. BY MR. MAURER: Okay. Can you tell me what the difference between a special interest and the regular interest is?

A. Well, the term "special" was meant to be referring to – was coupled with narrow, and the idea was special interests would be somebody whose only – or principal concern was one particular issue and one side of [118] a particular issue.

* * *

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[127] Q. BY MR. MAURER: Were there other goals that you sought to accomplish with Clean Elections besides that?

A. Sure. The – for one thing, there's a section of the – right at the very first section of the Act, 16-940 I think it is, has a number of goals actually stated out in the Act itself.

But one of our – what we – the goals was to – we felt that it promoted freedom of speech because candidates would have more opportunity – more candidates would have more opportunity to speak, and candidates that participated in the system would have an opportunity to speak, you know, to the voters more about their ideas and not because they weren't sitting there spending the time on the phone raising money.

There was a sense that elected officials and [128] candidates for office have to spend a lot of time raising funds rather than talking to voters and passing out messages and understanding, you know, what

their policy issues were and listening to voters. And that was another goal of the Act, to relieve public officials, you know – and once they're elected, they spend time raising funds, rather than, you know, analyzing issues or reading bills that they're going to vote on or whatever. So that was a goal.

There was a goal to avoid the unseemly appearance or actual corruption based on the parts of the – that had occurred in actual cases, like AzScam and Mecham and a variety of other bundling and various other issues that had come up before that cast aspersion on the integrity of public officials either because they were acting illegally or they were acting perfectly legally, but providing, you know, extra favors to campaign contributors in the form of extra access or the like. That was the whole goal of the Act.

There was the sense that – that there would – that you would have better policy decisions if you didn't have elected officials, you know, sometimes sacrificing the public interest in order to promote a private interest of a contributor. And that that could, you know, for example, save the state a bunch of money, [129] maybe in – you know, campaign contributors might well get – convince candidates that they had financed to give some special tax break to, you know, a category in which their businesses fell, even though it wasn't necessarily good public funding – or financing policy for the state, but, you know, promotes their private interest, and that could be detrimental to the state as a whole. So better decision-making by elected officials was a category.

Increasing the opportunity – the number and variety of voices. Increasing the, you know – decreasing the time spent by candidates and elected officials raising funds. Increasing public confidence in elected officials.

All of those were motivating factors. You know, as I say, there's a summary of those in the Act itself.

* * *

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INSTITUTE FOR JUSTICE
Timothy D. Keller (019844)
Jennifer M. Perkins (023087)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
P: 480-557-8300/F: 480-557-8305

INSTITUTE FOR JUSTICE
William R. Maurer (WSBA 25451)[1]
101 Yesler Way, Suite 603
Seattle, WA 98104
P: 206-341-9300/F: 206-341-9311

Attorneys for Plaintiff-Intervenors

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*, Plaintiffs, and DEAN MARTIN, a citizen of the State Of Arizona, *et al.*, Plaintiff-Intervenors vs. KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; *et al.*, Defendants,	Civil Action No. 08-1550-PHX-ROS PLAINTIFF-INTERVENOR DEAN MARTIN'S SUPPLEMENTAL RESPONSE TO DEFENDANTS' REQUEST FOR CLARIFICATION (Filed Jul. 2, 2009) (Assigned to the Honorable Roslyn O. Silver)

[1] Admitted *pro hac vice*

and)
)
CLEAN ELECTIONS)
INSTITUTE, INC.)
)
Defendant-Intervenor.)

Plaintiff-Intervenor Dean Martin hereby submits his first supplemental discovery response to Defendants' request for clarification regarding the disparity of fundraising activities in Martin's 2006 campaign as compared with this earlier campaigns in 2002 and 2004. These responses are based on information that is currently known to Plaintiff-Intervenors and may not be conclusive. Plaintiff-Intervenors reserve the right, and acknowledge their F.R.C.P. 26(e) obligation, to supplement and/or amend any of these disclosures if and when they become aware of any additional responsive information or documents.

REQUEST FOR CLARIFICATION

1. **Why is there a disparity in the apparent amount of fundraising activity that took place during Plaintiff-Intervenor Dean Martin's 2006 campaign for Arizona Treasurer as compared with his earlier races in 2002 and 2004 for the Arizona State Senate?**

As explained previously in my Declaration in support of Plaintiff-Intervenors' Amended Complaint (Doc. 59, filed September 3, 2008, Exhibit A at ¶¶ 5-8), during my 2006 campaign, I did not engage in as much fundraising as I would have otherwise due to

the presence of matching funds. Specifically, at the beginning of the primary election campaign season, I had already transferred in nearly enough money from my Senate reelection campaign committee to meet the primary matching limit, and thus any additional fundraising at that time could have triggered matching funds to my participating general election opponent as well as my potential primary election opponent. Once then-Treasurer David Petersen decided against running for re-election, CCEC did not count any primary expenditures, but rather counted all my money to date as general monies. At that point if I engaged in additional fundraising, my general election opponent would have received more free money without regard to fundraising costs, therefore further disadvantaging my campaign. My government sponsored opponent, Rano Singh Sidhu, received both primary and general funding but had no primary opponent. In contrast, I was only allowed general election funding; any additional fundraising would have harmed my campaign by providing additional funds to my opponent, As a result I engaged in very little fundraising activity in 2006.

While I was able to win that election despite this handicap, the limitation on my fundraising activities also limited my contacts with potential supporters. This lack of relationships with potential supporters will continue to be a handicap in my next election – and thus the harm from 2006 due to matching funds will actually extend into the 2010 election season.

/s/ Dean Martin	3/12/09
Dean Martin	Date

Respectfully submitted this ___ day of March, 2009.

INSTITUTE FOR JUSTICE

/s/ Timothy D. Keller

Timothy D. Keller (019844)
Jennifer M. Perkins (023087)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
P: 480-557-8300/F: 480-557-8305

INSTITUTE FOR JUSTICE
William R. Maurer (WSBA #25451)[2]
101 Yesler Way, Suite 603
Seattle, WA 98104
P: 206-341-9300/F: 206-341-9311

[Certificate Of Service Omitted In Printing]

[2] *Admitted pro hac vice*

Mr. Clean Elections

The Dirty Truth About Arizona Campaign Finance Reform.

Nos. 10-238, 10-239

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In The Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, et al.,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

JOHN MCCOMISH, et al.,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX, VOLUME 3, PAGES 732-894

NICHOLAS C. DRANIAS*
GOLDWATER INSTITUTE
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION
500 East Coronado Road
Phoenix, AZ 85004
Tel: (602) 462-5000
Fax: (602) 256-7045
ndranias@goldwaterinstitute.org
Counsel for Petitioners John McComish, et al.

WILLIAM R. MAURER*
INSTITUTE FOR JUSTICE
101 Yesler Way, Suite 603
Seattle, WA 98104
Tel: (206) 341-9300
Fax: (206) 341-9311
wmaurer@ij.org
Counsel for Petitioners Arizona Free Enterprise Club's Freedom Club PAC, et al.

MARY R. O'GRADY*
Solicitor General
1275 West Washington
Phoenix, AZ 85007
Tel: (602) 542-3333
Fax: (602) 542-4085
Solicitor.General@azag.gov
Counsel for Respondents Ken Bennett, et al.

BRADLEY S. PHILLIPS*
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071
Tel: (213) 683-9100
Fax: (213) 687-3702
Brad.Phillips@mto.com
Counsel for Respondent Clean Elections Institute, Inc.

*Counsel of Record

[Additional Counsel Listed On Inside Front Cover]

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CLINT BOLICK
GOLDWATER INSTITUTE
SCHARF-NORTON CENTER FOR
CONSTITUTIONAL LITIGATION
500 East Coronado Road
Phoenix, AZ 85004
Tel: (602) 462-5000
Fax: (602) 256-7045
Additional Counsel for Petitioners
John McComish, et al.

WILLIAM H. MELLOR
STEVEN M. SIMPSON
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
wmellor@ij.org
Additional Counsel for Petitioners
Arizona Free Enterprise Club's Freedom Club PAC, et al.

TIMOTHY D. KELLER
PAUL V. AVELAR
INSTITUTE FOR JUSTICE
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
Tel: (480) 557-8300
Fax: (480) 557-8305
tkeller@ij.org
pavelar@ij.org
Additional Counsel for Petitioners
Arizona Free Enterprise Club's Freedom Club PAC, et al.

TIMOTHY A. NELSON
Chief Deputy Attorney General
JAMES E. BARTON II
Assistant Attorney General
1275 West Washington
Phoenix, AZ 85007
Tel: (602) 542-3333
Fax: (602) 542-4085
Additional Counsel for Respondents
Ken Bennett, et al.

GRANT A. DAVIS-DENNY
ELISABETH J. NEUBAUER
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071
Tel: (213) 683 9100
Fax: (213) 687-3702
Additional Counsel for Respondent
Clean Elections Institute, Inc.

MONICA YOUN
MIMI MARZIANI
THE BRENNAN CENTER
FOR JUSTICE AT NYU
SCHOOL OF LAW
161 Avenue of the Americas
New York, NY 10013
Tel: (212) 992-8158
Fax: (212) 995-4550
monica.youn@nyu.edu
Additional Counsel for Respondent
Clean Elections Institute, Inc.

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

EXPERT REPORT OF DONALD P. GREEN

I. Qualifications

My academic position is A. Whitney Griswold Professor of Political Science at Yale University. I received my doctorate in political science from University of California, Berkeley in 1988. I have taught political science at Yale University since 1989. In 1996, I was appointed Director of Yale's Institution for Social and Policy Studies, an interdisciplinary policy center founded in 1968. I am currently serving my fifth consecutive three-year term as Director.

My expertise lies in the area of campaigns, elections, research design, and statistical analysis. I regularly teach courses to undergraduate and graduate students on those topics. I have published extensively on, among other things, the topics of campaigns and elections in leading political science journals such as the *American Political Science Review*, *American Journal of Political Science*, *Journal of Politics*, *Electoral Studies*, *Political Research Quarterly*, and *Political Analysis*. According to a citation count published in the January 2007 issue of *PS* magazine, I am among the 100 most widely cited political scientists. A complete list of my publications is included in my curriculum vitae attached as Exhibit A. Several of my publications focus on campaign

finance and use statistical models to estimate the effects of campaign spending. I also co-authored a book entitled *Get Out The Vote: How to Increase Voter Turnout* (Brookings Institution Press, 2008), which reports the results of more than a dozen studies of political campaigns and voter mobilization drives. In the course of conducting these studies and in the year since the book was published, I have worked closely with a wide array of partisan and nonpartisan campaigns, evaluating their efforts statistically and observing first hand their day-to-day operations.

During my professional career, I have taught classes in the field of American politics and served as a reviewer for every major academic journal in this field. I have been a member of the American Politics section of the American Political Science Association since 1984 and have made scores of presentations at professional meetings and lecture series around the country. In 2005, I was elected to the Council of the American Political Science Association. I currently serve on the Board of Overseers of the American National Election Study. My scholarship has won recognition from the National Science Foundation and substantial financial support from James Irvine Foundation, Pew Charitable Trusts, Smith Richardson Foundation, Harry Frank Guggenheim Foundation, and Russell Sage Foundation. In 2004, I was elected Fellow of the American Academy of Arts and Sciences.

I am being paid $250 per hour for my work on this case, plus expenses. I have previously testified as

an expert in the following cases: *League of Women Voters of Florida v. Browning*, *League of Women Voters of Florida v. Cobb*, *Green Party of Connecticut et al. v. Garfield et al.*, *Acorn vs. Bysiewicz*, *McConnell v. Federal Election Commission*, *California Prolife Council et al. v. Fair Political Practices Commission et al.*, and *Daggett v. Webster*.

Based on my extensive experience studying campaigns and elections at the local, state and federal level, I declare under penalty of perjury that the comments in this document are true and correct.

II. The Impact of Matching Funds on the Extent and Timing of Candidate Spending

Professor David M. Primo alleges that the current system of matching funds compels "rational" candidates to change the timing of their fundraising and campaign expenditures. His hypothesis is that in order to delay participating opponents' access to matching funds, nonparticipating candidates who intend to raise or spend beyond the limit will seek to trigger matching funds as late as possible:

> [I]n the general election, a privately funded candidate may wait to raise money until the day after a trigger report is due, in order to have use of those funds for a full reporting period . . . [A] candidate may wait to raise money from donors until the very last minute, or if expenses can be incurred on credit, until after the election is completed. (p.3)

Dr. Marcus B. Osborn argues further that candidates will choose to forgo contributions altogether in order to prevent their opponent(s) from receiving matching funds.

I disagree with both of these claims on empirical and theoretical grounds. With respect to the empirical evidence, I argue below that the statistical evidence that Professor Primo adduces to support the first claim about timing is flimsy and unpersuasive. A careful examination of this statistical evidence suggests just the opposite conclusion: the system of matching funds has little or no effect on the timing of spending or fundraising by nonparticipating candidates who face participating opponents. As for the anecdotes that Dr. Osborn adduces in order to support his argument that candidates will refrain from spending or fundraising rather than trigger matching funds, I show that these anecdotes run counter to statistical trends since the advent of public funding showing increasing amounts of fundraising and spending over time by nonparticipating candidates, even those who face participating opponents. These trends suggest quite clearly that Arizona's campaign finance system in no way "compels" nonparticipating candidates to refrain from fundraising or spending. With respect to the theoretical basis for the claim that Arizona's campaign finance system compels candidates to forego contributions or expenditures, I point out that Professor Primo's and Dr. Osborn's analysis of the incentives facing candidates is superficial and incomplete. The strategic incentives associated with

the matching fund system are overshadowed by other strategic incentives that impel nonparticipating candidates to raise and spend beyond the matching threshold.

Statistical evidence on the timing of campaign spending or fundraising. Let me begin by assessing Professor Primo's statistical analysis purporting to show that candidates alter the timing of their expenditures in order to keep money out of the hands of their opponents. Professor Primo's analysis compares two types of candidates, nonparticipating candidates who run only against other nonparticipating candidates, and nonparticipating candidates who run against at least one participating candidate.[1] In constructing this comparison, his aim is to isolate the causal influence of strategic incentives created by Arizona's campaign finance system.

Before examining the statistical results of this comparison, let us first assess the soundness of the comparison itself. The key assumption underlying this comparison is that in any given election cycle the two types of candidates are identical except for the strategic incentives presented by matching funds. In the appendix of his report, Professor Primo relaxes this assumption slightly by controlling for party and

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[1] This comparison is further restricted to candidates who run in districts that are contested by major party candidates who raise or spend at least some nonnegative amount in each reporting period.

whether the candidate held prior office. Restated, his key assumption is that in any given election cycle, candidates of the same party and prior office-holding experience are identical except for the strategic incentives presented by matching funds.

This dubious assumption is backed up by neither theory nor evidence. Candidates are not randomly assigned to districts or to participating or nonparticipating opponents. On the contrary, their own decision to participate or not is presumably based on strategic and ideological considerations that are unmeasured in Professor Primo's regression model. Much of Professor Primo's published work focuses on modeling the strategic incentives that political actors confront; here, however, his analysis ignores the fact that candidates may strategically enter certain races and not others and the fact that they may base their decision to participate in the public funding system on unobserved factors that may be correlated with their ability to raise and spend campaign funds. It is my opinion that no refereed political science journal would accept the kind of simplistic comparison that Professor Primo devises, and for good reason: given the potential for unobserved factors to throw off this comparison, this type of analysis does not lend itself to reliable causal inferences.

Even if one were to put these reservations about research design aside and focus solely on the statistical evidence that Professor Primo presents in his report, the statistical evidence does not support his conclusions. According to his reading of the regression

results, the numbers support the following claims: (1) candidates competing against participating opponents raise or spend money later in the primary and general election periods, and (2) this pattern is "statistically significant," a term of art that statisticians use to characterize the robustness of an observed statistical relationship. Professor Primo's claims is that the pattern of results in his sample is unlikely to occur by chance if in fact the two types of candidates tend generally to spend/raise money in a similar fashion. The first claim is a descriptive question: how much do candidates of each type differ in terms of when they raise and spend money? The latter claim is based on a probability calculation that statisticians use in order to avoid being fooled by the idiosyncrasies of a small set of observations. In brief, Professor Primo characterizes the two groups of candidates as being substantially different in terms of their fundraising and spending, and he contends that this difference is statistically significant. I disagree on both counts.

Let us first consider the size of the gap in late-election spending and fundraising by the two types of candidates, the number that is at the heart of Professor Primo's assertion that "Type 2 candidates should try to postpone expenditures until as late in their campaign as possible in order to minimize the effectiveness of matching funds" (p.5).[2] Following Professor

[2] Primo (p.5) defines Type 2 candidates as follows: "privately funded candidates who face at least one publicly financed opponent who receives matching funds as a result of a privately

(Continued on following page)

Primo, who analyzed the natural logarithm of spending (hereafter "log spending") because "[o]ne possible problem with comparing spending and income averages is that large expenditures or donations can drive the results" (p.6), I consulted the figures he provides in Table 2H and Table 2S. In the primary election phase, Type 2 House candidates outspent their opponents in every period. Moreover, contrary to Professor Primo's hypothesis, the gap in log spending by House candidates is almost identical from period to period. In the three primary reporting periods, average log spending by Type 2 candidates exceeded the average log spending by Type 1 candidates by 26%, 27%, and 25%, respectively.[3] The same pattern obtains in

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funded candidate's spending or fundraising behavior." He defines Type 1 candidates as "privately funded candidates who either face only privately funded candidates or face publicly financed opponents, none of whom receive a match in the election."

[3] Professor Primo's reported percentage differences in the rightmost columns of Tables 2H and 2S are miscalculated. So are the percentages presented throughout Table 3. Professor Primo seems to be under the impression that the difference between two logarithms represents the percentage difference between them. Thus, he takes the difference between 8.04 and 6.44 of 1.60 to imply a 160% difference in the log of spending. To see the error, consider the comparison between a situation in which all Type 1 candidates spend $1000 and all Type 2 candidates spend $2000. In absolute dollars, this constitutes a 100% difference. The log of 1000 is 6.91, while the log of 2000 is 7.60. The difference in logs is 0.69. But a 69% difference describes neither the difference in absolute amounts nor the difference in logs. In my calculations, I calculate the percentage change in the average logs using the formula 100*((Average Log of Type 2)/(Average Log of Type 1) – 1). There is also a subtraction error

(Continued on following page)

Senate primaries: Type 2 candidates always outspent their Type 1 counterparts. The percentages (20%, 6%, 22%) jump around from period to period due to the fact there are only eleven Type 2 candidates, but again the picture is one of a relatively stable fundraising and spending advantage and not the predicted surge in last-minute spending that is supposedly "compelled" by the campaign finance rules.

Turning to the general election, the observed pattern of candidate spending shifts erratically from period to period. In the House, the data vaguely comport with Professor Primo's assertion that Type 2 candidates fundraise more at the end of the campaign than their Type 1 opponents, but the Senate data follow no distinguishable pattern. Contrary to Professor Primo's hypothesis, in the final two reporting periods Type 2 Senate candidates did not outfundraise their opponents. In period GE4, Type 2 candidates spent less than their opponents, and in GE5, the gap in log spending was just 10%, which was less than the 14% gap observed in GE2.[4] Since Professor Primo's theory of strategic incentives says nothing about why strategic incentives would operate

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in Table 2S in the GE 1 row: Professor Primo reports a difference of 60%, but his formula yields -60%.

[4] Primo (p.6) defines "the last two weeks of the [primary] campaign as PR3, the previous two-week period PR2, and the earlier two-week period PR1. The eight week general election is broken down into four two-week periods, denoted GE1, GE2, GE3, and GE4, in chronological order, and a fifth period, GE5, reflecting income received after Election Day in November."

differently for Senate candidates, the Senate results offset the supposed confirmation of the theory provided by the House data.

I would also point out that the spending and fundraising differences in question here are quite small substantively. The key finding, according to Professor Primo, is that Type 2 House candidates fundraise substantially more than Type 1 candidates in the final GE5 period. But the anti-log of 4.03 is $56, while the anti-log of 5.58 is just $265, so the difference in fundraising amounts to a meager $209. In the Senate, the corresponding figure for GE5 is $125. So even if all of the difference in fundraising were traced to the incentives created by the campaign finance system, the political consequences are negligible.

That said, I do not believe that any of the statistical patterns I have just described qualify as statistically significant, even by the most generous interpretation of that term.[5] Professor Primo's claims to the contrary are based on flawed calculations. The

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[5] Note that while convention dictates that statistical significance be accorded to patterns that would obtain by chance less than 5% of the time, Professor Primo loosens this standard to 10%. Moreover, because he calculates one-tailed tests despite the lack of strong prior evidence that the gap between spending by the two types of candidates could only go in one direction, he effectively loosens the standard of statistical significance to 20%. Even with this permissive standard, I find that his results are not statistically significant when the calculations are performed properly.

essence of Professor Primo's argument is that the gap between the two types of candidates *grows larger* as we move from the middle of the election season to the end. However, the statistical test that he performs does not test this hypothesis. Instead, he tests the hypothesis that at a *given point in time,* the two types of candidates raise and spend different amounts. This is an elementary error and one that grossly overstates the degree of support for his claim that incentives cause the gap between Type 1 and Type 2 candidates to widen at the end of the campaign.

I have recalculated the significance test in an appropriate manner, and the results are quite clear. There is no support for the claim that the gap in spending between the two types of candidates changes significantly over time.[6] In order for a statistical effect to be dubbed "statistically significant," it must

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[6] My calculations are based on the following procedure. Using the results presented in Professor Primo's Appendix C, I conducted a series of meta analysis regression models. These models test whether the coefficients in his Appendix change systematically over time, or instead change in ways that could be attributed to chance variation. I considered a wide array of interpretations of Professor Primo's hypothesis that Type 2 candidate raise/spend more than Type 1 candidates "early in the campaign and late in the campaign" (p.9). I first operationalized "late" by examining whether the coefficients after PR1 and GE1 are predicted by a linear time trend. Next, I consider whether a dummy variable for the last period predicts coefficients for periods after PR1 and GE1. Finally, I considered a quadratic specification in which the coefficients are regressed on time and time squared in order to test whether the results dip in the middle period.

have less than a 5% probability of occurring by chance. In this case, the probability of seeing gaps in spending at least as large as what the data actually show is never less than 39.9%. In other words, the pattern of results that Professor Primo presents are about what we would expect to see simply by chance if the two types of candidates were unaffected by matching fund incentives.

In sum, there is nothing in Professor Primo's statistical presentation that establishes the claim that the prospect of matching funds fundamentally alters the way in which candidates raise and spend money. On the contrary, the statistical evidence is consistent with the null hypothesis that there is no widening of the gap in spending or fundraising between Type 1 and Type 2 candidates over the course of the campaign. Let me conclude my discussion of his results by reflecting briefly on why, from a theoretical standpoint, this result is not surprising.

The argument that candidates alter their fundraising and spending patterns in light of the incentives that Professor Primo identifies is based on an incomplete account of the incentives that candidates face during a campaign. Candidates who choose to run based on private contributions may place little emphasis on the timing of their fundraising and spending activity given the many other objectives that they are pursuing at the same time. For example, candidates have strong incentives to raise money as

quickly and as vigorously as possible, because fundraising tends to be an activity that builds on itself.[7] Putting off fundraising may be problematic because it impairs one's ability to convince current donors that a growing number of fellow donors have recently contributed. Professor Primo's rendering of the strategic logic of the campaign finance system ignores the strategic imperatives of the broader campaign. This may explain why his statistical results are so flimsy: the pressure to raise and spend money late in the campaign is evidently too weak to be detected even when studying the behavior of candidates in hundreds of election campaigns.

Non-statistical evidence concerning fundraising and spending. In his supplementary report of March 13, 2009, Dr. Osborn cites three pieces of evidence to support his contention that matching funds "deter" spending. The first comes from Mr. Michael Miller's 2008 article in *PS: Political Science and Politics*. Dr. Osborn characterizes this journal as "peer reviewed," but I can say from experience, having published in that journal on more than one occasion, that it is peer reviewed only in the weakest sense of that term. This journal essentially publishes brief pieces that are thought to be timely or provocative; serious and extensive pieces of research are redirected to other academic journals. In addition to mischaracterizing

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[7] Krasno, Jonathan S., Donald Philip Green, and Jonathan A. Cowden. 1994. The Dynamics of Campaign Fundraising in House Elections. *Journal of Politics* 56(2): 459-474.

the source of his evidence, Dr. Osborn also mischaracterizes the findings themselves. For example, Dr. Osborn on page 3 describes Mr. Miller's research as finding "that every non-participating candidate felt constrained by the matching funds component of the Clean Elections Act." Mr. Miller did not survey every non-participating candidate. Instead, he attempted to survey 186 candidates running in the 2006 election cycle and succeeded in getting responses from 69 of them. According to Mr. Miller's Table 2 (p.528), 67.6% of his survey sample "accepted Clean Elections Funds," which implies that his sample contains just 22 nonparticipating candidates. The quotations that Dr. Osborn extracts from the Miller study are based on Mr. Miller's in-depth interviews with just 16 candidates, of whom (according to Table 2), 4 were non-participating candidates. So when Mr. Miller says that "[s]tories like this one were echoed by every candidate who had ever run traditionally against a Clean Elections opponent" (p.529), he is describing the comments of a very small number of candidates.

More importantly, when drawing inferences from the Miller study, Dr. Osborn completely overlooks an even more glaring deficiency, namely, the fact that it lacks a control group. Granted, the candidates talk about the strategic "considerations" that they took into account when allocating campaign resources, but this evidence does not establish a causal link between the matching fund system and how candidates actually spent their money. At a minimum, Mr. Miller should have traced the spending and fundraising behavior of

these candidates under the new system in comparison with their spending patterns under the old system.

Establishing a causal connection between the matching fund provisions and actual campaign spending decisions based on an uncritical reading of interview transcripts is particularly problematic given that Mr. Miller's respondents are sophisticated politicians who clearly understand the policy implications of their complaints about the campaign finance system. These respondents have an incentive to report that their behavior was shaped by the law. The same point applies to the anecdote that Dr. Osborn adduces concerning Ms. Maria Weeg (p.4), whose declaration asserts that expenditures would not have been made by her group had they known that the opponent would be receiving matching funds. This may well have been Ms. Weeg's position after the fact when trying to prevent an opposing candidate from accessing funds, but there is no evidence that before donating to this race, her group decided to do so based on its presupposition about matching funds.

The second piece of evidence that Dr. Osborn adduces is testimony taken in the deposition of Commissioner Lori Daniels. But the quotations on p.5 of Dr. Osborn's report merely quote Commissioner Daniels as saying that the availability of matching funds "can influence" a candidate's expenditures. Similarly, she says that the availability of matching funds "can influence" whether an independent expenditure is made. Beyond admitting the law's potential to influence behavior, her testimony says nothing

about the extent of this influence or the method by which the extent of this influence has been established empirically.

Next, Dr. Osborn cites Mr. Miller's data suggesting that between 2002 and 2006 candidates spend at least one-third of their resources in the final week of the campaign. Again, there is no control group. No effort is made to compare this figure to what candidates spent before matching funds went into effect in Arizona or to compare this figure to what candidates typically spend in state legislative races in other places that lack a public financing system. Given that the crescendo of campaign activity culminates on Election Day, it should not be surprising that a sizeable amount of money is raised and spent at that time.

Another way to look at the evidence is to note that the fact that two-thirds of resources are *not* spent until the last week of the election cycle, which contradicts Dr. Osborn's assertion that "matching funds provisions deter traditional candidates from aggressively communicating with potential voters at the beginning of the campaign because these expenditures trigger matching funds early in the election cycle" (p.5). It should be noted that Dr. Osborn's claim that matching funds "deter" spending and communication is also at odds with Professor Primo's theory that matching funds cause non-participating candidates to spend and fundraise heavily "early in the campaign and late in the campaign" (p.9). Evidently, there is no agreement on how these incentives work

theoretically or what it means in terms of dollars to "deter" communication.

Is it strategically sensible for nonparticipating candidates to refrain from spending and, fundraising? Much of the rhetorical force behind the notion that matching funds "deter" nonparticipating candidates from spending derives from anecdotes about specific candidates who express misgivings about spending against participating opponents. However, adducing examples of candidates who claim that they do not want to spend for fear of providing matching funds for their competitor in no way establishes that this concern translates into actual changes in what candidates actually do. Earlier, I demonstrated that the prospect of running against a participating opponent has no statistically significant effect on the *timing* of fundraising and spending by nonparticipating candidates. Here I address the question of whether there is evidence to support the contention that the matching fund system deters nonparticipating candidates from spending campaign funds beyond the matching fund threshold.

When one examines patterns of spending by nonparticipating candidates in 2006 who were opposed in the general election by at least one participating opponent, one is struck by two facts. First, spending levels do not cluster at or around the matching fund threshold, as one would expect if nonparticipating candidates were deterred from spending past that threshold. Looking at the smooth distribution of these nonparticipating candidates' expenditures, one

would not guess that the matching fund threshold was $17,918, because there is no tendency for spending to cluster at or around this figure.[8] The second noteworthy fact is that, far from being deterred from spending, the top nonparticipating spenders in fact spend more lavishly than their 1998 counterparts, who were running prior to the introduction of matching funds. In 1998, the top ten legislative candidates facing major party opponents in the general election spent $34,622 on average (in 2006 dollars, where the inflation rate between 1998 and 2006 is assumed to be 22.2%). In 2006, the top ten nonparticipating legislative candidates facing participating major party opponents in the general election spent on average $42,162. For example, Jim Weiers in House District 10 spent $148,952 in the general election, while Jim Waring in Senate District 7 spent $70,700. The comparison between 2006 and 1998 holds as well for primary elections. In 2006, the top 10 nonparticipating legislative candidates facing participating opponents in the primary spent $61,395 on average. In 1998, average spending (in 2006 dollars) among the top 10 legislative candidates running opposed in the primary was $51,279.

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[8] Of the 46 nonparticipating candidates facing a participating opponent in the general election in 2006, 39 spent less than $15,000 and therefore never reached the matching threshold, although one candidate, Pete Hershberger, spent $12,415 and was subject to a reduced threshold of $11,945. Just one candidate subject to the $17,918 threshold spent between $15,000 and $26,000. The remaining 6 candidates spent between $26,000 and $149,000.

High levels of privately generated spending have not died out with the advent of matching funds. On the contrary, nonparticipating candidates under the current system spend at levels that equal or exceed those observed before the introduction of matching funds. I interpret these trends to mean that the matching fund system in no way compels candidates to desist from raising and spending campaign funds. Many nonparticipating candidates lack the means to raise and spend up to the matching limit. Those who are capable of exceeding the threshold may regard the flow of matching funds to their opponents with chagrin, but evidently these nonparticipating candidates are not deterred from spending beyond the limit.

III. Whether Campaign Contribution Limits are Sufficient to Eliminate the Reality or Appearance of Corruption

In both his original and supplemental report, Dr. Osborn asserts that public funding of campaigns is unnecessary if the goal is to limit the appearance of corruption. In his view, disclosure and contribution limits are sufficient, because, according to his statistical analysis, contribution limits have the effect of "reducing interest group influence" (September 24, 2008 report, p.5). However, the statistical analysis on which Dr. Osborn relies (Appendix 1 of his September report) is, on closer inspection, deeply flawed.

On page 41 of this Appendix, Dr. Osborn explains how he calculated the so-called two-stage least squares regression estimates in his report. He provides the specific formulas used to calculate the first stage of the two-stage estimator. These formulas show quite clearly that he made a serious calculation error. The first stage estimates must be generated by controlling for all of the exogenous covariates in the model that Dr. Osborn presents in Table 1 of his September report.[9] Inspection of Table 1 reveals that several variables, such as Years of Service, are missing from the equations on p.41 of the Appendix. This is an elementary mistake that, unfortunately, I have encountered often in more than twenty years of teaching graduate statistics. The results that Dr. Osborn presents are not in fact two-stage least squares regression estimates; they have no statistical interpretation.

Suppose, for the sake of argument, that Dr. Osborn had calculated these estimates properly. The results would still be no stronger than the ad hoc assumptions on which his general modeling approach is based. From the Appendix of his report, it appears that the central assumption underlying his analysis is the notion that holding a Democratic or Republican leadership position affects one's contributions from PACs and lobbyists but has no effect on one's

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[9] Stock, James H., and Mark W. Watson. 2007. *Introduction to Econometrics*. 2nd edition. Boston: Pearson. See page 435.

responses to Dr. Osborn's survey. There is no reason to believe this assumption, and Dr. Osborn makes no effort to discuss or defend it. I therefore place no weight whatsoever on Dr. Osborn's statistical claims about the limited extent to which contributions translate into legislative influence.

Dr. Osborn's thesis that contribution limits are sufficient to prevent the reality or appearance of corruption runs counter to the testimony given by those close to the fundraising process. For example, several deponents pointed out that lobbyists are able to skirt campaign contribution limits and curry favor with legislators by directing donors to the candidate or by "bundling" contributions. Mr. Querard talks about lobbyists who say

> hey, I'd like to put together an event for you and that lobbyist may actually take care of a lot of the work involved in the fundraiser to where you may be calling your Rolodex of your friends and the people you know or all the business cards you've collected at the Capitol and that may be your contribution . . . (p.43)

This point is echoed by Mr. Smolden (p.10), who notes that hosting a fundraiser is one way that lobbyists assist candidates in raising money and by Mr. Martin (p.64), who recalls how lobbyists on his fundraising committee collected donations on his behalf from their clients. Although each of the campaign donations falls below the contribution threshold, the aggregate

amounts raised by lobbyists can be considerable, as Ms. Lubin explains:

> Typically, the lobbyist makes a personal donation. Their client, the principals often make donations to candidates. And in addition, they hold fundraisers for that candidate which may include employees, members of the board of that organization, or supporters. And it's usually – even though they're individual checks, it will become obvious to the candidate whether by looking at their own campaign finance report or by having the lobbyist tell you, oh, we raised $10,000 for you tonight. So some people call it bundling. (p.19)

Bundling and other means of circumventing contribution limits amplify the influence of lobbyists. As Mr. Hoffman explains (p.20), lobbyists gain special access to legislators who are beholden to them for campaign resources. In my view, the threat of corruption is very real under these conditions. Contrary to Dr. Osborn's assertions, contribution limits alone do not alleviate the threat of corruption because the limits can potentially be circumvented when candidates remain reliant on private sources of funding.

In his supplemental report, Dr. Osborn offers an additional argument. Dr. Osborn asserts that the lobbying efforts of the Citizens Clean Election Commission create the appearance of corruption:

> The presence of a lobbying effort from a campaign regulatory agency creates the potential

> for questions from both traditional and publicly financed elected officials that there may be a relationship between the policy positions they take on election issues and their future regulatory treatment. (p.8)

No evidence is adduced to show that the CCES in fact exercises its discretion in a discriminatory fashion. And no evidence is adduced to suggest that legislators, interest group leaders, or the public believe the CCES abuses its authority or trades legislators' support for regulatory favors. In other words, Dr. Osborn offers nothing beyond his own assertion that there is "the potential for questions."

* * *

U.S. District Court for the District of Arizona

(Filed Jul. 17, 2009)

[Title Omitted In Printing]

List of All Candidate Committees for the 2006 General Election Cycle

Tuesday, April 14, 2009

Total Number of Committees = **162** *Total Number of Participating Committees =* **97**

Office Sought Candidate Name	Flier ID	Party	Part?	General Initial Disbursement	General Matching Disbursement	Independent Expenditures	Total Disbursement
Governor							
Hess, Barry	200291785	Lib	☐	$0.00	$0.00	$0.00	$0.00
Munsil, Len	200693378	Rep	☑	$680,774.00	$135,951.07	$11,908.71	$828,633.78
Napolitano, Janet	200693456	Dem	☑	$680,774.00	$430,486.95	$0.00	$1,111,260.95
				$1,361,548.00	$566,438.02	$11,908.71	$1,939,894.73
Secretary of State							
Brewer, Jan	200693296	Rep	☑	$143,325.00	$0.00	$0.00	$143,325.00
Hancock, Ernest	200693398	Lib	☐	$0.00	$0.00	$0.00	$0.00
Torres, Israel	200693425	Dem	☑	$143,325.00	$0.00	$0.00	$143,325.00
				$286,650.00	$0.00	$0.00	$286,650.00
Attorney General							
Goddard, Terry	200693415	Dem	☑	$143,325.00	$0.00	$0.00	$143,325.00
Montgomery, William	200693307	Rep	☑	$143,325.00	$981.03	$0.00	$144,306.03
				$286,650.00	$981.03	$0.00	$287,631.03
State Treasurer							
Martin, Dean	200693445	Rep	☐	$0.00	$0.00	$0.00	$0.00
Singh Sidhu, Rano	200693459	Dem	☑	$71,655.00	$1,827.62	$0.00	$73,482.62
				$71,655.00	$1,827.62	$0.00	$73,482.62
Superintendent of Public Instruction							
Horne, Tom	200693270	Rep	☑	$71,655.00	$0.00	$0.00	$71,655.00
Williams, Jason	200693286	Dem	☐	$0.00	$0.00	$0.00	$0.00
				$71,655.00	$0.00	$0.00	$71,655.00

State Mine Inspector							
Hart, Joe	200693419	Rep	☑	$3,530.00	$0.00	$0.00	$3,530.00
				$3,530.00	$0.00	$0.00	$3,530.00
Corporation Commissioner							
Boyer, Richard	200693453	Dem	☑	$71,655.00	$39,291.70	$0.00	$110,946.70
Fowlkes, Rick	200693488	Lib	☐	$0.00	$0.00	$0.00	$0.00
Manoil, Mark	200693424	Dem	☑	$71,655.00	$39,291.70	$0.00	$110,946.70
Mayes, Kris	200693282	Rep	☑	$71,655.00	$39,291.70	$0.00	$110,946.70
Pierce, Gary	200693527	Rep	☐	$0.00	$0.00	$0.00	$0.00
				$214,965.00	$117,875.10	$0.00	$332,840.10
State Senator – District No. 1							
Kelleher, Josephine	200693431	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
O'Halleran, Tom	200693389	Rep	☐	$0.00	$0.00	$0.00	$0.00
				$17,918.00	$0.00	$0.00	$17,918.00
State Senator – District No. 2							
Hale, Albert	200493190	Dem	☐	$0.00	$0.00	$0.00	$0.00
Jenkins, Royce	200693404	Rep	☑	$17,918.00	$0.00	$0.00	$17,918.00
				$17,918.00	$0.00	$0.00	$17,918.00
State Senator – District No. 3							
Gould, Ron	200693272	Rep	☐	$0.00	$0.00	$0.00	$0.00
				$0.00	$0.00	$0.00	$0.00
State Senator – District No. 4							
Gogek, Ed	200693482	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
Harper, Jack W.	200693299	Rep	☑	$11,945.00	$0.00	$0.00	$11,945.00
				$29,863.00	$0.00	$0.00	$29,863.00
State Senator – District No. 5							
Cobb, Phillip B	200693438	Dem	☑	$17,918.00	$24,593.70	$0.00	$42,511.70
Flake, Jake	200693306	Rep	☐	$0.00	$0.00	$0.00	$0.00
				$17,918.00	$24,593.70	$0.00	$42,511.70
State Senator – District No. 6							
Gorman, Pamela	200693284	Rep	☐	$0.00	$0.00	$0.00	$0.00
Larson, Jim	200693442	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
				$17,918.00	$0.00	$0.00	$17,918.00

State Senator – District No. 7							
Black, Lisa	200693434	Dem	☑	$17,918.00	$35,836.00	$0.00	$53,754.00
Waring, James	200693256	Rep	☐	$0.00	$0.00	$0.00	$0.00
				$17,918.00	$35,836.00	$0.00	$53,754.00
State Senator – District No. 8							
Allen, Carolyn S	200693319	Rep	☐	$0.00	$0.00	$0.00	$0.00
Oseran, Dan	200693485	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
				$17,918.00	$0.00	$0.00	$17,918.00
State Senator – District No. 9							
Burns, Robert "Bob"	200693301	Rep	☐	$0.00	$0.00	$0.00	$0.00
Poe, Steve	200693377	Dem	☑	$17,918.00	$0.00	$5,568.23	$23,486.23
				$17,918.00	$0.00	$5,568.23	$23,486.23
State Senator – District No. 10							
Gray, Linda	200693353	Rep	☑	$17,918.00	$0.00	$243.23	$18,161.23
Monroe, Martin	200693393	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
				$35,836.00	$0.00	$243.23	$36,079.23
State Senator – District No. 11							
Leff, Barbara	200693290	Rep	☐	$0.00	$0.00	$0.00	$0.00
Wallack, Ann	200693495	Dem	☑	$17,918.00	$35,836.00	$0.00	$53,754.00
				$17,918.00	$35,836.00	$0.00	$53,754.00
State Senator – District No. 12							
Blendu, Robert	200693358	Rep	☐	$0.00	$0.00	$0.00	$0.00
				$0.00	$0.00	$0.00	$0.00
State Senator – District No. 13							
Miranda, Richard	200693339	Dem	☐	$0.00	$0.00	$0.00	$0.00
				$0.00	$0.00	$0.00	$0.00
State Senator – District No. 14							
McCune Davis, Debbie	200693384	Dem	☐	$0.00	$0.00	$0.00	$0.00
				$0.00	$0.00	$0.00	$0.00
State Senator – District No. 15							
Cheuvront, Ken	200493098	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
Smigielski, Andrew	200693465	Rep	☐	$0.00	$0.00	$0.00	$0.00
				$17,918.00	$0.00	$0.00	$17,918.00

State Senator – District No. 16							
Landrum, Leah	200693314	Dem	☑	$11,945.00	$0.00	$0.00	$11,945.00
Veres, Daniel	200693354	Rep	☑	$17,918.00	$0.00	$0.00	$17,918.00
				$29,863.00	$0.00	$0.00	$29,863.00
State Senator – District No. 17							
Burton Cahill, Meg	200693362	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
Crutcher, Rose	200693476	Rep	☑	$17,918.00	$3,464.37	$31,506.12	$52,888.49
				$35,836.00	$3,464.37	$31,506.12	$70,806.49
State Senator – District No. 18							
Johnson, Karen S	200693266	Rep	☐	$0.00	$0.00	$0.00	$0.00
				$0.00	$0.00	$0.00	$0.00
State Senator – District No. 19							
Gray, Chuck	200693262	Rep	☐	$0.00	$0.00	$0.00	$0.00
Zachary, Steven William	200693513	Dem	☑	$17,918.00	$21,966.98	$0.00	$39,884.98
				$17,918.00	$21,966.98	$0.00	$39,884.98
State Senator – District No. 20							
Gratehouse, Donna	200693452	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
Huppenthal, John	200693298	Rep	☑	$17,918.00	$0.00	$0.00	$17,918.00
				$35,836.00	$0.00	$0.00	$35,836.00
State Senator – District No. 21							
Tibshraeny, Jay	200693326	Rep	☐	$0.00	$0.00	$0.00	$0.00
				$0.00	$0.00	$0.00	$0.00
State Senator – District No. 22							
Ray, Glenn A	200693519	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
Verschoor, Thayer	200493069	Rep	☐	$0.00	$0.00	$0.00	$0.00
				$17,918.00	$0.00	$0.00	$17,918.00
State Senator – District No. 23							
Chase, Cheryl	200493060	Rep	☐	$0.00	$0.00	$0.00	$0.00
Rios, Rebecca	200693454	Dem	☑	$17,918.00	$16,098.91	$18,159.09	$52,176.00
				$17,918.00	$16,098.91	$18,159.09	$52,176.00
State Senator – District No. 24							
Aguirre, Amanda	200693366	Dem	☑	$17,918.00	$0.00	$14,584.42	$32,502.42
Jones, Russell	200693487	Rep	☑	$17,918.00	$0.00	$35,836.00	$53,754.00
				$35,836.00	$0.00	$50,420.42	$86,256.42

State Senator – District No. 25							
Arzberger, Marshn	2006933323	Dem	☐	$0.00	$0.00	$0.00	$0.00
Black, Mary Ann	2006933379	Rep	☑	$17,918.00	$8,764.40	$2,000.00	$28,682.40
				$17,918.00	$8,764.40	$2,000.00	$28,682.40
State Senator – District No. 26							
Melvin, Albert Anthony	2006933295	Rep	☑	$11,945.00	$13,791.00	$10,099.00	$35,835.00
Pesquera, Charlene	2006933522	Dem	☐	$0.00	$0.00	$0.00	$0.00
				$11,945.00	$13,791.00	$10,099.00	$35,835.00
State Senator – District No. 27							
Garcia, Jorge Luis	2006933372	Dem	☐	$0.00	$0.00	$0.00	$0.00
				$0.00	$0.00	$0.00	$0.00
State Senator – District No. 28							
Aboud, Paula	2006933446	Dem	☑	$1,290.00	$0.00	$0.00	$1,290.00
				$1,290.00	$0.00	$0.00	$1,290.00
State Senator – District No. 29							
Soltero, Victor	2004933014	Dem	☐	$0.00	$0.00	$0.00	$0.00
				$0.00	$0.00	$0.00	$0.00
State Senator – District No. 30							
Bee, Tim	2006933263	Rep	☐	$0.00	$0.00	$0.00	$0.00
Chimene, Jeffrey	2006933412	Dem	☑	$17,918.00	$28,594.04	$7,241.96	$53,754.00
				$17,918.00	$28,594.04	$7,241.96	$53,754.00
State Representative – District 1							
Detwiler, Bryan	2006933312	Rep	☑	$0.00	$0.00	$0.00	$0.00
Edmonds Jr, Wesley	2006933410	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
Mason, Lucy	2006933423	Rep	☑	$11,945.00	$0.00	$0.00	$11,945.00
Seaman, George	2006933450	Ind	☑	$20,904.00	$0.00	$0.00	$20,904.00
Tobin, Andy	2006933418	Rep	☑	$11,945.00	$0.00	$0.00	$11,945.00
				$62,712.00	$0.00	$0.00	$62,712.00
State Representative – District 2							
Kirkpatrick, Ann	2006933340	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
Korn, Preston J	2006933499	Rep	☑	$17,918.00	$0.00	$0.00	$17,918.00
Tom, Albert	2006933360	Dem	☐	$0.00	$0.00	$0.00	$0.00
				$35,836.00	$0.00	$0.00	$35,836.00

State Representative – District 3							
Groe, Trish	2006933338	Rep	☐	$0.00	$0.00	$0.00	$0.00
Lopez, Luis	2006933409	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
McLinn, Nancy	2006933303	Rep	☑	$11,945.00	$0.00	$0.00	$11,945.00
				$29,863.00	$0.00	$0.00	$29,863.00
State Representative – District 4							
Boehike, Debra	2006933385	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
Boone, Tom	2006933333	Rep	☑	$17,918.00	$0.00	$0.00	$17,918.00
Burgess, Judy M	2006933304	Rep	☑	$11,945.00	$0.00	$0.00	$11,945.00
				$47,781.00	$0.00	$0.00	$47,781.00
State Representative – District 5							
Brown, Jack A	2006933348	Dem	☐	$0.00	$0.00	$0.00	$0.00
Konopnicki, William	2006933321	Rep	☐	$0.00	$0.00	$0.00	$0.00
				$0.00	$0.00	$0.00	$0.00
State Representative – District 6							
Clark, Doug	2006933494	Rep	☐	$0.00	$0.00	$0.00	$0.00
Crump, Sam	2006933317	Rep	☐	$0.00	$0.00	$0.00	$0.00
				$0.00	$0.00	$0.00	$0.00
State Representative – District 7							
Barnes, Ray	2006933258	Rep	☐	$0.00	$0.00	$0.00	$0.00
Barto, Nancy K	2006933441	Rep	☐	$0.00	$0.00	$0.00	$0.00
Fox, Marilyn C	2006933429	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
Lunn, Jeanne	2006933511	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
				$35,836.00	$0.00	$0.00	$35,836.00
State Representative – District 8							
Kavanagh, John	2006933364	Rep	☑	$11,945.00	$19,693.60	$0.00	$31,638.60
Reagan, Michele	2006933261	Rep	☐	$0.00	$0.00	$0.00	$0.00
Rimmer, Stephanie	2006933374	Dem	☑	$17,918.00	$19,693.60	$0.00	$37,611.60
Sandberg, William H	2006933391	Dem	☑	$17,918.00	$13,720.60	$0.00	$31,638.60
				$47,781.00	$53,107.80	$0.00	$100,888.80

State Representative – District 9							
Murphy, Rick	2006933342	Rep	☐	$0.00	$0.00	$0.00	$0.00
Stump, Bob	2006933309	Rep	☐	$0.00	$0.00	$0.00	$0.00
Van Horsen, Sheri	2006933455	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
				$17,918.00	$0.00	$0.00	$17,918.00
State Representative – District 10							
Lovejoy, Lamont	2006934496	Dem	☐	$0.00	$0.00	$0.00	$0.00
Quelland, Doug	2006933350	Rep	☑	$17,918.00	$35,836.00	$0.00	$53,754.00
Thrasher, Jackie	2006933392	Dem	☑	$17,918.00	$35,836.00	$0.00	$53,754.00
Weiers, James	2006933265	Rep	☐	$0.00	$0.00	$0.00	$0.00
				$35,836.00	$71,672.00	$0.00	$107,508.00
State Representative – District 11							
Desimone, Mark Anthony	2006934432	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
Driggs, Adam	2006934417	Rep	☑	$11,945.00	$0.00	$0.00	$11,945.00
Hesselbrock, Don	2006934433	Rep	☑	$11,945.00	$0.00	$0.00	$11,945.00
				$41,808.00	$0.00	$0.00	$41,808.00
State Representative – District 12							
Nelson, John	2006933332	Rep	☐	$0.00	$0.00	$0.00	$0.00
Weiers, Jerry P	2006933346	Rep	☐	$0.00	$0.00	$0.00	$0.00
				$0.00	$0.00	$0.00	$0.00
State Representative – District 13							
Gallardo, Steve	2006933255	Dem	☐	$0.00	$0.00	$0.00	$0.00
Garcia, Martha	2006933401	Dem	☐	$0.00	$0.00	$0.00	$0.00
				$0.00	$0.00	$0.00	$0.00
State Representative – District 14							
Campbell, Chad	2006933508	Dem	☐	$0.00	$0.00	$0.00	$0.00
Meza, Robert	2006933259	Dem	☐	$0.00	$0.00	$0.00	$0.00
Stevens, John	2006933352	Rep	☐	$0.00	$0.00	$0.00	$0.00
				$0.00	$0.00	$0.00	$0.00

State Representative – District 15							
Gear Jr., Robert Lee	2006933435	Rep	☑	$17,918.00	$0.00	$0.00	$17,918.00
Lujan, David	2006933294	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
Sinema, Kyrsten	2006933387	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
				$53,754.00	$0.00	$0.00	$53,754.00
State Representative – District 16							
Campbell Jr, Cloves	2006933349	Dem	☐	$0.00	$0.00	$0.00	$0.00
Coleman, Daniel	2006933478	Rep	☐	$0.00	$0.00	$0.00	$0.00
Miranda, Ben R	2006933498	Dem	☑	$11,945.00	$0.00	$0.00	$11,945.00
				$11,945.00	$0.00	$0.00	$11,945.00
State Representative – District 17							
Ableser, Edward	2006933341	Dem	☑	$17,918.00	$0.00	$17,639.88	$35,557.88
Despain, Dale	2006933428	Rep	☑	$17,918.00	$0.00	$9,433.63	$27,351.63
Knaperek, Laura	2006933277	Rep	☑	$17,918.00	$0.00	$18,367.56	$36,286.56
Schapira, David	2006934611	Dem	☑	$17,918.00	$0.00	$17,639.88	$35,557.88
				$71,672.00	$0.00	$63,080.95	$134,752.95
State Representative – District 18							
Anderson, Mark	2006933380	Rep	☐	$0.00	$0.00	$0.00	$0.00
Pearce, Russell K	2004930029	Rep	☐	$0.00	$0.00	$0.00	$0.00
Pursley, Tammie	2006933512	Dem	☑	$17,957.13	$19,806.02	$0.00	$37,763.15
				$17,957.13	$19,806.02	$0.00	$37,763.15
State Representative – District 19							
Adams, Kirk D	2006933267	Rep	☐	$0.00	$0.00	$0.00	$0.00
Crandall, Rich	2006933525	Rep	☑	$17,918.00	$17,936.66	$0.00	$35,854.66
Wibeto, Lara	2006933363	Dem	☑	$17,918.00	$17,936.66	$0.00	$35,854.66
				$35,836.00	$35,873.32	$0.00	$71,709.32
State Representative – District 20							
McComish, John	2006933318	Rep	☐	$0.00	$0.00	$0.00	$0.00
Robson, Bob	2006933257	Rep	☐	$0.00	$0.00	$0.00	$0.00
				$0.00	$0.00	$0.00	$0.00

State Representative – District 21							
Hettmansperger, Phil	2006933515	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
Nichols, Wardie V	2006933313	Rep	☑	$11,945.00	$0.00	$0.00	$11,945.00
Yarbrough, Steve	2006933315	Rep	☑	$11,945.00	$0.00	$0.00	$11,945.00
				$41,808.00	$0.00	$0.00	$41,808.00
State Representative – District 22							
Biggs, Andy	2004933028	Rep	☐	$0.00	$0.00	$0.00	$0.00
Farnsworth, Eddie	2006933502	Rep	☐	$0.00	$0.00	$0.00	$0.00
				$0.00	$0.00	$0.00	$0.00
State Representative – District 23							
Fillmore, John	2006933386	Rep	☑	$17,918.00	$0.00	$15,097.64	$33,015.64
McGuire, Barbara	2006933464	Dem	☑	$17,918.00	$0.00	$266.40	$18,184.40
Pratt, Franklin M	2006933395	Rep	☑	$17,918.00	$0.00	$15,098.64	$33,016.64
Rios, Pete	2006933470	Dem	☑	$17,918.00	$0.00	$14,931.20	$32,849.20
				$71,672.00	$0.00	$45,393.88	$117,065.88
State Representative – District 24							
Melchionne, Joseph "Mel"	2006933481	Rep	☑	$17,918.00	$0.00	$5,013.06	$22,931.06
Panerazi, Lynne	2006933474	Dem	☑	$17,918.00	$0.00	$2,833.32	$20,751.32
Rosevear, Ken	2006933484	Rep	☑	$17,918.00	$0.00	$5,013.06	$22,931.06
Ulmer, Theresa	2006933509	Dem	☑	$17,918.00	$0.00	$17,843.18	$35,761.18
				$71,672.00	$0.00	$30,702.62	$102,374.62
State Representative – District 25							
Alvarez, Manuel V "Manny"	2006933322	Dem	☑	$17,918.00	$0.00	$19,513.68	$37,431.68
Burns, Jennifer J	2006933422	Rep	☑	$17,918.00	$0.00	$11,422.98	$29,340.98
Fleming, Patricia	2006933365	Dem	☑	$17,918.00	$0.00	$14,590.70	$32,508.70
Griffin, Gail	2006933517	Rep	☐	$0.00	$0.00	$0.00	$0.00
				$53,754.00	$0.00	$45,527.36	$99,281.36

State Representative – District 26							
Hershberger, Pete	2006933320	Rep	☐	$0.00	$0.00	$0.00	$0.00
Jorgenson, David A	2006933406	Rep	☑	$11,945.00	$9,681.11	$0.00	$21,626.11
Saradnik, Lena	2006933437	Dem	☑	$17,918.00	$3,708.11	$0.00	$21,626.11
				$29,863.00	$13,389.22	$0.00	$43,252.22
State Representative – District 27							
Bedford, Olivia Cajero	2004933026	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
Chewning, Gene	2006933279	Rep	☐	$0.00	$0.00	$0.00	$0.00
Lopes, Phil	2006933280	Dem	☑	$17,918.00	$0.00	$0.00	$17,918.00
				$35,836.00	$0.00	$0.00	$35,836.00
State Representative – District 28							
Bradley, David	2006933371	Dem	☑	$11,945.00	$0.00	$0.00	$11,945.00
Farley, Steve	2006933436	Dem	☑	$11,945.00	$0.00	$0.00	$11,945.00
Philips, Bill	2006933477	Rep	☑	$17,918.00	$0.00	$0.00	$17,918.00
				$41,808.00	$0.00	$0.00	$41,808.00
State Representative – District 29							
Lopez, Linda J	2006933343	Dem	☐	$0.00	$0.00	$0.00	$0.00
Murchison, Bruce P	2006933302	Rep	☑	$17,918.00	$0.00	$0.00	$17,918.00
Prezelski, Tom	2006933403	Dem	☐	$0.00	$0.00	$0.00	$0.00
				$17,918.00	$0.00	$0.00	$17,918.00
State Representative – District 30							
Boykins, Clarence	2006933460	Dem	☑	$17,918.00	$11,826.10	$10,296.80	$40,040.90
McClure, Marian	2006932659	Rep	☐	$0.00	$0.00	$0.00	$0.00
Paton, Jonathan	2004932533	Rep	☐	$0.00	$0.00	$0.00	$0.00
				$17,918.00	$11,826.10	$10,296.80	$40,040.90
Grand Totals				**$3,692,594.13**	**$1,081,741.63**	**$332,148.37**	**$5,106,484.13**

IN THE UNITED STATE DISTRICT COURT
DISTRICT OF ARIZONA

CIVIL ACTION NO. 08-1550-PHX-ROS

MAY 5, 2009

JOHN MCCOMISH, ET AL.

Plaintiffs

and

DEAN MARTIN, a citizen of the
State of Arizona, et al

Plaintiff-Intervenors

-vs-

KEN BENNETT, in his official capacity
as Secretary of the State of Arizona, et al.

Defendants

and

CLEAN ELECTIONS INSTITUTE, INC.

Defendant-Intervenors

REPORTED BY: VICTORINE KALISZEWSKI
LICENSE NUMBER: 00208

[2] Deposition of DR. DONALD P. GREEN, a Witness, in the hereinbefore-entitled action, taken by the Plaintiffs, pursuant to Notice before Victorine Kaliszewski, a duly qualified Notary Public in and for the State of Connecticut, held at the Law Offices of

Benson A. Snaider, 55 Church Street, New Haven, Connecticut on May 5, 2009.

(Filed Jun. 12, 2009)
(Filed Jul. 17, 2009)

* * *

[194] How does matching funds address corruption [195] or the appearance of corruption?

A Well, in some ways, they limit the arms race from one perspective in the sense that if you're spending will trigger my spending, then you don't necessarily garner the advantage that you otherwise would in unilaterally raising your spending. It's not as though you get nothing out of your spending because, presumably, there was a rationale for your spending more, maybe you thought on the margin you were spending less more effective than my countervailing spending would be, so you might still spend anyway, but the net gain would not be as great.

* * *

[210] BY MR. MAURER:

Q I've marked as Exhibit 5 Dr. Primo's expert testimony. Can I draw your attention to page three, third line from the bottom, beginning with the – beginning with the clause beginning, I show that these anecdotes, do you see that? Page three. This is a different printout. I'm sorry, I'm looking at your – I apologize.

Let's go back to your expert report. I apologize. I apologize, once again.

Page three of your expert report, third line from the bottom, the section says, I show these anecdotes, and it says, run counter to statistical trends since the advent of public funding showing increasing amounts of fundraising and spending over time by non-participating candidates. Can you square that with your earlier discussion of the arms race?

A Yes, the arms race refers to the kind of explosion in campaign fundraising and spending that is associated with an unregulated system, or a system that doesn't involve matching funds. And part of the reason that you see an arms race is because of the uncertainty associated with how much one's opponent will spend. Whereas in the case of [211] matching funds, that uncertainty is dramatically reduced because you know how much a person will spend, you also know that eventually the match will cease as the triple matching fund provision has exceeded.

With respect to an increase, remember that this increase is very, very meager, particularly as a – as in proportion to the growth in the number of registered voters in the state of Arizona, so I think what we're talking about is more of a nonexistence, you're basically saying less you think that this money has cutoff spending, as they say deterred speech or chilled speech, in fact, people are spending even more now than they did formerly, but my arms race argument is very different, it says, had there been no limits at all, you would have seen an even greater explosion. So, there's no contradiction.

Q Okay. So, your conclusion is that clean elections has dampened the arms race or cut down on the amount of spending, but not as much as it would have occurred had clean elections not been in existence?

A I think that's correct. And just to make it clear, remember that the aggregate amount of [212] spending has increased because more candidates are being funded now than formerly, but the average spending, which is what we're talking about, did not shoot up as much as would have been the case in the absence of the law, but that the aggregate amount has increased.

Q So, you're saying that the clean election system has been successful, to some extent, in dampening the amount of spending in the campaign in Arizona?

MS. NEUBAUER: Objection, it misstates prior testimony, form.

THE WITNESS: Well, it's a bit different than that. Because, for example, on page 19 of my report, I point out that 206 legislative candidates spent a total of $6,487,133 in 2006 dollars, whereas in 1998, 177 legislative candidates spend only 1.3 million in 2000 dollars. So, more candidates are – well, approximately the same number of candidates are spending a greater amount of money, but the average spending by the top spenders has increased very slowly.

BY MR. MAURER:

Q Page four of your report. Six lines from [213] the top. The sentence beginning the strategic incentives associated with a matching fund system?

A Yes.

Q What evidence do you have to support that statement?

A That's a speculation on my part.

Q Okay. What are the other strategic incentives that you are discussing here?

A Well, principally, they are the incentives created by the expectation on the part of the spender that his or her marginal return to spending is greater than the expected marginal return to spending by that person's opponents. If I think that I'm going to get more out of my spending than my opponents are going to get out of their spending, then I have an incentive to keep right on spending.

* * *

---

[232] Q The result that after a general election occurs, type two candidates have a lot more contributions than type one candidates. Have you ever seen that result in another election?

A No.

Q Okay.

A And to the extent that I've looked at campaign spending broken down by period, you tend to see a surge in fundraising and spending often by the winner, but I don't think I've ever seen it with respect to this kind of breakdown.

* * *

[241] BY MR. MAURER:

Q Your attorney has objected a number of times on the fact that you are not a Constitutional scholar and you wouldn't be able to determine when a [242] violation of First Amendment – of a First Amendment will have occurred. On page 19, six lines from the top, you say, based on the statistical evidence, I see no grounds for the claim that a material violation of First Amendment freedoms has occurred. Do you see that, Doctor?

A Yes, I do.

Q If you're not a Constitutional scholar, how can you make that representation?

A Well, when I'm thinking of material, I'm thinking of the kinds of things that would affect either electoral accountability or representation. If you – if you think of it as a discerning reading of the First Amendment, I think you'll find it wanting. I don't pretend to have a discerning view of the First Amendment.

Q Okay. So, you really don't have any grounds for determining when a violation for First Amendment freedoms has occurred or not occurred.

MS. NEUBAUER: Objection, it misstates prior testimony, mischaracterizes testimony in the record, form.

THE WITNESS: Well, I think it's true as written based on the statistical evidence, which I see, basically, I find evidence for the [243] null hypothesis, no effect, I see no grounds for the claim that a material violation has occurred. Now that's true as written.

BY MR. MAURER:

Q Can you tell me the difference between a material and immaterial violation of the First Amendment?

A Well, again, this is based on my view, and you're free to challenge my view because it has no special authority. But my view would be a material violation has occurred when the kind of speech that would make a difference in an election or would get – would cause a group to have its views represented in some tangible way, if that kind of speech were thwarted, then there would be a material violation.

Q So, that's the standard by which you analyze whether a violation of the First Amendment has

occurred, whether there's been any difference in the outcome of an election?

MS. NEUBAUER: Objection, foundation, mischaracterizing evidence and testimony in the record.

THE WITNESS: No, I didn't say the only standard is whether an electoral outcome is [244] different, because there could be a different winner or different looser, but that's not the only criterion. For example, as a result of an election or the expression of views during an election, legislators take a different view of the kinds of interests that they must respect and take notice of.

BY MR. MAURER:

Q Okay. Do you see any grounds for an immaterial violation of First Amendment freedoms in this case?

MS. NEUBAUER: Objection, form, foundation.

THE WITNESS: Yes, if the consequence of this law is and, again, this not a statistically significance difference, but if the consequence of the law were that an average of $125 is spent less as a result of this provision, I would call that an immaterial diminution of First Amendment freedoms.

BY MR. MAURER:

Q So, the question is not whether a First Amendment violation has occurred, but whether just how bad it is?

A Yes.

* * *

[Court Reporter's Certification Omitted In Printing]

INSTITUTE FOR JUSTICE
Timothy D. Keller (019844)
Jennifer M. Perkins (023087)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
P: 480-557-8300 F: 480-557-8305

INSTITUTE FOR JUSTICE
William R. Maurer (WSBA 25451)[1]
101 Yesler Way, Suite 603
Seattle, WA 98104
P: 206-341-9300 F: 206-341-9311

Attorneys for Plaintiff-Intervenors

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*, Plaintiffs, and DEAN MARTIN, a citizen of the State Of Arizona, *et al.*, Plaintiff-Intervenors vs. KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; *et al.*, Defendants.	Civil Action No. 08-1550-PHX-ROS DECLARATION OF DENNIS SHANE WIKFORS ON BEHALF OF PLAINTIFF-INTERVENOR ARIZONA TAXPAYERS ACTION COMMITTEE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

[1] Admitted *pro hac vice*.

and	)	(Filed Jul. 2, 2009)
CLEAN ELECTIONS INSTITUTE, INC.	)	(Assigned to the Honorable Roslyn O. Silver)
Defendant-Intervenor.	)	

1. I, Dennis Shane Wikfors, pursuant to 28 U.S.C. §1746(2), hereby declare under penalty of perjury as follows:

2. I am a citizen of the United States and a resident of Maricopa County, Arizona. I am over eighteen years of age and fully competent to make this declaration. I make this declaration based on my personal knowledge.

3. I am currently the Treasurer for the Arizona Taxpayers Action Committee ("Arizona Taxpayers"). I make this declaration on behalf of Arizona Taxpayers and in support of Plaintiff-Intervenors' Motion for Summary Judgment in the above-referenced matter.

4. In addition to Arizona Taxpayers' responses to discovery requests, my deposition on September 16, 2008, and the deposition of Chad Kirkpatrick on January 30, 2009, Arizona Taxpayers representatives, including myself, have provided statements in the form of Declarations in support of Arizona Taxpayers' claims in both this matter, as well as in *Martin v. Brewer*, No. CV 04-0200-PHX-EHC. Specifically, the following statements have been provided regarding Arizona Taxpayers' claims against the Citizens Clean Elections Act (the "Act"):

a. Declaration of Chad Kirkpatrick in Support of Amended Complaint, *Martin v. Brewer* (executed November 20, 2007);

b. Declaration of Dennis Shane Wikfors in Support of Motion to Intervene (executed August 29, 2008);

c. Declaration of Dennis Shane Wikfors in Support of Plaintiffs-Intervenors Motion for Preliminary Injunction, (executed September 3, 2008);

d. Plaintiff-Intervenor Arizona Taxpayers Action Committee's Responses to Defendants' and Defendant-Intervenors' Interrogatories Document Requests (verified September 15, 2008);

e. Plaintiff-Intervenor Arizona Taxpayers Action Committee's First Supplemental Response to Defendants' and Defendant-Intervenors' Document Requests (verified September 15, 2008);

f. Responses to Defendants' and Defendant-Intervenor's First Set of Interrogatories and Requests for Production (verified January 20, 2009);

g. Responses to Defendant-Intervenor's First Set of Requests for Admission, Second Set of Interrogatories, and Second Set of Requests for [Production] Directed to Plaintiffs and Plaintiff-Intervenors (executed February 25, 2009);

h. Responses to Defendants' First Request for Admission and Second Request for Document Production to Plaintiff-Intervenors (executed February 27, 2009);

5. I now incorporate by reference and affirm each and every prior statement representatives of Arizona Taxpayers have made on Arizona Taxpayers' behalf regarding Arizona Taxpayers' claims concerning the Act, as listed above.

6. It is my understanding that this case may remain ongoing as we approach the 2010 election season.

7. Arizona Taxpayers intends to participate in the legislative and/or statewide elections that are subject to the Act in 2010 as well as all future elections, provided fundraising enables Arizona Taxpayers to make expenditures in future elections.

8. I hereby reaffirm that the Act, in particular the matching funds provision of the Act, impacts every spending decision Arizona Taxpayers makes with regard to races in which matching finds may be triggered, forcing Arizona Taxpayers to alter its independent expenditure strategy to achieve its political goals..

9. The Act, therefore, continues to impact Arizona Taxpayers' First Amendment rights as we continue to participate in the Arizona state elections system.

/s/ Dennis Shane Wikfors 5/7/09
Dennis Shane Wikfors Date

INSTITUTE FOR JUSTICE
Timothy D. Keller (019844)
Jennifer M. Perkins (023087)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
P: 480-557-8300/F: 480-557-8305

INSTITUTE FOR JUSTICE
William R. Maurer (WSBA 25451)[1]
101 Yesler Way, Suite 603
Seattle, WA 98104
P: 206-341-9300/F: 206-341-9311

Attorneys for Plaintiff-Intervenors

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*, Plaintiffs, and DEAN MARTIN, a citizen of the State Of Arizona, *et al.*, Plaintiff-Intervenors vs. KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; *et al.*, Defendants.	) Civil Action No. 08-1550-PHX-ROS)) DECLARATION OF STEVEN VOELLER ON BEHALF OF PLAINTIFF-INTERVENOR ARIZONA FREE ENTERPRISE CLUB'S FREEDOM PAC IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

[1] Admitted *pro hac vice*.

and	)	(Filed Jul. 2, 2009)
CLEAN ELECTIONS INSTITUTE, INC.	)	(Assigned to the Honorable Roslyn O. Silver)
Defendant-Intervenor.	)	

1. I, Steven Voeller, pursuant to 28 U.S.C. §1746(2), hereby declare under penalty of perjury as follows:

2. I am a citizen of the United States and a resident of Maricopa County, Arizona. I am over eighteen years of age and fully competent to make this declaration. I make this declaration based on my personal knowledge.

3. I am currently involved with and able to speak for the Arizona Free Enterprise Club's Freedom Club PAC ("Freedom Club") in this matter. I make this declaration on behalf of Freedom Club and in support of Plaintiff-Intervenors' Motion for Summary Judgment in the above-referenced matter.

4. In addition to Freedom Club's responses to discovery requests, my deposition on February 26, 2009, and the deposition of J. Fife Symington on February 4, 2009, Freedom Club representatives, including myself, have provided statements in the form of Declarations in support of Freedom Club's claims in both this matter, as well as in *Martin v. Brewer*, No. CV 04-0200-PHX-EHC. Specifically, the following statements have been provided regarding Freedom Club's claims

against the Citizens Clean Elections Act (the "Act"):

a. Declaration of the Honorable J. Fife Symington, III, in Support of Amended Complaint, *Martin v. Brewer* (executed November 26, 2007);

b Plaintiff-Intervenor Arizona Free Enterprise Club's Freedom Club PAC's Responses to Defendants' and Defendant-Intervenors' First Set of Interrogatories and Requests for Production (verified January 20, 2009);

c. Plaintiff-Intervenors' Second Supplemental Responses to Defendants' and Defendant-Intervenor's First Set of Interrogatories (verified February 3, 2009);

d. Responses to Defendant-Intervenor's First Set of Requests for Admission, Second Set of Interrogatories, and Second Set of Requests for [Production] Directed to Plaintiffs and Plaintiff-Intervenors (executed February 25, 2009);

e. Responses to Defendants' First Request for Admission and Second Request for Document Production to Plaintiff-Intervenors (executed February 27, 2009);

f. Plaintiff-Intervenors' Amended Responses to Defendants' and Defendant-Intervenor's First Set of Interrogatories and Requests for Production (verified March 18, 2009.

5. I now incorporate by reference and affirm each and every prior statement representatives of Freedom Club have made on Freedom Club's behalf regarding Freedom Club's claims concerning the Act, as listed above.

6. It is my understanding that this case may remain ongoing as we approach the 2010 election season.

7. Freedom Club intends to participate in the legislative and/or statewide elections in 2010 and future election years that are subject to the Act, provided fundraising enables Freedom Club to make expenditures in these elections.

8. I hereby reaffirm that the Act, in particular the matching funds provision of the Act, impacts every spending decision Freedom Club makes with regard to races in which matching funds may be triggered, forcing Freedom Club to alter its independent expenditure strategy to achieve its political goals..

9. The Act, therefore, continues to impact Freedom Club's First Amendment rights as it continues to participate in the Arizona state elections system.

/s/ Steven Voeller _____ 5/9/09 ____
Steven Voeller Date

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, et al.,

Plaintiffs,

and

DEAN MARTIN, a citizen of the State of Arizona, et al.,

Plaintiff-Intervenors,

-vs-

KEN BENNETT, in his official capacity as Secretary of State of Arizona; et al.,

Defendants,

and

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant-Intervenor.

Civil Action No.
08-1550-PHX-ROS

Deposition of:

KENNETH R. MAYER, Ph.D.

Madison, Wisconsin
May 12, 2009

Reported by: Theresa L. Groves, RPR

* * *

[64] Q From your testimony today, it sounds as a significant determinant of whether a public

financing system is competitive is whether the grants are sufficiently large to enable someone to run an effective campaign; is that correct?

A That's a necessary condition, yes.

Q Are there any other necessary conditions?

A You would – well, let's be clear what we're talking about here. Are we talking about what I would regard as an effective and efficient program or a program generally?

Q Well, your expertise is in studying competition and the effect public financing has on competition; correct?

A Yes. So in that regard, there are several necessary conditions for a program to be – have any meaningful effect. The first is you have to have adequate funding levels or adequate grants. The second is that you have to have some mechanism that protects the candidates who participate so that they don't fear that they would be locked into a particular funding level and wouldn't have – wouldn't remain competitive with a candidate who outspent them by a significant amount.

* * *

[Notary Certification Omitted In Printing]

INSTITUTE FOR JUSTICE
Timothy D. Keller (019844)
Jennifer M. Perkins (023087)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
P: 480-557-8300/F: 480-557-8305

INSTITUTE FOR JUSTICE
William R. Maurer (WSBA 25451)[1]
101 Yesler Way, Suite 603
Seattle, WA 98104
P: 206-341-9300/F: 206-341-9311

Attorneys for Plaintiff-Intervenors

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*, Plaintiffs, and DEAN MARTIN, a citizen of the State Of Arizona, *et al.*, Plaintiff-Intervenors vs. KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; *et al.*, Defendants,	Civil Action No. 08-1550-PHX-ROS DECLARATION OF PLAINTIFF-INTERVENOR ROBERT BURNS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (Filed Jun. 12, 2009)

[1] Admitted *pro hac vice*.

and	)	(Assigned to the
	)	Honorable
CLEAN ELECTIONS INSTITUTE, INC.	)	Roslyn O. Silver)
	)	
Defendant-Intervenor.	)	

1. I, Robert Burns, pursuant to 28 U.S.C. §1746(2), hereby declare under penalty of perjury as follows:

2. I am a citizen of the United States and a resident of Maricopa County, Arizona. I am over eighteen years of age and fully competent to make this declaration. I make this declaration based on my personal knowledge.

3. I am currently the Arizona State Senator in Legislative District 9. I was first elected to that position in 2002, and was re-elected in November 2008. During this Legislative Session I am also serving as the Senate President. I make this declaration in support of Plaintiff-Intervenors' Motion for Summary Judgment in the above-referenced matter.

4. To support my claims in this matter, I have provided responses to discovery requests, been deposed on September 17, 2008, and provided a statement in the form of a Declaration. Specifically, I have provided the following statements regarding my claims regarding the Citizens Clean Elections Act (the "Act"):

   a. Declaration of Robert Burns, (executed August 29, 2008);

b. Responses to Defendants' and Defendant-Intervenor's Interrogatories Document Requests (verified September 17, 2008);

c. Responses to Defendants' and Defendant-Intervenors' First Set of Interrogatories and Requests for Production (verified January 15, 2009);

d. Responses to Defendant-Intervenor's First Set of Requests for Admission, Second Set of Interrogatories, and Second Set of Requests for [Production] Directed to Plaintiffs and Plaintiff-Intervenors (executed February 25, 2009);

e. Responses to Defendants' First Request for Admission and Second Request for Document Production to Plaintiff-Intervenors (executed February 27, 2009);

5. I now incorporate by reference and affirm each and every prior statement I have made regarding my claims concerning the Act, as listed above.

6. It is my understanding that this case may remain ongoing as we approach the 2010 election season.

7. I have established an exploratory committee for the 2010 election and at this time plan to participate in that election.

8. The Act will continue to impact my First Amendment rights in coming Arizona state

elections in the ways described in the materials listed in paragraph 4 above.

9. In addition to the specific impacts on my free speech rights discussed in the materials listed in paragraph 4 above, I also believe that the existence of matching funds coerces traditionally funded candidates into changing their message and the timing of getting out their message, even if ultimately the amount of messaging a traditional candidate chooses to engage in does not change.

10. In that regard, since the Act went into effect, I have been present for discussions regarding a strategy whereby traditionally funded candidates could avoid triggering matching funds to their publicly funded opponents toward the end of their general election campaigns, and yet still make necessary expenditures during that time frame. Although I have no recollection of which specific candidates or consultants engaged in this activity, I am aware that some consultants and/or candidates have considered making end-of-campaign expenditures on credit rather than raising the funds to pay for those expenditures during the general election. The candidate would then raise funds after the election to pay off the debt, and avoid triggering matching funds before Election Day.

/s/ Robert L. Burns — 5/19/09

Robert Burns — Date

INSTITUTE FOR JUSTICE
Timothy D. Keller (019844)
Jennifer M. Perkins (023087)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
P: 480-557-8300 F: 480-557-8305

INSTITUTE FOR JUSTICE
William R. Maurer (WSBA 25451)[1]
101 Yesler Way, Suite 603
Seattle, WA 98104
P: 206-341-9300 F: 206-341-9311

Attorneys for Plaintiff-Intervenors

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*, Plaintiffs, and DEAN MARTIN, a citizen Of the State of Arizona, *et al.*, Plaintiff-Intervenors vs. KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, *et al.*, Defendants.	Civil Action No. 08-1550-PHX-ROS DECLARATION OF DAVID M. PRIMO, Ph.D. IN SUPPORT OF PLAINTIFF-INTERVENORS' MOTION FOR SUMMARY JUDGMENT (Filed Jun. 12, 2009) (Assigned to the Honorable Roslyn O. Silver)

[1] Admitted *pro hac vice*.

and)
)
CLEAN ELECTIONS)
INSTITUTE, INC.)
)
Defendant-Intervenor.)

I, David M. Primo, declare under penalty of perjury that the following is true:

1. I am a citizen of the United States, a resident of the State of New York, and over the age of 18 years. I make this declaration in support of Plaintiff-Intervenors' Motion for Summary Judgment based on my personal knowledge of the facts stated herein.

2. I have been asked by counsel for the Plaintiff-Intervenors to evaluate the effect of the matching funds provisions of the Arizona Clean Elections law on candidate behavior. I was paid $225 per hour for the work on my initial and rebuttal reports and $250 per hour to prepare for and participate in my deposition; in addition, I will be compensated $225 per hour for all additional work in this case, except that further court testimony or depositions, and related preparation, will be compensated at a rate of $250 per hour.

3. In this declaration, I describe: 1) my qualifications as an expert in this case; 2) pertinent characteristics of Arizona's matching provisions; 3) the incentives created by the matching provisions; 4) the dataset I used to perform my statistical analysis; 5) the results of my statistical analysis and a related

cost-benefit analysis; and 6) my conclusions. A summary of my analysis follows.

Summary

4. I remain confident in the conclusion, reached in the reports I prepared for this case, that the matching provisions of Arizona's Clean Elections law distort political speech.

5. Based on a statistical analysis of the matching provisions in Arizona's Clean Elections law, I conclude that these provisions impose significant costs on candidates and, by extension, the public.

6. Specifically, the matching provisions lead to changes in fundraising and campaign spending in ways that are harmful to free expression.

7. Based on a regression analysis, I am very confident that privately funded candidates in races where matching funds are awarded change the timing of their fundraising activities, the timing of their expenditures, and, by extension, their campaign strategies.

8. To the best of my knowledge, I am the only expert in this case to perform original research on the effect of matching funds.

9. In conducting my data analysis, I rely on data from 2000-2006 and compare patterns of fundraising and campaign spending between privately funded candidates in races where matching funds are

triggered and privately funded candidates in races where a match is not triggered. Some of my key findings include the following:

10. In primaries, privately funded candidates in House races where matching funds are awarded spent 385% more than other privately funded candidates in the final two weeks of the campaign. This is consistent with a strategy to spend money at the last minute to minimize the effectiveness of matching funds given to one's opponent as a result of such spending.

11. In the period immediately following very competitive general election races, privately funded candidates in races where matching funds are triggered raised over three times more than privately funded candidates in races where a match is not triggered. This set of results imply that matching funds provisions have a powerful effect precisely where they matter most: in very competitive races.

12. This behavior in general elections is consistent with a strategy of deferring income that could trigger a match until after the election (and, to the extent possible, funding last minute purchases on credit, which does not trigger a match in the general election) in order to reduce the amount of matching funds awarded to a publicly financed candidate.

13. These results, combined with the limited evidence in the literature that Clean Elections have improved elections or the policy process in Arizona, lead me to conclude that the harms to free expression

and the free exercise of political activity associated with Clean Elections far outweigh any benefits the law confers on the state of Arizona or its residents. In other words, the costs of this law are significant relative to its benefits.

Qualifications

14. I am an associate professor of political science at the University of Rochester. I joined the faculty in 2002 after receiving my Ph.D. in Political Science from Stanford University. I also have an M.A. in Economics from Stanford, an M.A. in Political Science from Brown University, and a B.A. in Economics and Honors Political Science from Brown. At the University of Rochester, I teach courses on American politics, positive political theory, the interplay of business and government, entrepreneurship, and campaign finance. My current vita is attached as Exhibit A and incorporated herein by this reference.

15. My research on campaign finance, public finance, methodology, and political bargaining has been published in peer-reviewed journals including *American Journal of Political Science; Journal of Politics; Election Law Journal; Economics and Politics; Journal of Law, Economics, and Organization; Business and Politics; Independent Review; State Politics and Policy Quarterly;* and *Public Choice*. My work has also been published in several edited volumes, and I have published two books. My second book, *Rules and Restraint: Government Spending and*

the Design of Institutions (University of Chicago Press, 2007), was awarded the Alan Rosenthal Prize by the Legislative Studies Section of the American Political Science Association. I have also received numerous grants to support my research, including from the National Science Foundation.

16. My research on campaign finance laws focuses on the impact of these laws on competitiveness, turnout, and perceptions of government. This research establishes that the claims reformers make about the benefits of campaign finance law often to do not hold up in practice. For instance, Primo and Milyo (2006) establish that few campaign finance laws improve citizen perceptions of government, and in fact they may sometimes negatively impact these perceptions. *See* Primo, David M., and Jeffrey Milyo. 2006. "Campaign Finance Laws and Political Efficacy: Evidence From the States." *Election Law Journal* 5(1):23-39.

17. Most of my research in the area of campaign finance law is quantitative in nature, utilizing data analytic techniques such as regression to probe relationships among campaign finance laws and outputs such as perceptions of government. This work has been cited widely in academic journals, policy reports, and the popular press.

18. I am familiar with the provisions of the Clean Elections law and with the extant political science literature on public financing of campaigns.

19. I have previously served as an expert witness in one case, *McConnell v. FEC*. In that case, which dealt with the federal Bipartisan Campaign Reform Act, I focused on the impact of campaign spending on citizen perceptions of government. I showed that at the very time that soft money receipts were increasing, so was citizen trust in government. This simple pattern in the data suggested that it was unlikely that soft money spending was harming citizen perceptions of government.

20. In this case, I have authored two reports.

21. In my initial expert report, I demonstrated statistically that the matching provisions of the Arizona's Clean Elections law distort political speech by changing the timing of fundraising and expenditures. In my opinion, the costs associated with these changed political activities far outweigh any benefits conferred by the law. My initial expert report is attached as Exhibit B and incorporated herein by this reference.

22. In my rebuttal report, I defended my statistical methodologies as sound and appropriate and reaffirmed that I remain confident that the matching provisions distort political speech. I also conducted new statistical analyses demonstrating that the matching funds provisions have a powerful negative impact in very competitive races. My rebuttal report is attached as Exhibit C and incorporated herein by this reference.

The Clean Elections Matching Provisions

23. Pursuant to Arizona's Clean Elections law, a candidate who chooses to forgo private funds in return for receiving public monies is provided with a lump sum at the beginning of the primary and general election periods. A.R.S. § 16-951. I will refer to such candidates as "publicly funded" candidates.

24. Publicly funded candidates are eligible to receive additional public monies through the Clean Elections law's matching provisions. A.R.S. § 16-952.

25. Candidates who choose not to accept public monies will be referred to as "privately funded" candidates.

26. The matching provisions operate as follows:

i) In the primary election, if a privately funded candidate spends in excess of the initial disbursements provided to publicly funded candidates in the same race, then the state of Arizona provides all publicly funded candidates in that race with a dollar-for-dollar match, up to a set amount. A.R.S. § 16-952(A).

ii) In the general election, determinations are based on money raised, as opposed to spent. A.R.S. § 16-952(B).

iii) Privately funded candidates are required to submit "trigger reports" periodically throughout both the campaign. A.R.S. § 16-941(B)(2); A.R.S. § 16-958. These reports are used by the state to determine whether any publicly

financed candidates are eligible to receive matching funds.

Incentives Created By The Clean Elections Law

27. Before turning to the data, it is useful to consider the incentives created by the Clean Elections law.

28. Privately funded candidates who expect to trigger matching funds may want to time their expenditures or income in order to minimize the effectiveness of any matching funds that are awarded.

29. For instance, in the primary, a candidate may want to wait until the last two or three days before the primary election to unleash a barrage of spending.

30. Similarly, in the general election, a privately funded candidate may wait to raise money until the day after a trigger report is due, in order to have use of those funds for a full reporting period. And as the campaign draws to a close, a candidate may wait to raise money from donors until the very last minute, or if expenses can be incurred on credit, until after the general election is completed.

31. In other words, the matching provisions should encourage a rational privately funded candidate to alter his or her fundraising and campaign expenditures to minimize the impact of matching funds in ways consistent with maximizing the likelihood of victory in the election.

32. Of course, only privately funded candidates facing at least one other publicly funded candidate and who fear that a match will be triggered should alter their behavior. Throughout this declaration, I will refer to these candidates as Type 2 candidates.

33. Privately funded candidates facing off against other privately financed candidates should not exhibit altered patterns of behavior.

34. Privately funded candidates facing off against at least one publicly funded candidate in races unlikely to trigger matching funds also should not exhibit altered patterns of behavior.

35. I will refer to privately funded candidates who should not exhibit altered patterns of behavior as Type 1 candidates.

36. Type 2 and Type 1 candidates are defined entirely based on the above criteria. For instance, some Type 1 candidates outspend some Type 2 candidates in a given period, but in other cases Type 2 candidates outspend Type 1 candidates. So, candidate spending is not included as a criterion for defining Type 1 and Type 2 candidates.

37. This theoretical perspective provides the foundation for empirically examining whether Type 2 candidates behave differently than Type 1 candidates.

Data

38. I utilized a dataset of all candidates for the Arizona House and Senate from 2000 to 2006.[2] The units of observation are candidates. For each candidate, several pieces of data were collected, including income, expenses, and experience. Some data for years prior to 2000 was used in order to construct variables for candidate experience.

39. The dataset was constructed by Dr. Dick Carpenter of the Institute for Justice using data obtained from public sources, specifically the Arizona Secretary of State's Office, the Citizens Clean Elections Commission (CCEC), and state archives. The data obtained from the Secretary of State includes official election results, voter registration totals, and campaign finance data. The data from the CCEC includes campaign finance data. A list of legislative officeholders was obtained from state archives. Dr. Carpenter's approach is typical of the way in which political scientists go about gathering data for similar types of analysis.

40. I received the data in the form of an Excel file and personally placed the file into STATA format so that I could perform my statistical analysis. During the process of placing the data into STATA format, I spot-checked the data for accuracy. I discovered

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[2] 2008 was omitted from the dataset due to data limitations.

a few errors in the vote totals and worked with Dr. Carpenter to correct those totals prior to working with the data.

41. I am confident that the dataset constructed by Dr. Carpenter is largely accurate. If I had concerns about the overall accuracy of the dataset, I would not have worked with it. In a large dataset such as this one, with well over 1,000 observations, there are bound to be some errors.

42. In addition to correcting errors in the dataset that I personally found, I also corrected the errors pointed out by Dr. Kenneth Mayer in his rebuttal to my initial expert report. In this declaration, I will refer to statistical analyses performed with the corrected data any time the corrections altered my original conclusions.

43. I followed Dr. Kenneth Mayer's coding scheme when constructing a variable for candidate type (e.g., incumbent).

44. I subdivided the data by chamber and election type and presented results for House primaries, Senate primaries, House general elections, and Senate general elections.

45. To focus on the effect of the matching provisions on candidate behavior, I restricted the sample as follows:

i) I eliminated independents and third-party candidates from my analysis.

ii) I eliminated candidates involved in races for which the number of candidates is equal to or less than the number of winners. This restriction is made by election (i.e., primary or general), so it is possible for a candidate to be excluded from the primary election analysis yet appear in the general election analysis, or vice versa.

iii) I eliminated publicly funded candidates. They do not trigger matching funds or raise money, and they are constrained in their expenditure decisions.

iv) I eliminated candidates who spent less than $1,000 or raised less than $1,000 in the primary and general election combined (all financial figures are in 2006 dollars).

v) I eliminated candidates whose records indicated negative income or a credit in the expenses category in any of the subperiods (typically two weeks in duration) in the data.

46. As restricted, that left me with 117 observations for House primary elections, 46 observations for Senate primary elections, 109 for House general elections, and 59 observations for Senate general elections.

Statistical Analysis

My Methodologies Are Generally Accepted in the Political Science Community

47. My statistical techniques are appropriate and sound. In order to examine whether Type 2 and Type 1 candidates behave in systematically different ways, performed three types of statistical analysis: difference of means tests; OLS regression; and tobit. These methods, described in further detail below, are generally accepted research methodologies in political science and appear in practically every overview textbook in econometrics. OLS regressions routinely appear in leading peer-reviewed journals in political science, and tobits and difference of means test also appear in these journals, though with less frequency, because OLS remains the "workhorse" technique for analyzing continuous dependent variables.

48. In each of my three types of statistical analysis, I used both the amounts of spending and income, in 2006 dollars, as well as the logarithms of these amounts. I converted dollars to logarithms because there were large differences between the smallest and largest values in the dataset. The use of logarithms to eliminate the influence of large values is very common in the campaign finance literature. For example, Ansolabehere, de Figueiredo, and Snyder (2003, 124) state that they convert campaign spending data into logs to "correct for the skew in . . . total [campaign] spending." They perform this conversion when working with both state-level and federal-level data.

49. Statistical significance refers to how confident the researcher is that any differences found in the data are not due to chance. In probing the differences between Type 2 and Type 1 candidates, I use a .10 level of statistical significance in one-tailed tests. In many cases, my results are statistically significant at a stricter threshold, such as .05. The .10 level of statistical significance is commonly used in peer-reviewed publications. For instance, I used one-tailed tests with a .10 significance level in my peer-reviewed article "Who Consents? Competing Pivots in Federal Judicial Selection." *See* Primo, David M., Sarah A. Binder, and Forrest Maltzman. 2008. "Who Consents? Competing Pivots in Federal Judicial Selection." *American Journal of Political Science* 52(3):471-489. This article appeared in *American Journal of Political Science*, a leading peer-reviewed political science journal.

50. In the same issue of that journal in which my article appeared, at least sixty percent of the remaining empirical articles utilized a .10 standard (with two-tailed tests where appropriate). One of these articles that utilized the .10 standard was given the award for best paper in the *American Journal of Political Science* in 2008.

Difference of Means

51. A difference of means test examines whether two groups differ on some variable in ways that are

not due to chance. A difference of means test is a useful "first cut" at the data.

52. In my reports, I utilized difference of means tests to compare the spending and income of Type 2 and Type 1 candidates.

OLS Regression

53. The next step in the analysis is to ask whether other factors may be driving the differences between Type 2 and Type 1 candidates. An OLS regression enables the researcher to isolate the effect of a single independent variable on the variable under study after the effects of other variables have been accounted for. Details on OLS can be found in Appendix A of my Expert Report.

54. In my reports, I utilized regression analysis to account for three important aspects of campaigns: the experience of the candidate, the campaign environment in the election year, and the party of the candidate. In analyses performed for the rebuttal report, several other variables were also used, including the competitiveness of the race.

55. Adding these variables to the analysis allowed me to isolate the effect of matching funds on Type 2 candidates.

Tobit

56. Finally, I used another technique, known as tobit, to account for the fact that campaign spending and income data is *censored*. Specifically, candidates sometimes raise no money or spend no money in particular periods. This censoring violates the assumption in OLS regression that the error term (E) and independent variables (the x's) are uncorrelated. Tobit regression accounts for these problems. The results from the tobit analysis were largely consistent with the OLS findings. Details on tobit can be found in Appendix A of my Expert Report.

Findings and Conclusions

57. Unless otherwise specified, the results in what follows are based on OLS regressions using the log of spending or income as the dependent variable.

58. In primaries, privately funded candidates in House races where matching funds are awarded (Type 2 candidates) spent 385% more than other privately funded candidates (Type 1 candidates) in the final two weeks of the campaign. This is consistent with a strategy to spend money at the last minute to minimize the effectiveness of matching funds given to one's opponent as a result of such spending.

59. In general elections, Type 2 candidates in the House raised more than twice as much money as their Type 1 counterparts in the period following the

general election. This is consistent with a strategy of deferring income that could trigger a match until after the election (and, to the extent possible, funding last minute purchases on credit, which does not trigger a match in the general election) in order to reduce the amount of matching funds awarded to a publicly financed candidate. These results were weakened when several other variables were added to the OLS regressions. However, F-tests taking into account analyses performed for all periods implied that a more parsimonious specification (i.e., one with fewer control variables) was statistically superior in most cases.

60. Moreover, further analyses showed that in very competitive general election races, Type 2 candidates raised over three times more than Type 1 candidates in the period immediately following the general election. These additional analyses imply that matching funds provisions have a powerful effect precisely where they matter most: in very competitive races.

61. These findings imply that the matching funds provision of the Clean Elections law is leading candidates to alter campaign behavior in ways that harm free expression. Specifically, the law provides an incentive for candidates to time campaign expenditures and income so as to minimize the impact of matching funds in ways consistent with maximizing the likelihood of victory in the election.

62. My study shows that there are clear harms (i.e., costs) that result from the Clean Elections law. An examination of extant research shows that these harms are not offset by significant benefits.

63. Public financing, including Clean Elections, is argued by reformers to address at least three perceived problems in the democratic process: limited electoral competitiveness, low levels of trust in government, and excessive "special interest" influence. There is limited support for these claims in the political science literature.

64. Regarding competition, incumbent reelection rates (one measure of competitiveness) have changed little since public financing was implemented in 2000.

65. Regarding trust in government and excessive "special interest" influence, I am aware of no scientific evidence that perceptions of government have improved or any "special interest" influence has been reduced due to Clean Elections.

66. In short, there is minimal scientific evidence that public financing laws have positive effects on participatory democracy, but in my reports I demonstrated that the law imposes real costs on candidates.

Concluding Remarks

67. I remain confident in the conclusion, reached in the reports I prepared for this case, that

the matching provisions of Arizona's Clean Elections law distort political speech.

68. In my opinion, Type 2 candidates are altering their behavior as a result of the Clean Elections law in ways that infringe on their free speech rights. The effects are real and they are substantively meaningful.

69. Based on my statistical analysis of the data and the extant research on Clean Elections, I conclude that the matching provisions of Arizona's Clean Elections law have deleterious effects on free expression.

70. Based on my statistical analysis of the data and the extant research on Clean Elections, I conclude that there are few empirically demonstrated benefits to Clean Elections and significant costs to free expression.

I certify and declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief. May 26, 2009

/s/ David M. Primo
David M. Primo, Ph.D.

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

Chart of "Level the Playing Field" and/or "Limit Spending" References

"Level the Playing Field" and/or "Limit Spending" References	Source
"Public financing of campaigns is designed to encourage more people to seek office and to level the playing field for all candidates." "The changes in both Arizona and Maine indicate that public financing has leveled the financial playing field for candidates, making challengers more competitive."	The National Institute on Money in State Politics, *Study looks at public financing of legislative campaigns Shows Candidates Increased, Private Money Decreased in Arizona and Maine* (March 26, 2000); (CEI0000166-67); Ex. 67
"The promise of Proposition 200 is a level playing field which encourages diversity and competition in districts throughout the state. I am committed to making this promise a reality in the future."	Memo from AZ State Senator Chris Cummiskey to Sharlene Bozack of the Clean Elections Institute (April 07, 2000); (CEI0000176); Ex. 68
"What is being triggered is additional public funding to keep the playing field level between the two candidates."	Editorial response to suit against Clean Elections; (CEI0000415); Ex. 69

"Candidates must work hard to earn the right to use the Clean Elections system by gathering a threshold of $5 qualifying contributions from registered voters within their districts. They must refuse all money from political action committees and, with the exception of small initial seed-money contributions, they accept no private contributions. They must abide by spending limits adequate to run grass roots campaigns."	Clean Elections Institute Action Fund, *Frequently Asked Questions about Arizona's Clean Election System*; (CEI0000420); Ex. 70
"In order to qualify for monies from the Clean Elections Fund, a candidate must limit spending and forgo contributions from special interest groups."	Clean Elections Institute, *Talking Points* (October 2001); (CEI0000460); Ex. 71
"By thus leveling the playing field, we would eliminate the 'wealth primary' amply documented in this report by which a small group of wealthy individuals with vested financial interests decide with their contributions who will be allowed to become viable candidates for public office."	Jim Driscoll, *Who Paid to Elect Last Sessions Legislative Leaders* 33 (Arizona Citizen Action); (CEI0000986); Ex. 5

"Clean Elections reduce the influence of special interest money and provide a level playing field by offering qualified candidates a limited and equal amount of public funds."	Money & Politics Implementation Project, *Clean Elections, Year One in Action!*; (CEI0001242); Ex. 72
"Problem: Good people don't have a fair chance to compete. CMCR Solution: Provides a financially level playing field to compete." "Problem: Campaigns are too expensive CMCR Solution: Provides constitutionally acceptable spending limits" "Many candidates worry that if an opposing candidate opts out of the Clean Money system and runs on private money, he or she will have an advantage. Thus, CMCR enables qualified individuals to run for office on a financially level playing field regardless of their personal economic status or access to large contributors." "In order to maintain a financially level playing field, Clean Money candidates who are outspent by privately financed opponents, or targeted by independent expenditures, are entitled to a limited amount of matching funds."	Public Campaign, Clean Money Campaign Reform Article; (CEI0001370-1371); Ex. 73

"Two national organizations, the Club for Growth and Institute for Justice, are making the defeat of the Arizona Clean Elections law a priority and have established local chapters in Arizona. We believe that these groups are closely allied and are working with Senator Mitch McConnell (R-KY) as part of a national strategy to shut down the only reform solution that significantly benefits grassroots campaigns and goes the furthest to level the playing field against special interests."	Public Campaign, Clean Money, Clean Elections, *Defending Arizona*; (CEI0001526); Ex. 74
"So why would you think Arizona's entrenched special interests are expending every effort to limit and control the number of players in their political game? Why, to avoid at all costs fair contests in which common voters can hear all candidates – competing on a level playing field – before we vote!"	Bill Searle, *Big Money Out to Buy Elections*, Scottsdale Republic (March 26, 2004); (CEI0001538); Ex. 75

"This law levels the playing field."	Quotes From Participants In "Keep It Clean" News Conference, (March 16, 2004) (Ginger Fetzer, Co-President, League of Women Voters, Tucson); (CEI0001541); Ex. 76
"Candidates who choose to run Clean abide by spending limits to keep the cost of campaigns down."	Speech outline, *Why Clean Elections is Important*; (CEI0001561); Ex. 77
"The Citizens Clean Elections Act has a number of stated purposes: • Limit and equalize campaign spending"	*Law firm talking points*; (CEI0001569); Ex. 78
"If we want elections, not auctions, where candidates compete on a level playing field and all voters are equal, we have to overhaul the system."	*The Big Money Election* (May 27, 2004); (CEI0001611); Ex. 79
"Besides the aim of keeping candidates free of undue influence from moneyed interests, the promise of increased competition and a more level playing field for challengers is one of the main attractions of public financing proposals."	John Cochran, *Public Financing: Rebirth or Irrelevance,* CQ Weekly 806 (March 19, 2007); (CEI0001680); Ex. 80

"In fact, more and more candidates generally have been opting into the system each year – from 21 percent of eligible candidates the first year to 60 percent last year – which theoretically has helped level the playing field, at least when it comes to money." "Candidates must agree to spending limits in return for the help. Two states stand out among that group and are the focus of much debate and scholarship: Arizona and Maine. They were the first to provide full public funding for candidates for statewide and legislative offices."	
"Candidates for statewide office who are running 'Clean' would receive 30 percent more funding in the race for governor and 60 percent more for other state positions. It's hoped that those changes would level the field among candidates and ensure they have enough funding."	Matthew Benson, *Clean Elections Bill Unanimously Passes in House*, Arizona Republic (March 07, 2007); (CE10001696); Ex. 81

"Clean Elections, candidates who voluntarily agree to limit their spending and to reject campaign contributions from private sources can qualify for full public financing for their campaigns after raising a certain number of small contributions ($5 in Arizona and Maine, where the system is in place for statewide elections)."	Public Campaign, The Fannie Lou Hamer Project, and The William C. Vasquez Institute, *Color of Money: The 2004 Presidential Race*; (CEI0002623); Ex. 82
"We need to level the playing field so people with good ideas, but no access to money or connections, have the opportunity to run for office. They say a system that replaces private contributions with a strictly limited amount of public money won't solve all our problems, but it's a first step toward limiting campaign spending, reducing special interest influence and leveling the playing field."	Northeast Action, *Statewide Surveys – Arizona* (June 13, 1997); (CEI0002733); Ex. 83

"She was entitled to the extra funding under a provision of Arizona's Clean Election law, which aims to level the playing field among candidates." "She believes strongly that publicly funded elections can play a role in enabling more people of color to run for office and compete on a level playing field."	Northeast Action, *Civil Rights and Publicly Funded Elections* 5; (CEI0003068); Ex. 84
"Rep. Leah Landrum Taylor of Phoenix said Clean Elections opens up the playing field for women and minorities." "Seed money is used for campaign expenses and should be added together with the Clean Elections funding in calculating matching funds. This will result in a more level playing field." "The matching system is a critical element of the Clean Elections reform, which is all about leveling the playing field." "Let's do the right thing by keeping the matching system in place and the field as level as we can make it."	*Clean Elections Repair Kit* 4, 6, 7 (League of Women Voters of Arizona and the Clean Elections Institute); (CEI0003076, 3078, 3079); Ex. 85

"The rules should help to level the playing field by incorporating reforms that serve to improve the resources available to the challengers."	The Reform Institute, *Enhancing Values: Practical Campaign Reform for States*; (CEI0003101); Ex. 86
"However, if a publicly funded candidate is facing a non-publicly funded opponent whose spending exceeds the spending allowance established by the public funding rules, the law usually provides supplemental funds to the publicly funded candidate to help ensure a level financial playing field." "Moreover, it helps establish a level playing field so that a wealthy candidate or well-funded interest group can not drown out the voice of any opponents and diminish the information available to voters." "They should also incorporate a means of allowing publicly funded candidates to level the playing field when facing nonparticipating, frees pending opponents."	The Reform Institute, *Enhancing Values: Practical Campaign Reform for States* 6, 18-19; (CEI0003103, 3115-3116); Ex. 86 (cont.)

"It offers full public financing to candidates for state office who reject special-interest contributions and agree to campaign spending limits." "Thus, CMCR enables qualified individuals to run for office on a financially level playing field regardless of their personal economic status or access to large contributors."	Public Campaign, *Clean Money Campaign Reform* 2, 4; (CEI0003141, 3143); Ex. 87
"If there were spending limits, it is argued, there would be a more level playing field and therefore fairer competition."	Public Campaign, *Myths and Misconceptions About Reforming the Campaign Financing System* 15; (CEI0003160); Ex. 88
"While Congress and many state legislatures appear far from any consensus on a solution, there are signs that citizens and some bold public servants are taking the lead with Clean Money Campaign Reform. Since 1996, voters in three states – Maine, Arizona, and Massachusetts have passed Clean Money proposals. In June 1997, members of the Vermont legislature voted overwhelmingly to create such a system for their state.	Public Campaign, *A winning system for voters and elected officials* 1, 2; (CEI0003179, 3180); Ex. 89

Although each law is crafted to meet the unique needs of the particular state, all establish an alternate financing system that offers full public funding to candidates for state office who reject special-interest contributions and agree to campaign spending limits." "It is an alternate system that provides strong incentives to participate qualifying candidates receive a set amount of Clean Money from a publicly financed fund if they agree to reject private money and limit their spending."	
"Public financing makes candidates less dependent on large or special interest contributions, provides them with neutral sources of funding, gives them more time to discuss their issues with voters, increases opportunities for people of color, women and new candidates to enter politics and encourages candidates to limit their spending." "Public financing increases competition by leveling the fundraising playing field."	Center for Governmental Studies, "Investing in Democracy, Creating Public Financing Elections in Your Community" v, 9, 12, 16, 17; (CE10003188, 3198, 3201, 3205, 3206); Ex. 90

"Under an ideal trigger provision, a nonparticipating candidate who exceeds the spending limit 'triggers' the elimination or raising of spending limits and the provision of additional public funds to publicly-financed candidates in the same race, to help keep them on a level playing field." "Most public financing programs share the same general features: contribution limits, spending limits, qualification thresholds, high spending opponent trigger provisions, limits on a candidate's use of personal funds and debate requirements." "Although it is possible to create a system of public financing without linking it to spending limits, all jurisdictions with public financing systems for candidates also have spending limits."	
"Under the new Clean Election systems, candidates forego large private contributions and agree to strict spending limits with fixed and equal financing from a publicly financed election fund."	Marc Breslow, PH.D, Janet Groat, Paul Saba, *Revitalizing Democracy, Clean Election Reform Shows the Way Forward* 3, 11, 30

"Candidates who choose to run for office by participating in a Clean Election system are provided with a limited and equal amount of public funds in exchange for a pledge to abide by strict spending limits." "Clean Elections helped get me on the playing field. It didn't necessarily give me the win, but it put me on the playing field so at least I could participate against the Arizona Speaker of the House."	(Money and Politics Implementation Project); (CE10003246, 3253, 3272); Ex. 91
"Second, public grants can make elections more competitive. By reducing the fundraising advantages that, in particular, incumbents have over challengers, public funding systems can 'level the playing field' and reduce the number of landslide victories."	Kenneth R. Mayer, Timothy Werner, and Amanda Williams, *Do Public Programs Enhance Electoral Competition* 4 (March 2005); (CE10003322); Ex. 92
"Supporters of public funding also contend that it levels the playing field, giving candidates of modest means equal access to the money needed to mount a viable campaign."	Megan Moore, *Clean Elections Arizona 2004* 5 (The Institution, Money in State Politics, May 18, 2006); (CE10003353); Ex. 93

"When Arizonans passed the law in 1998, they took into consideration spending limits to reduce the high cost of running campaigns. Spending limits open the door for new candidates to participate who otherwise could not have afforded the high cost of opposing an incumbent who traditionally has access to large amounts of money."	Clean Elections Institute, *The Road to Victory, Clean Elections Shapes 2002 Arizona Elections* (December, 2002); (CEI0003573); Ex. 94
"The Clean Elections funding system is founded on the premise that publicly funded campaigns encourage election competition and voter choice, level the financial playing field, and return political accountability to the voters." "Second, in order to qualify for monies from the Clean Elections Fund, a candidate must limit spending and forgo contributions from special interest groups."	Clean Elections Institute, *Impact of Clean Elections on Arizona's 2000 Election* 4, 8 (April 23, 2001); (CEI0003585, 3589); Ex. 95
"A level playing field where working people can compete with other candidates."	Arizonans for Clean Elections, *Why Labor Needs Clean Elections Reform*; (CEI0003660); Ex. 96

"The primary purpose is to judge each reform on its merits – particularly regarding its likely, or demonstrated, ability to advance the core democratic principles of political equality (by creating a level playing field for candidates and voters who do not have access to big money)." "Candidates who qualify for the same office would receive the same amount of campaign money, thus creating a financially level playing field and allowing all candidates an equal opportunity to reach the voters."	Center for Responsive Politics, *Reform Principles and Problems: Part V – Proposals for Reforming Campaign Finance* 11, 17 (1996); (CEI0003661, 3667); Ex. 97
"Voters' Major Concerns: Good people don't have a fair chance to compete" "Clean Money Campaign Reform: Provides a financially level playing field" "By providing limited but equal funding for qualified candidates, CMCR enables qualified individuals to run for office on a financially level playing field regardless of their economic status or access to large contributors."	Public Campaign, *Clean Money Campaign Reform*; (CEI0003671-72); Ex. 98

"GIVE AVERAGE CITIZENS MORE REPRESENTATION! REDUCE AND LIMIT CAMPAIGN SPENDING! STOP THE ENDLESS MONEY CHASE! STOP SPECIAL INTEREST MONEY! LEVEL THE PLAYING FIELD!"	*Clean Money = Clean Elections*; (CEI0003674); Ex. 99
"PROP 200 will create a new way for candidates to run for office. Qualifying candidates who refuse all special interest contributions and who agree to strict spending limits, receive a fixed amount of money for their race from a public Clean Elections fund." "Some of PROP 200's provisions that address key voter concerns are: Cutting the direct link between candidates and big money special interest contributors, Strict spending limits."	*So why does Arizona need prop 200*; (CEI0003675); Ex. 100
"Clean Elections in Arizona bring fairness, accountability, and a level playing field to politics."	Arizona AFL-CIO, *Arguments Against Proposition 106* (July 09, 2004); (CEI0003677); Ex. 101

"To maintain a financially level playing field, CMCR also tightens the definition of 'issue' campaigns, and it bans 'soft' money." "It would create a more level playing field for incumbents and challengers, create genuine opportunities for qualified [residents of state, Americans] to run for [statewide or legislative, federal] office, and encourage more competitive elections." "Since non-participating candidates would not be eligible to receive free and discount broadcast time, this would keep the financial playing field level." "An alternative way of leveling the playing field with respect to mass mailings is to provide all Participating Candidates (challengers and incumbents alike) a limited number of free mass mailings, in addition to their Clean Money funding."	Public Campaign, *Clean Money Campaign Reform: A Model Bill* 8, 16, 41, 54 (December 1997); (CEI0003690, 3696, 3721, 3734); Ex. 102
"Spending Limits And Leveling the Playing Field Are The Proposal's Most Popular Provisions."	The Mellman Group, *Memo to Public Campaign: Summary of Research Findings in*

"The proponents' arguments focused on limiting special interest influence, ending special favors and tax breaks, limiting spending, leveling the playing field and acknowledging that this was a first step."	*Arizona* 3, 5 (June 18, 1997); (CEI0003785, 3787); Ex. 103
"I think it makes more sense to regard the primary and general as separate elections and to make sure their [sic] is a financially level playing field among competing candidates in each election." "If, on this basis, candidates in one district receive more or less money than candidates in another district, the playing field in each district would still be level, and that's what counts."	Email from Randy Kehler to: Myrna Baron; Lola Boan; Jim Driscoll; Ann Eschinger; Jon Fiegen; Linda Fries; Louis Hoffman; John De Lasauc Carol Mattoon; Gini McGirr; Marge Mead; Marjorie Mead; Louis Rhodes; Lila Schwartz; Lila Schwartz; Josh Silver; Marilou Stanley; Craig B. Holman; Randy Kehler; Nick Nyhart Subject: election commission powers (November 24, 1997); (CEI0003823); Ex. 104
"To allow candidates (who can afford it) to contribute $1-5,000 to their own campaigns may not make much difference in terms of the outcome of the race as long as the money is seed money,	Email from Randy Kehler to: Mark Osterloh; Subject: Other comments on AZ initiative (June 20, 1997); (CEI0003842); Ex. 105

but it undermines the basic premise of a Clean Elections system – namely, that there should be a financially level playing field for all qualified candidates."	
"This initiative would create a new approach to AZ political campaigns by shortening the length of campaign periods, limiting campaign spending, prohibiting special-interest and private contributions to participating candidates, and providing a financially level playing field." "It Blocks Special Interest Money, Creates A Level Playing Field On Which Good Candidates Can Run Competitively, And Ends The Perpetual Chase After Campaign Contributions."	Draft language for 100 word description in Arizona Secretary of State's ballot measure handbook (Arizonans for Clean Elections (CEI0003893-3895); Ex. 106
"It would create a more level playing field for incumbents and challengers, create genuine opportunities for qualified residents of state, Americans] to run for [statewide or legislative, federal] office, and encourage more competitive elections."	Email from Randy Kehler to: Mark Osterloh; Subject: New findings and declaration language (August 3, 1997); (CEI0003904); Ex. 107

"Clean Elections provides an alternative source of 'clean' funding for elections. Candidates who refuse all private donations and agree to strict spending limits may qualify for a fixed and limited amount of funding from a public source." "It limits campaign spending, removes the influence of big money from politics, levels the playing field for candidates and voters, and controls the soft money loophole." "Coalitions in six states are working to put Clean Elections on the ballot in November, 1998. It limits campaign spending, removes the influence of big money from politics, levels the playing field for candidates and voters, and controls the soft money loophole."	Arizonans for Clean Elections, Invitation to cocktail party hosted by John and Jenice Benton; (CEI0004102) ; Ex. 108
"Candidates who voluntarily refuse all private donations and agree to strict spending limits may qualify for a fixed and limited amount of money from a citizen-funded source."	Arizonans for Clean Elections; (CEI0004106); Ex. 109

"To qualify, participating candidates would: Prove they have public support by obtaining a set number of $5 contributions from constituents; Agree to campaign spending limits; and Agree not to accept private campaign contributions. In return for agreeing to run a Clean Money Campaign, the candidate will receive from the clean elections fund a set amount of money to run his/her campaign."	Arizonans for Clean Elections, *Summary of the Arizona Clean Elections Initiative*; (CEI0004139); Ex. 110
"By limiting campaign spending and increasing disclosure requirements, it will level the playing field so that the voices of Arizona's working families and seniors on fixed incomes are heard just as loudly as the big money donors who are corrupting our system."	Letter from John Eichenaurer supporting clean elections; (CEI0004255); Ex. 111
"You can end the money chase, halt corruption, limit campaign spending and reduce special interest influence by supporting 'Clean Elections.' The League of Women Voters of Arizona urges you to vote yes on the 'Clean Elections Act.'"	Dr. Lila J. Schwartz, President, League of Women Voters (League of Women Voters); (CEI0004254); Ex. 112

"The Citizens' Clean Elections Act is the right step to clean up Arizona politics. It frees the politicians from the money chase, ends the relentless pursuit from big money, and allows more Arizonans the opportunity to serve in public office. Simply stated, it levels the playing field and stops corruption."	Letter from John Benton supporting clean elections (July 8, 1998); (CEI0004259); Ex. 113
"A totally open primary system win give women a more level playing field." "Simply stated, it levels the playing field and stops corruption." "By limiting campaign spending and increasing disclosure requirements, it will level the playing field so that the voices of Arizona's working families and seniors on fixed incomes are heard just as loudly as the big money donors who are corrupting our system."	AZ Secretary of State, 1998 Ballot Propositions 55, 87, 89; (CEI0004636, 4668, 4670); Ex. 114
"Clean Money, Clean Elections Limit campaign spending • Clean Election candidates must agree to fixed spending limits. Remove the influence of big money from politics • Clean Election candidates may	Campaign Brochure, *On clean elections day, this shouldn't count more than your vote* (Arizonans for Clean Elections); (CEI0004870); Ex. 115

only raise a limited amount of private money. Level the playing field for voters and candidates • All Clean Election candidates who agree to spending limits and demonstrate a broad base of support receive a fixed and equal amount of citizen funds for the primary and general elections."	
"The proponents' arguments focused on limiting special interest influence, ending special favors and tax breaks, limiting spending, leveling the playing field and acknowledging that this is a first step."	Memo from Mellman Group to Public Campaign, *Findings from state surveys in Missouri, Idaho, Massachusetts and Arizona* 3 (June 18, 1997); (CEI0005024) Ex. 116
"Clean elections will level the playing field."	Kris Mayes, *Public funding for elections?*, The Arizona Republic (June 25, 1997) (Quoting Marilou Stanley, State Director of United We Stand Arizona); (CEI0005031); Ex. 117
"Under CMCR, candidates who voluntarily reject private money and limit their spending receive a fixed and equal amount of campaign funding from a publicly financed fund."	Public Campaign, *A Reform That Makes All Other Reforms Possible* 2, 3; (CEI0005033, 5034); Ex. 118

"Clean Money Campaign Reform directly addresses each of these concerns by limiting campaign spending, eliminating special interest contributions, stopping the money chase, leveling the financial playing field, and closing loopholes."	
"The system would operate in a well-defined framework: candidates must prove broad popular support before they receive public funds; they must abide by spending limits; and they must agree to reject all sources of private money." "More important, be a 'Clean Money' spokesperson for true reform that will limit campaign spending, open the process to more good candidates, and cut special-interest ties." "It will cut the cost and reduce the length of campaigns, level the playing field so that all qualified candidates can run, and cut the direct ties between candidates and wealthy special interests."	Public Campaign, *20 Things You Can Do To Clean Up Elections* Forward, 11, 14, 27; (CEI0005038, 5047, 5050, 5063); Ex. 119

"We must curb special interest influence in policy-making, limit spending on campaigns, and free lawmakers from the money chase so they can do their jobs."	
"The CCEA allows qualified candidates who agree to spending limits and to raise little or no private money to receive a limited amount of public money." "In order to qualify for monies from the Clean Elections Fund, a candidate must limit spending and forgo contributions from special interest groups."	*Clean Elections Media Tool Kit* 1, 2; (CE10005153, 5154); Ex. 120
"Clean Money levels the playing field and reduces the influence of special interest money."	*Clean Money Basics* (CE10005158); Ex. 121
"Let's go back to basics: reform must get rid of special interest money; make elections more competitive; level the playing field; return to the principle of one person, one vote; and give average people a fair shot to run and win elective office."	*Difficult questions about clean elections*; (CE10005253); Ex. 122

"The goal of comprehensive campaign finance reform should be to create a system that reduces the influence of special interests and their money and creates a level playing field so all good, qualified candidates can run for office." "No more special interest influence. A level playing field so that senior citizen policy will no longer be dictated by organized corporate interests' campaign contributions."	*Why America's seniors should care about money in politics*; (CEI0005260); Ex. 123
"Comprehensive campaign finance reform should aim to provide a system that reduces special interests' influence and creates a level playing field so all good, qualified candidates can run for office." "A level playing field so that labor policy will no longer be dictated by corporate campaign contributions."	*Why working people should care about money in politics*; (CEI0005263); Ex. 124

"Comprehensive campaign finance reform should aim to provide a system that reduces special interests' influence and creates a level playing field so all good, qualified candidates can run for office." "In return, voters will get an end to special interest influence and a level playing field so that environmental policy will no longer be dictated by corporate campaign contributions."	*Why environmentalists should care about money in politics*; (CE10005266); Ex. 125
"PETITION LANGUAGE This Citizens Clean Elections Act targets the corrupt system of special-interest campaign funding and enables qualified candidates to run for state office. The Act will limit campaign spending, equalize candidate funding, tighten campaign-law enforcement and ban special-interest contributions to participating candidates." "BALLOT LANGUAGE setting personal monies and spending limits for participating candidates; limiting private contributions for participating candidates unless commission declares emergency."	(CE10005376); Ex. 126

"A 'yes' vote shall have the effect of establishing a 5-member commission to administer an additional alternative campaign financing system which includes spending limits and public funding for participating candidates;"	
"This kind of level playing field is not possible under the current system." "One of the goals of Clean Money Campaign Reform is to open up the system to as many people as possible and to establish a financially level playing field."	Public Campaign, *Just the FAQs: Frequently Asked Questions About Clean Money Campaign Reform* 5, 6; (CE10005402, 5403); Ex. 127
"Concerned citizens are working to put on the ballot a 'Clean Elections' initiative that restores the principles of democracy to our political system. It limits campaign spending, reduces the influence of big money special interests, and levels the playing field for candidates and voters." "Voters Concerns: Campaigns are too expensive" "Clean Money Reform: Limits campaign spending"	Clean Elections Campaign Finance Reform, *A closer look at the Arizona initiative*; (CE10005410, 5412); Ex. 128

"Voters Concerns: People without access to big money can't compete" "Clean Money Reform: Eliminates need for fundraising Provides a financially level playing field and allows more candidates to run Shortens length of campaign period."	
"The existing clean elections system encourages participation by providing participating candidates with stability and some semblance of an even playing field."	Letter from Arizona Advocacy Network to Commissioner Gene Lemon of the Citizens Clean Election Commission (June 20, 2003); (CEI0005414); Ex. 129
"The Commission's goal is not, and has never been, to eliminate private money from Arizona politics. Rather, the Act itself serves to level the playing field for individuals who lack the private resources or contacts, but whose ideas, convictions and passion for public service lead them to seek statewide or legislative office."	Letter from L. Gene Lemon to Arizona Republic Editorial Board (February 11, 2004); (CEI0005528); Ex. 130
"In exchange for public funding, Clean Elections candidates agree to reject traditional private campaign contributions, and to abide by strict spending limits."	*What is Clean Elections*; (CEI0005666); Ex. 131

"In addition to removing the corrupting influence of special interest money from campaigns, advocates say that clean elections levels the electoral playing field by removing nearly insurmountable financial barriers faced by people without personal wealth or access to traditional sources of campaign money." "Now, the clean-elections approach, with its emphasis on public funding, shifts the playing field fundamentally toward equality."	Peter Ross Range, *Running Clean*; (CEI0005684); Ex. 132
"Additionally, as special interest influence is removed, elections are made more competitive, thereby allowing citizens commonly ignored in money-dominated races to be heard because the playing field is leveled."	Melissa Roberts, *Students Fight for Clean Elections*, Arizona State Press (February 17, 2003); (CEI0005701); Ex. 133
"Clean Elections levels political playing field"	Millicent Gray Parks, Letter to the Editor, Scottsdale Tribune (July 22, 2003); (CEI0005706); Ex. 134
"This system allows ordinary citizens to run for the Legislature and statewide office. It reduces the influence of	*Arizona's Groundbreaking Clean Elections System is in Danger*; (CEI0005802); Ex. 135

big money special interests on state government. And it acts to hold down overall campaign spending."	
"Candidates who wish to take part in the system must raise a set number of these $5 contributions from Arizona residents. They then qualify to receive a public grant to run their campaigns. Once they accept this grant, they must abide by strict spending limits and can no longer raise any private money for their campaign."	Public Campaign, *All Over the Map* 1 (CEI0005888); Ex. 136
"Candidates who participate in Clean Elections must demonstrate broad public support in their districts or across the state by raising a large number of very small ($5) contributions along with gathering the required petition signatures. In 2006, the number of $5 contributions required for a legislative candidate was 210. In addition, candidates must agree to adhere to spending limits and raise very limited private money."	Clean Elections Institute, *About Clean Elections in Arizona*; (CEI0006015); Ex. 137

"Most importantly, however, will be the personalized press relationships that were developed in the campaign and will be continued by CEI. These personal relationships insure that stories that include clean elections will have balanced coverage and that CEI will always be able to comment on issues of concern, thus providing a broader view to the public and maintaining a level playing field in the battles ahead."	*The Battle for Clean Elections Continues*; (CEI0006053); Ex. 138
"Rep. Manuel Alvarez (D-Elfrida) says Clean Elections made it possible for him to run from his rural district in southeast Arizona without relying on lobbyists based at the State Capitol in Phoenix: 'Clean Elections gives me an opportunity to run on an even playing field . . . '"	Participating candidate quotes about Clean Elections; (CEI0006063); Ex. 139
"Supporters of continuing the Clean Elections Act cite an honest electoral process, leveling the playing field, greater accountability and control, and a need to police the electoral process as the main reasons for supporting the Act."	Memo from Mike Becker to Clean Elections Commission, Subject: Behavior Research Center, Inc., Survey 10 (March 2, 2006); (CEI0006085); Ex. 140

"Clean Elections levels the playing field by encouraging small ($5) in-district donations that most citizens can afford. Clean Elections does not aim to rid the political system of money – that's impossible. What Clean Elections does is level the playing field, so that any qualified person – not just those with access to big money – can run a competitive campaign for office."	*Myth vs. Fact* 5 (March 3, 2005); (CEI0006321); Ex. 141
"Qualifying Candidates qualify by collecting a large number of $5-qualifying contributions from registered voters within their districts or across the state for statewide candidates. These candidates agree to adhere to spending limits and do not raise any private money."	Clean Elections Institute, *Working Arizonans Win With Clean Elections*; (CEI0006472); Ex. 142
"The most important difference is that in a Clean Money system, a candidate like Dean wouldn't have to keep raising money to stay abreast of a privately-financed system-buster like Bush; he'd be getting infusions of additional matching funds (of up to two or three	Memo to Clean Elections supporters from Public Campaign, Re: Howard Dean, George Soros and the future of public financing (December 19, 2003); (CEI0006531); Ex. 143

times his baseline grant) to keep a relatively level playing field."	
"How The Clean Election Laws Work: Candidates in both Maine and Arizona can opt into the public financing system by agreeing to take no private money other than the minimal amounts they must, under the law, raise to qualify for public funds and a minimal amount of seed money they may raise in addition. They also must agree to spending limits, while in both states, non-participating candidates face limits on contributions they may accept."	*Draft Outlines for Maine/Arizona Release*; (CEI 0006553); Ex. 144
"Clean Elections Candidates Reject special interest money, Agree to campaign spending limits, Contribute very limited personal money."	Clean Elections Institute, *2006 Campaign Training*; (CEI0006675); Ex. 145
"Clean Money, Clean Elections would level the playing field for all candidates and ensure fair elections." "In 2001 Sen. Wellstone introduced legislation that was considered the Gold Standard of campaign	"Campaign Finance Reform, 2004 Wellstone Academy Arizona, Presented by: Clean Elections Institute" 3, 5; (CEI0006844, 6846); Ex. 146

finance reform Would provide candidates public funding if they agree to: forgo private contributions agree to strict spending limit."	
"Provides spending limits and restrictions"	Clean Elections Institute, *2002 Election Second Level Training for Candidates and Mangers: Talking Points*; (CEI0006867), Ex. 147
"Arizona voters passed the Citizens Clean Elections Act by initiative in November 1998. The law was enacted to diminish the influence of big money special interests and encourage citizen participation in the political process by both voters and candidates. The Act created a system of voluntary full public financing for state offices where candidates must agree to spending limits, accept very limited private and personal donations and are prohibited from taking political action committee or corporate funds."	Clean Elections Institute, *Arizona Clean Elections Law, an Overview*; (CEI0006948, 6949); Ex. 148

"Clean Elections candidates must agree to Spending limits Limited personal and private donations Accept no corporate or political action committee (PAC) money."	
"Not too long ago, the citizens of Arizona realized a critical need to address how statewide and legislative elections are conducted. Recognizing a desire to remove special interest money from Arizona politics and to level the playing field in campaign financing, Arizona voters approved the ballot initiative establishing the Citizens Clean Elections Commission, in 1998."	Todd Lang, *Big Money Contributions in Political Races Will Open Floodgates in 2006 Race* (April 17, 2006); (CE10007107); Ex. 149
"The editorial misses the point of 'clean' or publicly financed elections, which allow candidates to run for office without being beholden to lobbyists and wealthy campaign donors. This is a practical, proven reform that levels the playing field so that qualified people, many of whom otherwise would not have run, can launch a competitive campaign."	Nick Nyhart, Executive Director, Public Campaign, *Letter to the Editor*; Los Angeles Times (CE10007440); Ex. 150

"As we become aware that certain major lobbyists give candidates, in addition to the perks, the bulk of their campaign contributions, it is clear why we need the Clean Elections law so that average citizens can influence legislators on a level playing field with the lobbyists!"	Marjorie Thornton, *Keep your eyes on those lobbyists* Arizona Republic (June 27, 2006); (CE10007508); Ex. 151
"Participating candidates are only limited to their set allocation if their opponents, or some independent expenditure committee, don't spend more than that amount. If they're outspent, participating candidates get extra equalizing funds (up to a maximum limit) to level the playing field."	Eric Ehst, *Clean Elections levels the playing field!*, Opinion Editorial; (CE10007782); Ex. 152
"Two privately funded state legislators will attempt to level the playing field by changing laws they say put traditional candidates at a financial and strategic disadvantage."	Christian Palmer, Luige del Puerto, Jim Small, and Phil Riske, *Top Ten Issues to Watch in 2007*, Arizona Capital Times; (CE10007797); Ex. 153
"'Under the Davis opinion, I think the matching-funds provision is very, very suspect,' said Gordon. 'And the whole point of the matching funds is to level the playing field.'"	*Matching Funds Called Into Question*, Arizona Capital Times (August 1, 2006) (Quote from Andy Gordon); (CE10007858); Ex. 154

"Regardless of the outcome of Prop 105, forces in the Legislature are gearing up to place significant restrictions on the initiative process that will make it much harder for grassroots groups to qualify measures for the ballot, tilting the playing field even further in favor of well-financed special interests."	Clean Elections Institute, *Clean Elections Institute Launches "Choose Democracy Project"* (October 9, 2008); (CE10007918); Ex. 155
"Matching funds are available to allow participating candidates to keep their campaign funds equal to their non-participating opponent."	*Clean Elections Press Kit, Revised, May 2003*; (CE10007955); Ex. 156
"Candidates who demonstrate a serious level of community support by collecting a set number of $5 contributions from voters in their district, can qualify for Clean Elections funding provided they agree to abide by spending limits and not raise any private money."	Clean Elections Institute Press Release *Clean Elections System Produces More Electoral Competition* (September 11, 2000); (CE10007980); Ex. 157
"2. Arizona's Clean Elections system levels the financial playing field."	*Clean Elections Institute Annual Report* (CE10008148); Ex. 158

"When a non-Participating candidate attempts to outspend their Clean Elections opponent, the Clean Elections candidate can receive matching funds, leveling the playing field."	
"Now we now [sic] we cant make these big interests go away and disappear. They will be powerful in any political system but we can change the rules so the fight is more fair and the playing field is more level."	AZ AN Forum Comments; Nick Nyhart; Executive Director of Public Campaign (June 1, 2006); (CEI0008169); Ex. 159
"Clean Elections also puts voters on a level playing field, with teachers having the same power as a corporate CEO." "If a candidate is outspent by a privately financed opponent, rescue funds are available to keep the race on a level playing field."	Public Campaign, *Leveling the Playing Field*; (CEI0008199, 8200); Ex. 160
"Like matching programs, these are voluntary and available to qualified candidates who show a broad base of support and agree to certain fundraising and spending caps (Lerner, 2007). Clean money	NALEO Educational Fund Report, *How Much Help? Public Campaign Financing and Latino Candidates* 18, 51 (April 2008); (CEI0008523, 8551); Ex. 161

initiatives aim to eliminate any conflict of interest that might arise from accepting large private contributions. They thereby seek to improve voters faith in the political process, boost voter turnout, and most significantly improve competition by leveling the playing field for political newcomers and those unable to contribute personal wealth to their own campaign." "Candidates can qualify for the program if they face competition in an election, meet a threshold amount in contributions, and agree to set spending limits."	
"I believe that while not perfect, Clean Elections helps level the playing field for those interested in seeking public office."	Gary Cox, House Candidate District 12, *Clean Elections Alumni Quotes*, Glendale Star (August 8, 2002); (CEI0008667); Ex. 162
"Given the option of a clean alternative that frees them from constantly dialing for dollars, and puts them on a level-playing field with their opponents, hundreds of	Public Campaign, *Donor-Free Clean Elections Taking Hold* (May 14, 2002); (CEI0013483); Ex. 163

candidates in Arizona, Maine and Massachusetts from across the political spectrum are showing that there's a better way."	
"Clean Elections has leveled the playing field among candidates."	Cecilia Martinez, Executive Director of CEI (October 17, 2002); (CEI0013496); Ex. 164
"The Clean Elections Act, passed by Arizona voters in 1998, provides public funds to candidates who agree to forgo the use of special interest money in their campaigns in addition to adhering to stricter spending limits."	Information on Clean Elections forum hosted by Native American Community Organizing Project; (CEI0013621); Ex. 165
"The Clean Elections law promotes competition, eliminates special interest money, and levels the playing field."	*2004 Election in the Foreground*; (CEI0013723); Ex. 166
"During the next election cycle of 2002 more people are expected to choose this alternative campaign financing method that seeks to level the playing field for candidates and remove special interest monies from our electoral process."	Letter from Sharlene Bozack & Barbara Lubin (March 23, 2001); (CEI0013769); Ex. 167

"e. Candidates who choose to run Clean agree to spending limits, cannot accept PAC or corporate money, and can only put in a limited amount of personal money."	Clean Elections Institute, *Talking Points for Group Presentations*; (CEI0013770); Ex. 168
"Qualifying Candidates qualify for public funding by collecting a large number of $5-qualifying contributions from registered voters within their districts or across s the state for statewide candidates. These candidates agree to spending limits and do not raise any PAC money. They may raise a limited amount of seed money from private donors in $110 contributions or less."	Clean Elections Institute, *About Clean Elections in Arizona*; (CEI0014357); Ex. 169
"The whole intent of the Citizens Clean Elections Act was to level the playing field between candidates. A.R.S. § 16-940(A)." "The informational pamphlet distributed by proponents of the initiative reflects a desire to level the playing field for candidates and voters."	Letter from Timothy Hogan to Jeffrey P. Larson, Arizona Auditor General's Office; (CEI0014348, 14349); Ex. 170

"As one of those who originally drafted the Clean Elections initiative, which the voters approved, I realized that to level the playing field Clean Elections would have to provide matching funds to those candidates who did not have access to 'big money' doled out by major interest groups."	Editorial by Lila J. Schwarta, *Matching funds level playing field* (December 7, 2004); (CEI0014559); Ex. 171
"Matching funds limit spending. A traditional candidate may think twice about raising additional funds in a race against a Clean Elections candidate."	*Justifications for Clean Elections Matching Funds;* (CEI0015007); Ex. 172
"Citizens Clean Elections website says the law, 'encourages broad-reaching citizen participation in the political process and eliminating special-interest monies in campaigns, the Act levels the playing field for qualified candidates by providing limited and equal funding, and enables registered voters to support their preferred candidates through affordable contributions and grass-roots support."	Sylvia Allen, Snowflake Pioneer (March 16, 2005); (CEI0015073); Ex. 173

"Ableser said Clean Elections motivated him during his 2004 campaign for a seat in the House. 'The fact that we were all on the same playing field was very important . . . and something I'm very committed to', Ableser said."	*ASU Club Hosts Clean Elections Summit*, Arizona State Press (April 11, 2005); (CEI0015092); Ex. 174
"The campaign finance reform measure created public funding for qualified candidates. Its meant to encourage broad citizen participation in the political process, eliminate special interest money in campaigns and level the playing field for candidates." "Autumn Southard, voter education manager at the Clean Elections Commission, said campaign finance reform is a difficult subject for voters to understand. The ad push is meant to drive voters to the Clean Elections Web site to learn more about the process. 'We wanted to let people know that there was an easy way to get involved, as easy as putting a bumper sticker on your car,' she said. 'You can get involved for as little as $5 and help to level the political playing field.'"	Laura Newpoff, *Clean Elections Kicks Off Campaign To Educate Voters*, The Business Journal (September 16, 2005); (CEI0015111); Ex. 175

"On the other hand, Arizona more than five years ago enacted into law what is known as the Clean Money Act. It allows candidates to obtain full public funding to conduct their campaigns if they agree to spending limits. The candidates become eligible to get on the ballot and qualify for public financing by raising a minimum number of $5 contributions from citizens."	Dave Zweifel, *Arizona Shows Way on Finance Reform*, Arizona Capital Times (April 6, 2005); (CEI0015113); Ex. 176
"The Institute considers it critical that the Commission promptly and vigorously enforce campaign spending provisions of the Act and impose meaningful penalties on violators. We believe this is crucial to the credibility of the entire system."	Clean Elections Institute (CEI0015274); Ex. 177
"Most importantly, however, will be the personalized press relationships that were developed in the campaign and will be continued by CEI. These personal relationships insure that stories that include clean elections will have balanced coverage	*The Battle for Arizona Clean Elections Continues*; (CEI0015668); Ex. 178

and that CEI will always be able to comment on issues of concern, thus providing a broader view to the public and maintaining a level playing field in the battles ahead."	
"Known as the Citizens Clean Elections Act, the new law aimed to diminish the influence of private money in political campaigns and level the electoral playing field through voluntary public financing of political campaigns as an alternative to traditional fundraising means."	Daniel M. Weeks, *Effects of Full Public Financing on Electoral Competition: A Comprehensive Assessment of Arizona's Clean Elections Law* (April 26, 2004); (CEI0016102); Ex. 179
"Barbara Lubin, executive director of the Clean Elections Institute, a private nonprofit group established to promote and defend Arizona's public election financing system, said the law protects candidates who accept spending limits."	David Pittman, *Refusing Public Money Perhaps Sank Salmon,* Tucson Citizen (July 30, 2003); (CEI0016305); Ex. 180
"The Citizens Clean Elections Act was passed by the people of Arizona in 1998 to level the playing field when it comes to running for office."	Citizens Clean Elections Commission, *Get Involved* (CCEC website page printed September 16, 2008); Ex. 181

"Help Clean Elections level the playing field. In 1998 the citizens of Arizona voted to create a funding system to help level the playing field for people running for office."	Citizens Clean Elections Commission, *Check the Box!* (CCEC website page printed September 16, 2008); Ex. 182
"For the average citizen, clean elections means a voice in the political process. For candidates, it levels the playing field."	Video created by the Citizens Clean Election Commission (January 27, 2008), available at http://www.youtube.com/watch?v=vwsq612L6CY&feature=channel_page (last accessed June 11, 2009) Ex. 183

U.S. District Court for the District of Arizona

(Filed Jun. 12, 2009)

[Title Omitted In Printing]

Pursuant to Local Rule 56.1(a), Defendants Ken Bennett, et al., and Defendant-Intervenor Clean Elections Institute, Inc. ("CEI") submit the following Joint Statement of Undisputed Facts as to which there is no genuine issue for trial.

	FACTS NOT GENUINELY IN DISPUTE	SUPPORTING EVIDENCE
1.	The Baltimore Sun reported that, in 1988, Governor Evan Mecham was indicted on charges of perjury, fraud and failure to report a campaign contribution and was later impeached and ousted from office.	Declaration of Tanja K. Shipman in Support of Defendants' Motion for Summary Judgment ("Shipman Decl.") Ex 1 (*Arizona Ponders Its High-Office Headaches*, Baltimore Sun, August 12, 1997).
2.	The New Orleans Times reported that savings-and-loan tycoon Charles Keating's financial empire collapsed and that his relationships with Arizona politicians prompted Senate Ethics Investigations.	Shipman Decl. Ex 2 (*Trying to Repair A Damaged State*, New Orleans Times Picayune, May 10, 1991).

3.	The Los Angeles Times reported that, in the early 1990s Governor Fife Symington was investigated over a conflict of interest, and in 1997 he was convicted of bank fraud and resigned from office.	Shipman Decl. Ex 3 (*Arizona Governor Guilty of Fraud, Forced to Resign*, Los Angeles Times, September 4, 1997).
4.	In 1991, a police sting operation popularly known as "AzScam" caught state legislators on videotape accepting cash bribes and campaign contributions in return for agreeing to support pro-gambling legislation.	*State v. Walker*, 185 Ariz. 228, 231, 235, (Ct. App. 1995).
5.	Nearly ten percent of the members of the state legislature were indicted.	Sandhu Decl. Ex. A (Maricopa County Superior Court Docket, CR 1991-000997), Ex. B (L. Feldman, *Indictment of Lawmakers Another Blow to Arizona*, Los Angeles Times, Feb. 9, 1991, at 1).
6.	Twenty-three people, including legislators and lobbyists, were indicted as a result of the AzScam investigation.	*State v. Walker*, 185 Ariz. at 231 (Ct. App. 1995); Sandhu Decl. Ex. A ((Maricopa County Superior Court Docket, CR 1991-000997).

7.	A legislator was convicted on corruption-related charges as a result of the AzScam investigation.	*State v. Walker*, 185 Ariz. 228 (Az. Ct. App. 1995)
8.	The press reported that video clips from the AzScam investigation showed legislators stuffing tens of thousands of dollars into gym bags while making comments such as: • "I sold way too cheap." • "My favorite line is, 'What's in it for me?'" • "There's not an issue in this world I give a [expletive] about." • "We all have our prices." • "I like the good life, and I'm trying to position myself that I can live the good life and have more money."	*State v. Walker*, 185 Ariz. at 236; Sandhu Decl. Ex. F (*Excerpts from indictment tell tale of political deals*, Arizona Daily Star, Feb. 10, 1991), Ex. G (Mary K. Reinhart, *Videotapes show payoffs: Ariz. legislators, lobbyists appear at sting meetings*, Arizona Daily Star, Feb. 8, 1991), Ex. B (L. Feldman, *Indictment of Lawmakers Another Blow to Arizona*, Los Angeles Times, Feb. 9, 1991, at 1) Ex. H (Sally Ann Stewart, *New Tarnish on Arizona's Image, Bribe Case has State 'In Shock,' USA Today*, Feb. 13, 1991, at 6A);

9.	The AzScam scandal received local, state, and national media coverage.	Sandhu Decl. Exs. B, F-H [collected news articles]; Ex. D (Aja Dep. 36: 5-13); Ex. C (Smoldon Dep. 46: 25, 47: 1-4); Ex. E (Symington Dep. 99: 18-19).
10.	Media reports about AzScam included quotes from lobbyists, former state legislators, and present legislators about the harmful effects of the AzScam scandal on public trust in state government.	Sandhu Decl. Ex. I (Mary K. Reinhart, *AzScam fallout is far from over, politicians say*, Arizona Daily Star, June 24, 1991), Ex. J (John Woestendiek, *For Arizona, The Scandals Just Keep on Coming*, Philadelphia Inquirer, Feb. 25, 1991 at A2), Ex. K (Seth Mydans, *Civics 101 on Tape in Arizona, Or 'We All Have Our Prices,'* N.Y. Times, Feb. 11, 1991), Ex. L (Steve Yozwiak, *Survey says opinions vary on state ethics: 2nd 'AzScam' is 'probable,'* The Arizona Republic, Oct. 5, 1991 at B1, B4).
11.	Arizona lobbyist Russell Smoldon testified that he was "not surprised" when news of the AzScam scandal broke because some of the legislators involved were on "shaky ground."	Sandhu Decl. Ex. C (Smoldon Dep. 45: 23-25, 46: 1-17).

12.	As part of a series called "The Invisible Legislature," the *Arizona Republic* printed a December 14, 1997 article in which it reported that: "Reforms passed by voters in 1986 were supposed to prevent the practice known as bundling contributions, but candidates and lobbyists have found a loophole in the law. Bundling occurs when an individual collects a number of checks from individuals and then presents them to one candidate. Lawmakers get around that prohibition by appointing lobbyists to their campaign finance committees, a role that allows them to gather checks from others." The article also reported that at a fundraising luncheon for the Arizona Speaker of the House, 45 of 55 fundraising committee members were registered lobbyists, and most of those lobbyists	Sandhu Decl. Ex. O (Michael Murphy, *Holiday Premium on Fund-Raising*, The Arizona Republic, Dec. 14, 1997, at p. A1 (Bates-stamped CEI0005008-11)); *see also* Sandhu Decl. Ex. M (Jonathan Sidener & Kris Mayes, *Invisible Legislature: Dollars and Bills: Lobbyists' influence spreads far but often goes unrecorded*, The Arizona Republic, Jan. 21, 1996 at A1, A10-A11), Ex. N (Kris Mayes & Michael Murphy, *Invisible Legislature: Lobbyists bearing gifts solidify grip on Capitol*, The Arizona Republic, Dec. 22, 1996 at A1).

	were table sponsors selling ten tickets at $200 each, for a total of $2,000 in contributions.	
13.	In August 1998, the *Arizona Republic* reported that the State Senate's President assigned lobbyists to raise money for certain candidates and "warned the lobbyists that they will suffer political retribution in the next session of the Legislature if they raise money for Democrats."	Sandhu Decl. Ex. P (Chris Moeser, *Invisible Legislature: GOP drafts lobbyists for help in crucial races, Senate chief reputedly warns them not to raise funds for Democrats*, The Arizona Republic, Aug. 20, 1998 at A1, A2 (Bates-stamped CE10005006-CE10005007)).
14.	The passage of the Act was motivated in part by the widespread perception of corruption in Arizona state government.	Ariz. Rev. Stat. § 16-940(B); Sandhu Decl. Ex. Q (Hoffman Dep. 19:13-25, 20:1-9).
15.	In the 1998 Publicity Pamphlet for the Clean Elections Act initiative, one supporter commented on Arizona's "reputation of a state rife with corruption and abuse of money in politics."	Declaration of Tanja K. Shipman in Support of Defendants' Opposition To Plaintiffs' Motion For Temporary Restraining Order (docket no. 24) at Ex. 1.

16. A national media article stated that "[i]f there were ever a state ripe for campaign finance reform it is Arizona, whose government oozes with corruption and scandal."	Declaration of Tanja K. Shipman in Support of Defendants' Response to Plaintiffs' and Plaintiff-Intervenors' Motions For Preliminary Injunction (docket no. 125) at Ex. 1 ("Arizona's clean-money fight," 98 Nation 19 (1998))
17. Another national media article observed that "Arizona politics has been racked by one money scandal after another: state legislators indicted for bribery and racketeering, two U.S. senators among the in famous Keating Five, a governor driven from office for fraud."	Declaration of Tanja K. Shipman in Support of Defendants' Response to Plaintiffs' and Plaintiff-Intervenors' Motions For Preliminary Injunction (docket no. 125) at Ex. 2 (*High Cost of Reform*, U.S.A. Today, Oct. 22, 1998).
18. Since the 2000 election, when the Act went into effect, there has been a 20% increase in the number of contested state Senate races.	Report of Dr. Kenneth Mayer attached to his declaration in support of Defendant's opposition to the preliminary injunction motion ("Mayer Report") (docket no. 1333, filed 09/23/2008) at 7; Sandhu Decl. Ex. S (Querard Dep. 39:10-15; 40:5-18).

19.	Since the 2000 election, there has been a 300% increase in the number of competitive state Senate races.	Mayer Report at 7.
20.	Plaintiffs consist of consist of four incumbents, the State Treasurer who previously served as a State Senator, one first time 2008 challenger, and two political action committees.	Shipman Decl. Ex 4 [Plaintiff-Intervenors' Objections and Responses to Defendants' First Request For Admissions and Second Request For Production at 2 (response to RFA 8 re: Murphy), 3 (response to RFA 24 re: Burns)], Ex 5 [Plaintiffs' Collective Response to Defendants' First Set of Requests For Admission and Second Set of Requests For Production at 7 (response to RFA 10 re:McComish), 8-9 (response to RFA 13 re: McComish), 11 (response to RFA 19 re: McLain), 12 (response to RFA 22 re: McLain)]; Ex. 6 (Bouie Depo. at 5:19 – 6:3, 7:12-16); Ex. 7 (Martin Depo. 24:14-18). Plaintiff-Intervenors' Complaint in Intervention [Dkt 58] at ¶¶ 8, 11, 12.

21.	Plaintiff Murphy was initially elected using Clean Elections Funds.	Sandhu Decl. Ex. S (Querard Dep. 78:23-79:25); Shipman Decl. Ex. 4 [Plaintiff-Intervenors' Objections and Responses to Defendants' First Request For Admissions and Second Request For Production at 1 (*see* responses to RFAs 1 & 2)].
22.	A trigger report is a one-page form that is electronically filed with the Secretary and which indicates merely the identity of the candidate committee, the filing date and reporting period, and the total amount of the contributions or expenditures.	Declaration of Todd F. Lang in Support of Defendants' Motion for Summary Judgment ("Lang Decl.") at ¶ 11 & Ex. 5 (Bob Burns' October 14, 2008 trigger report).
23.	Plaintiff-Intervenor Robert Burns triggered matching funds in the 2002, 2004, and 2006 election cycles.	Sandhu Decl. Exs. V-X (Citizen Clean Elections Commission disbursement data).
24.	When asked whether he triggered matching funds for his opponent in the 2004, and 2006 election cycles, Burns stated, "I don't believe I	Sandhu Decl. Ex. U (Burns Dep. 32:12-23, 50:25-51:1-6)

	did," and when told his primary opponents in 2002 received matching funds, he stated, "I'm surprised at the amount. I wasn't aware that that – that they received that amount of money. . . ."	
25.	Robert Burns testified at deposition that he could not say that he had reduced the number of mailers he had sent out to voters since the enactment of the Clean Elections Act.	Sandhu Decl. Ex. U (Burns Dep. 101:13-17, 101:13-103:9).
26.	Dean Martin has run as a traditional candidate in each of his four prior campaigns.	Sandhu Decl. Exs. Z-CC (Campaign Finance Reports).
27.	Dean Martin could not recall at deposition if he had triggered matching funds in any of his prior campaigns.	Sandhu Decl. Ex. R (Martin Dep. 28: 1-4).
28.	Dean Martin has not been coerced into running as a participating candidate in any of his four prior campaigns.	Sandhu Decl. Exs. Z-CC (Campaign Finance Reports).

29. The elimination of matching funds from the Act would not make any difference in Dean Martin's decision as to whether to run as a participating candidate in 2010.	Sandhu Decl. Ex. R (Martin Dep. 36:4-7).
30. All Plaintiff candidates except Tony Bouie won their 2008 election campaigns.	Lang Decl. Ex. 4 (2008 Arizona Official Election Canvas).
31. Three of the four incumbent Plaintiffs received public funding under the Act during election campaigns prior to 2008.	Shipman Decl. Ex. 4 (Plaintiff-Intervenors' Objections and Responses to Defendants' First Request For Admissions and Second Request For Production at 1 (*see* responses to RFAs 1 & 2 re: Murphy)), Ex. 8 (McLain Depo. 14:1-3); Ex. 9 (McComish Depo. 9:1-3).
32. Because of Clean Elections funding, Meg Burton Cahill was able to successfully run for the state legislature against two powerful incumbents.	Sandhu Decl. Ex. T (Burton Cahill Decl. ¶ 3 in support of Defendant-Intervenors' Opposition to Motions for Preliminary Injunction (docket no. 121, filed 9/23/2008)).

33.	The availability of matching funds was a "critical factor" in Meg Burton Cahill's decision to run as a participating candidate.	Burton Cahill Decl. ¶ 5.
34.	Without matching funds, the state would have to either: (1) give participating candidates higher initial grant amounts, which would waste public funds and threaten the public legitimacy of the program; or (2) leave initial grant amounts at current levels, which would, in the absence of matching funds, result in reduced participation rates due to the increased risk of being outspent.	Sandhu Decl. Ex. Q (Hoffman Dep. 43:12-25; 38:23-43:25).
35.	The Act has enabled candidates to run for office.	Sandhu Decl. Ex. S (Querard Dep. 39:10-15; 40:5-18); Ex. T (Burton Cahill Decl. ¶3); Declaration of Paula Forster in Support of Defendants' Response in Opposition to Plaintiffs' And Plaintiff-Intervenors' Motions For Preliminary Injunction at ¶¶ 3, 6 (docket no. 128,

	filed 9/23/2008); Declaration of Tammie Pursley in Support of Defendants' Response in Opposition to Plaintiffs' And Plaintiff-Intervenors' Motions For Preliminary Injunction at ¶¶ 3, 4, 8 (docket no. 134, filed 9/23/2008); Declaration of David Scapira at ¶ 7 (docket no. 135, filed 9/23/2008); Declaration of Pamela Durbin in Support of Defendants' Response in Opposition to Plaintiffs' And Plaintiff-Intervenors' Motions For Preliminary Injunction at ¶ 3 (docket no. 137, filed 9/23/2008); Declaration of Jorge Garcia in Support of Defendants' Response in Opposition to Plaintiffs' And Plaintiff-Intervenors' Motions For Preliminary Injunction at ¶ 3 (docket no. 139, filed 9/23/2008).
36. Rick Murphy could not have successfully run for office in 2004 without Clean Elections Act funding.	Sandhu Decl. Ex. S (Querard Dep. 78:23-79:25).

37. In 1998 (before the Act went into effect) 177 legislative candidates spent a total of $1,333,999 (in 2006 dollars); by 2006, 206 legislative candidates spent a total of $6,487,133.	Green Decl. Ex. A at 19.
38. Average inflation-adjusted spending among the top ten percent highest-spending candidates increased between 1998 and 2006 from $34,622 to $42,162 in the general elections and from $51,279 to $61,395 in the primary elections.	Green Decl. Ex. A at 14.
39. In 1998, political entities made $29,746.85 in independent expenditures ($36,791.20 in 2006 dollars, adjusted for inflation), and in 2006, independent expenditures totaled $1,262,976.95.	Migally Decl. ¶¶ 7-8.
40. Of the forty-six nonparticipating candidates who faced a participating opponent in 2006 and who could trigger	Green Decl. Ex. A at 14.

	matching funds by spending more than $17,918, one spent between $15,000 and $26,000. Thirty-nine candidates spent less than $15,000 and 6 candidates spent more than $26,000.	
41.	It is more difficult for challengers to raise money than it is for incumbents.	Sandhu Decl. Ex. R (Martin Dep. at 43:4-44:5).
42.	The participation rate for Arizona candidates in the Clean Election Act for the 2008 general election was 67% and, of that group, 44% won their seats.	Lang Decl. at ¶¶ 8, 10 & Exs.2-4.
43.	Candidate participation in the program for general elections has been between 52% and 67% since the 2002 election cycle. In 2008, one in three candidates chose private funding.	Lang Decl. at ¶¶ 5-9 & Exs.1, 2; Sandhu Decl. Ex. Y (Citizens Clean Elections Commission 2008 Annual Report).
44.	Matching funds have influenced candidates' decision to accept public funding.	Sandhu Decl. Ex. T (Burton Cahill Decl. ¶ 5; *see also* Declaration of Tammie Pursely in Support of Defendant's

		Response in Opposition to Plaintiff and Plaintiff-Intervenor's Motion for Preliminary Injunction at ¶¶ 4, 8 (docket no. 134, filed 9/23/2008); Declaration of David Schapira in Support of Defendant's Response in Opposition to Plaintiff and Plaintiff-Intervenor's Motion for Preliminary Injunction at ¶¶3-8 (docket no. 135, filed 9/23/2008); Declaration of Ed Ableser in Support of Defendant's Response in Opposition to Plaintiff and Plaintiff-Intervenor's Motion for Preliminary Injunction ¶¶8-14 (docket no. 136, filed 9/23/2008); Declaration of Pamela Durbin in Support of Defendant's Response in Opposition to Plaintiff and Plaintiff-Intervenor's Motion for Preliminary Injunction ¶¶4-5 (docket no. 137, filed 9/23/2008)).
45.	Absent matching funds, participation rates would decline.	Mayer Report at 8; Querard Dep. 32: 2-24; *see also* Declaration of Ed Ableser in Support of

		Defendants' Response in Opposition to Plaintiffs' And Plaintiff-Intervenors' Motions For Preliminary Injunction at ¶ 8 (docket no. 136, filed 9/23/2008); Declaration of David Schapira in Support of Defendant's Response in Opposition to Plaintiff and Plaintiff-Intervenor's Motion for Preliminary Injunction at ¶ 7 (docket no. 135, filed 9/23/2008).
46.	The Clean Elections program funded at least one candidate in 429 races for statewide and legislative office, including 222 primary election races and 207 general election races, since 2000.	Migally Decl. ¶ 12.

BRADLEY S. PHILLIPS (*pro hac vice*)
Brad.Phillips@mto.com
GRANT A. DAVIS-DENNY (*pro hac vice*)
Grant.Davis-Denny@mto.com
ELISABETH J. NEUBAUER (*pro hac vice*)
Elisabeth.Neubauer@mto.com
PUNEET K. SANDHU (*pro hac vice*)
Puneet.Sandhu@mto.com
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

MONICA YOUN (*pro hac vice*)
monica.youn@nyu.edu
ANGELA MIGALLY (*pro hac vice*)
angela.migally@nyu.edu
THE BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas
New York, NY 10013
Telephone: (212) 992-8158
Facsimile: (212) 995-4550

TIMOTHY M. HOGAN (004567)
ARIZONA CENTER FOR LAW IN
THE PUBLIC INTEREST
202 E. McDowell Road, Suite 153
Phoenix, AZ 85004
Telephone: (602) 258-8850

Attorneys for Defendant-Intervenor
CLEAN ELECTIONS INSTITUTE, INC.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JOHN MCCOMISH, et al., Plaintiffs, and DEAN MARTIN, et al., Plaintiff-Intervenors, vs. KEN BENNETT, et al., Defendants, and CLEAN ELECTIONS INSTITUTE, INC. Defendant-Intervenor.	CASE NO. CV-08-1550-PHX-ROS (Assigned to the Honorable Roslyn O. Silver) **DECLARATION OF DONALD GREEN IN SUPPORT OF DEFENDANT-INTERVENOR CLEAN ELECTIONS INSTITUTE, INC.'S MOTION FOR SUMMARY JUDGMENT** (Filed Jun. 12, 2009)

I, Donald P. Green, declare as follows:

1. I submit this declaration in support of Defendant-Intervenor's Motion for Summary Judgment. I have been retained by Defendant-Intervenor to provide my opinions to the Court, including those set forth in this affidavit. I have personal knowledge of the matters set forth here, except as I am being compensated for my services in this action at a rate of $250 per hour.

2. I have spent my entire professional career studying, writing, teaching and lecturing about American politics and the American election system

in particular. I am the A. Whitney Griswold Professor of Political Science at Yale University. In addition, I serve as the director of the Yale Institution for Social and Policy Studies, an interdisciplinary policy center. I am currently serving my fifth consecutive three-year term as Director.

3. I received my doctorate in political science from University of California, Berkeley in 1988. My area of expertise lies in campaigns, elections, research design and statistical analysis. I regularly teach undergraduate and graduate courses in these areas.

4. I also have published extensively on, among other things, the topics of campaigns and elections in leading political science journals such as the *American Political Science Review*, *American Journal of Political Science*, *Journal of Politics*, *Electoral Studies*, *Political Research Quarterly*, and *Political Analysis*. Several of my publications focus on campaign finance and use statistical models to estimate the effects of campaign spending. I also co-authored a book entitled *Get Out The Vote: How to Increase Voter Turnout* (Brookings Institution Press, 2008), which reports the results of more than one hundred studies of political campaigns and voter mobilization drives.

5. In 2005, I was elected to the Council of the American Political Science Association. I currently serve on the Board of Overseers of the American National Election Study. My scholarship has won recognition from the National Science Foundation and substantial financial support from James Irvine

Foundation, Pew Charitable Trusts, Smith Richardson Foundation, Harry Frank Guggenheim Foundation, and Russell Sage Foundation. In 2004, I was elected Fellow of the American Academy of Arts and Sciences.

6. At issue in this litigation are, I understand, assertions that the matching fund provisions of the Arizona Clean Elections Act discourage nonparticipating candidates from making expenditures beyond the matching funds threshold. However, data regarding candidate expenditures in legislative races in Arizona before and after the enactment of the Citizens Clean Elections Act demonstrates that nonparticipating candidates under the current system spend at levels that equal or exceed those observed before the introduction of matching funds.

7. I examined patterns of spending by nonparticipating candidates in 2006 who were opposed in the general election by at least one participating opponent. I observed that spending levels do not cluster at or around the matching funds threshold, as one would expect if nonparticipating candidates were deterred from spending past that threshold. Looking at the smooth distribution of these nonparticipating candidates' expenditures, one would not guess that the matching fund threshold was $17,918, because there is no tendency for spending to cluster at or around this figure.

8. Of the 46 nonparticipating candidates facing a participating opponent in the general election in

2006, 39 spent less than $15,000 and therefore never reached the matching threshold, although one candidate, Pete Hershberger, spent $12,415 and was subject to a reduced threshold of $11,945. Just one candidate subject to the $17,918 threshold spent between $15,000 and $26,000. The remaining 6 candidates spent between $26,000 and $149,000.

* * *

INSTITUTE FOR JUSTICE
Timothy D. Keller (019844)
Jennifer M. Perkins (023087)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
P: 480-557-8300/F: 480-557-8305

INSTITUTE FOR JUSTICE
William R. Maurer (WSBA 25451)[1]
101 Yesler Way, Suite 603
Seattle, WA 98104
P: 206-341-9300/F: 206-341-9311

Attorneys for Plaintiff-Intervenors

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*,

Plaintiffs,

and

DEAN MARTIN, *et al.*,

Plaintiff-Intervenors

vs.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, *et al.*,

Defendants,

and

Civil Action No. 08-1550-PHX-ROS

PLAINTIFF-INTERVENORS' STATEMENT OF MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

(Filed Jun. 12, 2009)

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[1] Admitted *pro hac vice*.

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant-Intervenor.

* * *

67. In the 2008 general election campaign, Burns' publicly funded opponent received $17,707.44 in candidate equalization disbursements and $10,543.98 in independent expenditure disbursements, in addition to the $19,382.00 initial general election disbursement, for a total public subsidy of $47,633.42 – which means that Burns' publicly funded opponent had $7,263.42 more than Burns to run her campaign. Ex. 34, Jan. 20, 2009, Disc. Resps. 6.

* * *

U.S. District Court for the District of Arizona

(Filed Jun. 13, 2009)

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[Some Columns Omitted In Printing]

TITLE OF DOCUMENT	AUTHOR & PUBLISHER	DATE	SUBSTANCE
Commission's Final Decision in the Matter of Matt Salmon (No.: 03A-02036-CCE)	CCEC	6/30/03	"[Opposing clean elections candidates may not have received equalization monies in time to fully benefit their campaigns. For example, a nonparticipating candidate could delay filing until near the end of an election period to prevent clean elections opponent from receiving timely equalization monies."
CCEC: Statement of Reasons of Executive Director, MUR: No. 06-0022	Executive Director o CCEC	10/23/06	Executive Director of Citizens Clean Elections Commission finding allegation that candidate for office failed to report expenditures for t-shirts in violation of Clean Elections Act "are supported by the Complaint and the Response provided by the Respondent."
CCEC Statement of Reasons of Executive Director, MUR No. 06-0047	Executive Director o CCEC	2/28/08	Citizens Clean Elections Commission finding that candidate for office failed to report expenditures.
Settlement Agreement in the Matter of Clancy Jayne, Case No. MUR 04-0011	CCEC	8/6/04	Clean Elections Commission finding that candidate did not file an original campaign finance report when the campaign's expenditures exceeded the triggering amount, but that the violation was unintentional.
Gould pays $1,000 to settle dispute with Clean Elections	Caleb Soptelean, *Kingman Daily Miner*	7/26/05	News article relating to traditional candidate paying a $1,000 penalty for untimely Clean Elections reporting.
Clean Elections Commission Stmt. Of Reasons of Exec. Dir. Re MUR No. 02-0008	Executive Director o CCEC	8/13/02	Finding that candidate failed to timely file campaign finance reports specifically related to expenditures.

Clean Elections Commission Stmt. of Reasons of Exec. Dir. Re MUR No. 02-0009	Executive Director of CCEC	8/13/02	Finding that candidate failed to file a timely expenditure report.
Gould pays $1,000 Clean Elections Settlement	Caleb Soptelean, *Today's News Herald*	6/8/05	News article relating to traditional candidate paying a $1,000 penalty for untimely Clean Elections reporting.
CCEC Probable Cause Recommendation Revised re CCEC MUR #06-0015	Executive Director of CCEC	9/26/06	Finding that traditional candidate's expenditures exceeded the triggering amount but failed to comply with reporting requirements.
CCEC Statement of Reasons of Executive Director MUR No. 06-0014	Executive Director of CCEC	9/6/06	Finding that traditional candidate failed to report expenditures which exceeded the triggering amount.
Karlstrom Letter Re: CCEC	Florence Kalstrom	10/21/2004	"I write today to express my concern that a candidate in my district is not following the reporting requirements of the clean elections law."

* * *

Candidates against public cash, but take it anyway	Le Templar	7/16/04	"But Allen said existing law and supporting rules written by the Arizona citizens Clean Elections Commission make traditional fund raising nearly impossible."
Payton allegations	CCEC	No Date	"Failure to file a contribution report in a timely manner. Failure to file a supplemental contribution report in a timely manner."
Osterloh Letter Re: CCEC	Mark Osterloh	12/12/00	"I believe Ms. Hellon conspired with the Republican Party, her campaign treasurer, and possibly others, to purchase media (radio or television) and printed literature and reported delayed purchase dates of November 3rd and 6th. I allege the actual "expenditures" occurred at much earlier times and the report was delayed to prevent my receiving matching funds."

Somers CCEC	CCEC	No Date	"Failure to file a contribution report in a timely manner. Failure to file a supplemental contribution report in a timely manner."
CCEC Statement of Reasons of Executive Director MUR #06-0015	Executive Director of CCEC	9/5/06	"Respondent reached the original report triggering level on June 18, 2005. Although the Respondent's first report was due by January 1, 2006, Respondent did not report these expenditures until January 25, 2006. Therefore, Respondent was 24, days late filing $9,077.24 of expenditures previously unreported."
CCEC Statement of Reasons of Executive Director MUR #06-0014	Executive Director of CCEC	9/5/06	" . . . Respondent was 7 days late filing $7,183.32 of expenditures previously unreported, delaying the disbursement of matching funds to his participating opponent in violation of A.R.S. § 16-958(A)"

* * *

CCEC Memorandum Re: Possible Independent Expenditure	Executive Director of CCEC	9/6/06	"While I acknowledge that Goldwater has emphasized a border security plan detailed and described in the poll, and while I respect that he would not wish to be associated with a poll that voters might deem offensive, I am not persuaded that these considerations elevate phone calls to express advocacy against the Goldwater campaign. The question referencing Goldwater is not clearly calibrated to influence recipients of the phone calls to support or oppose the Goldwater candidacy, but seems geared to gauge support for a policy position he has unequivocally adopted. By contrast, I believe that the questions regarding Munsil were clearly calibrated to influence recipients of the phone calls to oppose his candidacy. In particular, the question asking whether it would influence a recipient's vote to know that Munsil had an illegitimate child appears a thinly veiled effort to cast Munsil in a negative light and to advocate his defeat."

* * *

Letter of Lewis and Roca to Members of CCEC	Scott Bales	4/26/02	"Section III: Union Letters Urging Members to Make $5 Qualifying Contributions. The third section . . . Concerns letters sent by leaders of the UFCW and [AFSCME]. These letters expressed support of Janet Napolitano as a candidate for Governor and urged members to make $5 qualifying contributions. Mr. Mays alleges that these letters violate the Citizens Clean Election Act or the Commissions' rules because the labor unions were improperly acting as solicitors for Janet Napolitano and there was no 'proper accounting' of the expenses for these mailings."
Letter of Clancy Jayne to Colleen Connor	Clancy Jayne	11/15/04	"[The] Executive Director of Arizona Right to Life [ ] is quoted in the *Arizona Capitol Time* on August 13, 2004, admitting to mailing a letter on behalf of Ms. Gorman soliciting $5.00 qualifying contributions. The news article reported [the Executive Director] stated that while he did indeed write the fund-raising letters for Mr. Carpenter and Ms. Gorman, their respective campaigns, not his organization, paid for the printing and mailing."
Response of Arizona Republican Party and Nathan Sproull to Subpoena Duces Tecum	Nathan Sproull	9/5/00	"[The] Executive Director of the Arizona Republican Party, being first duly sworn, deposes and says that: . . . [He] wanted to ensure that Kaminsky [a Republican candidate for the Arizona State Senate] received as many qualifying contributions as possible. . . . In addition to soliciting qualifying contributions for Pat Kaminsky by telephone or at various Republican Party events, he solicited qualifying contributions by mail."

* * *

CCEC Statement of Reasons of Executive Director MUR: NO 02-001 and 02-002	Executive Director of CCEC	5/15/02	" . . . Richard Mays filed a complaint with the Citizens Clean Elections Commission, alleging that Janet Napolitano, a candidate for governor, had violated three provisions (Allegations 1-3) of the Citizens Clean Elections Act."

Re: Citizens Clean Elections Act Violations Committed by Janet Napolitano	Richard Mays	4/24/02	"... I believe Napolitano has violated or will violate the Act on an additional theory of the law. Specifically, Napolitano has already exceeded the maximum contribution."
CCEC Letter	Steven Rasmussen	5/1/02	"... I submit this complaint concerned that the basic purpose of the law will be irretrievably subverted if candidates are permitted to organize and orchestrate special interest groups to finance and collect their five-dollar contribution. The definition of independent expenditures must be strict ..."
First Amended Complaint – In the matter of Pat Kaminsky	David Eagle	9/14/00	"Beginning on or about August 1, 2000, the Arizona Republican Party and Sproul, for the benefit of Kaminsky, mailed to 2400 voters of all party memberships resident in District 25 a mailing which included a letter, a CCEC contributor form and postage pre-paid return envelope. One insert, a letter signed by Trent Franks, expressly advocated the election of Kaminsky and the defeat of his opponent and urged recipients to make a $5.00 Clean contribution to Kaminsky and return a signed CCEC contributor form to the Arizona Republican Party at its state headquarters address."

* * *

Rasmussen Letter re. CCEC	Steven Rasmussen	4/30/02	"Dear Commission Members: As someone who circulated the initiative petition for Clean Elections, I submit this complaint concerned that the basic purpose of the law will be irretrievably subverted if candidates are permitted to organize and orchestrate special interest groups to finance and collect their five-dollar contributions. The definition of 'independent expenditures' must be strict – no contact and no coordination – or this law becomes a special interest shell game with the public asked to foot the bill."

* * *

Motion for Rehearing or Review In the Matter of David Burnell Smith	David Burnell Smith	9/23/05	"The Commission let all of these elected officials off with minor monetary penalties, or with no fines at all, as was the case with Janet Napolitano. The Commission did not seek to impose major monetary penalties or forfeiture of office as a penalty against any of these successfully elected state officials, although it did so against Smith."

* * *

Effort to gut Clean Elections ignores the choice by voters	Executive Director of CCEC	9/11/05	"Recognizing a desire to remove special interest money from Arizona politics and to level the playing field in campaign financing, voters approved the ballot initiative establishing the Citizens Clean Elections Commission in 1998."
Equalization Calculations [CD]	CCEC	8/23/05	Equalization was stated 588 times within the calculations sheets located on CD ROM. On each election equalization calculation there were differences in: date, name, house district number, senate district number, filer ID number, and vendor number.

* * *

Equalization Calculations [CD]	CCEC	10/31/02	Equalization was stated 127 times within the calculation sheets located on CD ROM. On each election equalization calculation there were differences in: titles, names of non participating candidates, names of participating candidates, filer ID #, equalization number totals, and dates.
Equalization Calculations [CD]	CCEC	1/1/04	Equalization was stated 585 times within the calculation sheets located on CD ROM. On each election equalization calculation there were differences in: number of participating candidates, vendor numbers, filer ID #, number of non participating candidates, district numbers, dates and titles.

Citizens Clean Elections Commission – Recommendations of External Investigative Consultant	Gene Lemon	1/19/06	"The complaint originally filed on August 31, 2005, alleged that Respondent violated R2-703(A)(3) by purchasing fixed assets with a value in excess of $600.00
Settlement Agreement	Colleen Connor	3/18/05	"Specifically, the Commission finds that Respondent received in-kind family contributions (and by operation of law made in-kind expenditures) in excess of the permissible limit and after the end of the qualifying period."
Internally Generated Complaint	Gene Lemon	8/22/05	"Based on the Candidate's campaign finance reports, it appears that the Candidate is in violation of A.R.S. Sec 16-953(A), (B), (C), Return of monies to the Citizens Clean Elections fund and should promptly remit to the Commission the sum of $6,490.45."
Settlement Agreement	Executive Director of CCEC	12/13/05	"The complaint alleges that four reimbursements to family members and individuals for campaign expenses had exceeded the individual and personal contribution limits."
Citizens Clean Elections Commission – Statement of Reasons of External Investigative Consultant	Gene Lemon	10/28/05	"... A participating candidate for State Representative, District 20, violated the Act by failing to identify on his campaign finance reports the full name and street address of persons providing goods and services to his campaign."
Citizens Clean Election Commission – Statement of Reasons of External Investigative Consultant	Gene Lemon	8/17/05	"... Meyers ("Complainant") filed a complaint against Carole Hubbs ("Respondent"), a participating candidate for State Representative, District 4, alleging that Respondent (i) failed to pay the vendor directly for goods and services and properly report those payments, and (ii) accepted an unreported in-kind contribution from another candidate who shared a voter list with Respondent in violation of the Act."
Patrick Meyers Letter	Patrick Meyers	5/5/05	"In order to apply the new standards as set out by the Clean Elections Commission and its staff equally to all candidates, I continue to review campaign finance reports and I continue to find numerous violations." (Exemplar Doc)

Carol Vandercook Letter re: Complaint Against Doug Quelland	Carol Vandercook	11/12/08	"This is a formal request for the Secretary of State (the "Secretary") and the Citizens Clean Elections Commission (the "Commission") to investigate Dough Quelland for entering into a $15,000.00 consultant agreement with Intermedia Public Relations ("IMPR") in violation of Article I and Article II of Arizona's campaign finance law."
CCEC Statement of Reasons of Executive Director MUR #06-0005	Executive Director of CCEC	1/7/09	" . . . Chairman of the Arizona Democratic Party . . . Filed a complaint against Len Munsil . . . A participating candidate for governor, alleging possible violations of Arizona election law, specifically that the Respondent failed to report the receipt of in-kind contributions, or alternatively, incurred expenses in excess of the available cash on hand
Defendant's motion to dismiss Smith v. CCEC	Diana Varella	10/20/05	"Pursuant to A.R.S. § 16-942 and -957, and A.A.C. R2-20-215 and A.A.C. R2-20-217, the Commission issued a written order on March 25, 2005 requiring Smith (1) to pay a civil penalty of $10,000 to the Commission; (2) to forfeit his office of State Representative for District 7; and (3) to repay to the Citizens Clean Elections Fund the amount of $34,625.09

. . .

Conciliation Agreement in the Matter of Charlene Pesquiera	Executive Director of CCEC and Charlene Pesquiera	1/17/08	" . . . Respondent made expenditures in excess of the threshold set forth in A.R.S. § 16-941(B)(2). Respondent was therefore required to file a supplemental campaign finance report on or before November 6, 2006. Respondent failed to declare such expenditures until December 6, 2006, a date 30 days after the due date for filing a supplemental campaign finance report."

. . .

Andrew Gordon Letter re: Janet Napolitano	Andrew Gordon	9/25/06	"... The complaint appears to claim that the Napolitano campaign coordinated with two independent campaign committees, Arizona Conservative Trust ("ACT") and Arizona Values Coalition ("AVC") and Beau Memory and Seamus Perry."
CCEC Statement of Reasons of Executive Director MUR #06-0027	Executive Director of CCEC	11/22/06	"The Complaint alleges that Respondent made a series of campaign related trips without disclosing expenditures for the costs of such trips."
CCEC Statement of Reasons of Executive Director MUR NO 02-0047	Executive Director of CCEC	10/3/02	"The Complaint alleges that the Respondent violated A.R.S. § 16-904 AND 16-915 for failing to disclose the nature of the petty cash disbursements.
Patrick Meyers Letter	Patrick Meyers	3/2/05	"I noticed that Clean Elections has initiated, on its own, several investigations into such behavior, but only against conservative Republican candidates. Given the impartiality required of your agency, I assumed that this was an oversight and that you intended to pursue everyone equally. However, several moths have passed and you have not done so."
			* * *
CCEC Probable Cause Recommendation MUR #06-0001	Executive Director of CCEC	8/15/06	"... Reason to believe that Janet Napolitano ... a participating candidate for governor, by and through her campaign committee, Janet Napolitano 2006 ... may have committed violations of the citizens Clean Elections Act and Commission rules."
CCEC Probable Cause Recommendation MUR #06-0001	Executive Director of CCEC	8/15/06	Starting to campaign without having official monetary funds ..." On March 15, 2006 Respondent entered into a Letter of Agreement for Internet Consulting and Related Services with Vendor ... April 24, 2006 Respondent received public funding as a participating candidate."

Patrick Meyers Letter	Patrick Meyers	2/24/05	Repeat of Meyers Letter/ "I wish to file a formal complaint against Janet Napolitano for Governor – 2002 (2002-91776). I trust that you will pursue it with the same zeal and single-mindedness with which you have pursued the others.
		- - -	
Campaign contribution complaint dismissed against legislative candidate	Daniel Barnette	7/11/04	"Gilbert resident Garry Bae filed a complaint on May 10th alleging that a publicly funded candidate, Lindn Wegener, a Tempe Republican running for the House in District 20, had exceeded the early contribution limit of $3,380 by $1,360."
		- - -	
More dirt on clean elections	No Author	7/29/04	"First, there's the news, curiously underreported south of the Gila River, that onetime Libertarian candidate Yuri Downing was indicated for theft, fraud, and perjury for his 2002 publicly funded campaign for the Arizona Legislature. . . . Fun lovin' Yuri . . . got a couple of his buddies together to run a Libertarian slate of candidates for the House and Senate. The trio had a good ol' time blowing about $100,000 while campaigning in Tempe and Scottsdale hot spots and nightclubs. . . . The political consultant spearheading the effort to flush Clean Elections by blocking the use of public funds for campaigns calls the case 'Exhibit A in why tax-payer-funded elections are a bad idea. Here you had three people who ran for no other reason than having a three-month-long party.'"

Losing candidate probed over signatures to qualify for public funding	Daniel Burnette	9/10/04	"A defeated Democratic candidate for the House in District 28 is being investigated for allegedly forging signatures on forms to qualify for public campaign money. . . . The investigation grew out of suspicions in the Arizona Secretary of State's office in August when Mr. Lawrence submitted 223 $5 contributions to qualify for up to $11,320 in public funding for the primary election."

* * *

Ex-candidate misses appeal	Le Templar	10/3/03	"Yuri Downing was the leader of three former roommates who campaigned last year as a team of Libertarians for legislative seats. The Clean Elections Commission ordered all three to repay the state after executive director Colleen Connor said they had spent thousands of dollars at Scottsdale nightclubs, vehicle rentals and personal office equipment."
Ex-Deputy Director files suit against clean elections panel	Howard Fischer	8/28/03	"The former deputy director of the Citizens Clean Elections Commission filed suit against the commission Wednesday, claiming he was fired for complaining that politics was driving an investigation into the finances of gubernatorial candidate Matt Salmon."
Former Clean Elections official sues over firing	Daniel Burnette	8/29/03	"The former deputy director of the Citizens Clean Elections Commission has filed a lawsuit alleging that he was illegally fired for blowing the whistle on a politically motivated inquiry into the campaign finances of then-gubernatorial candidate Matt Salmon."

* * *

Salmon says $10,000 fine was effort to smear him	David Pittman	8/1/03	"A state investigator who studied the charge and ruled for the GOP candidates was fired. . . . A lawyer for Salmon said he will file suit against the commission alleging a $10,000 fine it imposed against the Republican candidate for governor was excessive, contrary to law and part of a smear campaign. In a second case, a former top commission official claims he was fired for exposing a politically motivated investigation of Salmon's campaign finances."
Clean Elections commission under fire for alleged dirty politics	No Author	4/8/07	"Shaffer and Casey charge that Frankhouser found a willing accomplice in Colleen Connor, the commission's executive director. . . . A report issued by the firm said Arizona's campaign finance laws are quite often confusing, even to accountants.' It also found no evidence to suggest the Salmon campaign deliberately delayed reporting campaign spending."

* * *

Consent agreement and mutual release of all claims – in the matter of DeDonati	Steven McFarlany	9/18/03	The Commission and Respondent agree that Respondent . . . violated the [Clean Elections] Act and the Rules. . . . Respondent made representations to the Commission that he was in compliance with the requirements of the Act and would operate his campaign and use the public funds in compliance with all requirements of the Act and Commission Rules; . . . Respondent, in fact, failed to fulfill the above-mentioned representations and failed to operate his campaign committee in complete compliance with the Act and Rules. . . ."
Arizona clean elections law	David Pittman	7/31/03	"A trio of defeated Phoenix-area legislative candidates spent thousands of dollars on alcohol, food, rental cars and entertainment expenses at trendy Scottsdale nightspots – and used Clean Elections money to do it."

It's all in the family – kinfolk often on candidates' payrolls	David Pittman	7/31/03	"Arizona political candidates have used thousands of dollars of public campaign money to hire family members."
Dirty tricks	John Dougherty	7/30/03	"Within days, the Mahoney campaign began using the [bogus] news accounts as the basis for television commercials. . . . Mahoney ran for governor as a clean-elections candidate and received more than $1.69 million in public funds for his campaign. He spent several hundred thousand dollars on the Colorado City TV ads in the last few weeks of the campaign."
Ex-candidate agrees to repay clean funds	No Author	9/17/03	"A former legislative candidate has admitted misusing public funding he got for his campaign and has agreed to repay the state about half the $31,000 he received."

. . .

A toast to questionable campaign expenditures	No Author	1/1/06	"In the last days of the 2004 election, [participating candidate Ed Ableser] got about $7,000 in Clean Elections matching funds on Election Day, obviously at a point where it was too late to spend them on campaign ads or anything else that might help him win. So what did Ableser do? Well, he could have given it back, but he wasn't required to. And he didn't. Instead, he threw a party for his campaign volunteers wherein he rented a $287 'frozen drink' machine and reimbursed his dad $1,118 for food and drink expenses. Ableser also took one of his campaign volunteers and suddenly made her a paid consultant, handing over $3,628."
Coleen Connor letter CCEC	Emily Talmege	6/27/02	"I am writing to file a complaint involving the abuse and misuse of Clean Elections funding. [Describes story] . . . I believe this is a slap in the face to all Arizonans. . . . I would also suggest an audit of all the clean election forms that are signed for Carol Springer, since the ones I witnessed were being signed fraudulently."

. . .

Dirty Cash still flows	No Author	7/15/05	" . . . I do wish to take exception with the belief that Clean Elections has taken dirty money out of elections. In fact, some candidates participating in the public funding are still selling their souls to special interest groups to line up 'independent expenditures' (attack pieces from third parties). That public funding for the challenger's campaign, coupled with attacks on fiscally conservative incumbents by political action committees and other third-party committees, doesn't bode well for the 'clean elections' argument."

* * *

CCEC Probable Cause Recommendation MUR #06-0001	Executive Director of CCEC	8/15/06	"Following an investigation of the Respondent's campaign activities, I recommend that the Commission find probable cause that the Respondent violated the Act and assess a civil penalty of $500.00."
CCEC Statement of Reasons of Executive Director MUR #08-0026	Executive Director of CCEC	10/16/08	"On behalf of the Citizens Clean Elections Commission . . . , the Executive Director hereby provides the Statement of Reasons showing reason to believe that violations of the Citizens Clean Elections Act and or the Commission rules . . . may have occurred."
CCEC Statement of Reasons of Executive Director MUR #08-0021	Executive Director of CCEC	10/17/08	"Complainant alleges that Respondent accepted in-kind contributions from KFNX/Clear Channel Communications/ The Arizona Right Report 'Right Report' in the form of discounted rates for radio advertising spots."
CCEC Statement of Reasons of Executive Director MUR #08-0021	Executive Director of CCEC	10/17/08	Complainant alleges that Respondent violated A.A.C. R2-20-109(G) by claiming transportation expenses as expenditures in two cases. Complainant alleges that Respondent reimbursed himself for $350 in transportation expenses on September 2, 2008. Complainant also alleges that Respondent also improperly directly purchased gas for an individual on several dates in July.

* * *

CCEC internally generated complaint	Executive Director of CCEC	12/14/05	"During this time, Ableser violated A.R.S. [section] 16-945(B), where early contributions may only be raised and spent during the exploratory and qualifying period. . . . Respondent's campaign made a payment to Greg Ableser, Respondent's father, for 'reimbursement of food and drinks for a campaign volunteer party' in the amount of $1,118.22 on November 2, 2004. . . . On November 1, 2004, Respondent received matching funds in the amount of $528.34, but did not report either the receipt of the funds or how the funds were spent. . . ."

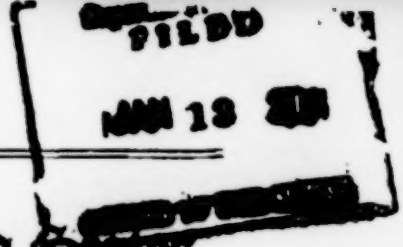
* * *

Settlement Agreement re Hernandez	Gene Lemon	11/1/05	"Respondent agrees to pay $1,190.66, which is the sum of the expenditures not reported on the amended campaign finance report and the amount remaining in his account at the end of the campaign, to the Citizens Clean Election Commission within 30 days of the date of the Settlement Agreement."
CCEC Statement of Reasons of Executive Director MUR #08-0004	Executive Director of CCEC	8/19/08	"Respondent admits that a total of $620.56 in expenditures were therefore not reimbursed within seven calendar days. This is a violation of A.A.C. R2-20-109(A)(3)(c)."

* * *

Response to CCEC MUR No 06-0014	Jason Williams	9/5/06	"Given your recent case with Governor Napolitano's reelection campaign committee, we would find it hard for you to justify any significant penalty. She committed a greater violation of the law and was not penalized at all."

Nos. 10-238, 10-239



In The
Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, et al.,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

JOHN MCCOMISH, et al.,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX, VOLUME 4, PAGES 895-1025

NICHOLAS C. DRANIAS*
GOLDWATER INSTITUTE
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION
500 East Coronado Road
Phoenix, AZ 85004
Tel: (602) 462-5000
Fax: (602) 256-7045
ndranias@goldwaterinstitute.org
Counsel for Petitioners John McComish, et al.

WILLIAM R. MAURER*
INSTITUTE FOR JUSTICE
101 Yesler Way, Suite 603
Seattle, WA 98104
Tel: (206) 341-9300
Fax: (206) 341-9311
wmaurer@ij.org
Counsel for Petitioners Arizona Free Enterprise Club's Freedom Club PAC, et al.

MARY R. O'GRADY*
Solicitor General
1275 West Washington
Phoenix, AZ 85007
Tel: (602) 542-3333
Fax: (602) 542-4085
Solicitor.General@azag.gov
Counsel for Respondents Ken Bennett, et al.

BRADLEY S. PHILLIPS*
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071
Tel: (213) 683-9100
Fax: (213) 687-3702
Brad.Phillips@mto.com
Counsel for Respondent Clean Elections Institute, Inc.

*Counsel of Record

[Additional Counsel Listed On Inside Front Cover]

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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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CLINT BOLICK
GOLDWATER INSTITUTE
SCHARF-NORTON CENTER FOR
CONSTITUTIONAL LITIGATION
500 East Coronado Road
Phoenix, AZ 85004
Tel: (602) 462-5000
Fax: (602) 256-7045
Additional Counsel for Petitioners
John McComish, et al.

WILLIAM H. MELLOR
STEVEN M. SIMPSON
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
wmellor@ij.org
Additional Counsel for Petitioners
Arizona Free Enterprise Club's Freedom Club PAC, et al.

TIMOTHY D. KELLER
PAUL V. AVELAR
INSTITUTE FOR JUSTICE
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
Tel: (480) 557-8300
Fax: (480) 557-8305
tkeller@ij.org
pavelar@ij.org
Additional Counsel for Petitioners
Arizona Free Enterprise Club's Freedom Club PAC, et al.

TIMOTHY A. NELSON
Chief Deputy Attorney General
JAMES E. BARTON II
Assistant Attorney General
1275 West Washington
Phoenix, AZ 85007
Tel: (602) 542-3333
Fax: (602) 542-4085
Additional Counsel for Respondents
Ken Bennett, et al.

GRANT A. DAVIS-DENNY
ELISABETH J. NEUBAUER
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071
Tel: (213) 683-9100
Fax: (213) 687-3702
Additional Counsel for Respondent
Clean Elections Institute, Inc.

MONICA YOUN
MIMI MARZIANI
THE BRENNAN CENTER
FOR JUSTICE AT NYU
SCHOOL OF LAW
161 Avenue of the Americas
New York, NY 10013
Tel: (212) 992-8158
Fax: (212) 995-4550
monica.youn@nyu.edu
Additional Counsel for Respondent
Clean Elections Institute, Inc.

U.S. District Court for the District of Arizona

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Title Omitted In Printing

Year	Office	Candidate	Party	Participate?	Total	Primary	General	Ran in general?	Traditional Candidate facing a Participating Candidate in Primary	Traditional Candidate Facing a Participating Candidate in General
2008	State Representative – District 1	ANDY TOBIN	Republican	Yes	$40,040.37	$30,110.54	$9,929.83	Yes		
2008	State Representative – District 1	BRYAN DETWILER	Republican	Yes	$16,946.19	$16,946.19	$0.00	No		
2008	State Representative – District 1	GEORGE SEAMAN	Other	Yes	$29,007.07	$10,272.69	$18,734.38	Yes		
2008	State Representative – District 1	LUCY MASON	Republican	Yes	$42,596.19	$30,619.07	$11,977.12	Yes		
2008	State Representative – District 1	NOEL CAMPBELL	Republican	Yes	$27,666.38	$27,666.38	$0.00	No		
2008	State Representative – District 1	WES EDMONDS	Democrat	Yes	$21,905.90	$9,302.94	$12,603.06	Yes		
2008	State Representative – District 10	DOUG QUELLAND	Republican	Yes	$56,679.00	$16,523.00	$52,156.00	Yes	p	p
2008	State Representative – District 10	JACKIE THRASHER	Democrat	Yes	$66,865.00	$27,185.26	$39,680.61	Yes	p	p
2008	State Representative – District 10	JIM WEIERS	Republican	No	$196,070.64	$47,119.13	$148,951.51	Yes	*	*
2008	State Representative – District 10	LAMONT LOVEJOY	Democrat	No	$2,019.49	$838.00	$1,181.49	Yes	*	*
2008	State Representative – District 11	ADAM DRIGGS	Republican	Yes	$33,103.92	$21,974.95	$11,178.97	Yes		
2008	State Representative – District 11	DEVIN SLAYTON	Republican	Yes	$20,647.58	$20,647.58	$0.00	No		

2006	State Representative – District 11	DON HESSELBROCK	Republican	Yes	$33,565.71	$22,284.40	$11,281.66	Yes		
2006	State Representative – District 11	JOHN ALLEN	Republican	Yes	$1,458.38	$1,458.38	$0.00	No		
2006	State Representative – District 11	MARK ANTHONY DESIMONE	Democrat	Yes	$32,681.60	$15,321.00	$17,360.60	Yes		
2006	State Representative – District 12	JERRY WEIERS	Republican	No	$2,365.96	$1,635.96	$730.00	Yes		
2006	State Representative – District 12	JOHN NELSON	Republican	No	$5,191.72	$2,984.72	$2,207.00	Yes		
2006	State Representative – District 13	MARTHA GARCIA	Democrat	No	$490.73	$62.69	$428.04	Yes		
2006	State Representative – District 13	STEVE GALLARDO	Democrat	no	$9,745.93	$3,232.31	$6,513.62	Yes		
2006	State Representative – District 14	CHAD CAMPBELL	Democrat	No	$24,149.06	$19,585.63	$4,563.43	Yes		
2006	State Representative – District 14	JOHN CARPENTER	Democrat	No	$3,751.82	$3,751.82	$0.00	No		
2006	State Representative – District 14	JOHN STEVENS	Republican	No	$1,158.98	$1,058.98	$100.00	Yes		
2006	State Representative – District 14	MIKE RENZULLI	Libertarian	no	$0.00	$0.00	$0.00	Yes		
2006	State Representative – District 14	ROBERT MEZA	Democrat	No	$40,945.67	$33,331.59	$7,614.08	Yes		
2006	State Representative – District 15	BOB GEAR	Republican	Yes	$32,678.00	$15,240.85	$17,437.15	Yes	p	p
2006	State Representative – District 15	DAVID LUJAN	Democrat	Yes	$36,519.47	$21,171.81	$13,347.66	Yes	p	p
2006	State Representative – District 15	KYRSTEN SINEMA	Democrat	Yes	$36,149.33	$21,548.86	$14,564.47	Yes	p	p
2006	State Representative – District 15	RICHARD E BUCK	Libertarian	No	$0.00	$0.00	$0.00	Yes		
2006	State Representative – District 15	ROBERT YOUNG	Democrat	No	$16,722.36	$16,722.36	$0.00	No	*	

2006	State Representative – District 15	WILLIAM WHEAT	Republican	No	$4,120.00	$448.21	$3,690.19	Yes	-	-
2006	State Representative – District 16	BEN R MIRANDA	Democrat	Yes	$36,374.03	$24,492.91	$11,881.12	Yes	P	P
2006	State Representative – District 16	BETTY DOSS WARE	Democrat	Yes	$23,632.63	23,632.63	$0.00	No	P	
2006	State Representative – District 16	CARLOS AVELAR	Democrat	Yes	$19,123.00	$19,123.00	$0.00	No	P	
2006	State Representative – District 16	CLIVES CAMPBELL JR	Democrat	No	$4,655.46	$2,717.21	$1,938.63	Yes	-	-
2006	State Representative – District 16	DANIEL COLEMAN	Republican	No	$5,267.96	$4,940.11	$327.85	Yes	-	-
2006	State Representative – District 16	ROBERT MCPEEK	Republican	Yes	$13,900.00	$13,893.98	$6.02	No	P	
2006	State Representative – District 17	ANGIE CROUSE	Democrat	Yes	$14,651.00	$14,651.00	$0.00	No		
2006	State Representative – District 17	CHRIS DEROSE	Republican	Yes	$15,412.00	$15,412.00	$0.00	No		
2006	State Representative – District 17	DALE DESPAIN	Republican	Yes	$42,866.66	$18,217.63	$24,649.03	Yes		
2006	State Representative – District 17	DAN GRANSINGER	Republican	Yes	$12,010.00	$12,010.00	$0.00	No		
2006	State Representative – District 17	DAVID W HAPIRA	Democrat	Yes	$50,966.22	$22,409.94	$28,556.28	Yes		
2006	State Representative – District 17	ED ABLESER	Democrat	Yes	$51,128.57	$18,162.75	$32,965.82	Yes		
2006	State Representative – District 17	LAURA KNAPEREK	Republican	Yes	$51,690.56	$17,992.76	$33,697.80	Yes		
2006	State Representative – District 17	RHETT WILSON	Democrat	Yes	$14,875.00	$14,855.64	$19.36	No		
2006	State Representative – District 18	MARK ANDERSON	Republican	No	$15,136.03	$7,423.67	$7,712.36	Yes		-
2006	State Representative – District 18	RUSSELL PEARCE	Republican	No	$33,539.15	$20,262.99	$13,276.16	Yes		-

2016	State Representative – District 18	TAMMIE PURSLEY	Democrat	Yes	$34,419.70	$17,319.60	$17,100.10	Yes		p
2016	State Representative – District 19	KIRK ADAMS	Republican	No	$31,267.67	$23,220.15	$8,027.52	Yes	r	r
2016	State Representative – District 19	LARA WIRETO	Democrat	Yes	$30,192.19	$21,921.41	$28,270.78	Yes		p
2016	State Representative – District 19	RICH CRANDALL	Republican	Yes	$66,606.59	$17,916.68	$28,669.91	Yes	p	p
2016	State Representative – District 2	ALBERT TOM	Democrat	No	$3,664.66	$2,462.84	$1,202.00	Yes	r	r
2016	State Representative – District 2	ANN KIRKPATRICK	Democrat	Yes	$37,646.00	$19,788.84	$17,857.16	Yes	p	p
2016	State Representative – District 2	PRESTON KORN	Republican	Yes	$33,421.83	$23,564.65	$9,856.68	Yes		p
2016	State Representative – District 20	BOB ROBSON	Republican	No	$20,896.13	$10,377.67	$10,518.46	Yes		
2016	State Representative – District 20	JACK EDWARD HEALD	Libertarian	No	$0.00	$0.00	$0.00	Yes		
2016	State Representative – District 20	JOHN MCCOMISH	Republican	No	$11,616.55	$8,538.17	$6,078.38	Yes		
2016	State Representative – District 21	DONNA WALLACE	Republican	Yes	$25,546.50	$25,546.50	$0.00	No		
2016	State Representative – District 21	PHIL HERTZMANSPERGER	Democrat	Yes	$20,202.74	$11,631.15	$8,571.59	Yes		
2016	State Representative – District 21	STEVE YARBROUGH	Republican	Yes	$32,838.44	$20,893.44	$11,945.00	Yes		
2016	State Representative – District 21	WARDE NICHOLS	Republican	Yes	$32,163.00	$20,238.70	$11,924.30	Yes		
2016	State Representative – District 22	ANDY BIGGS	Republican	No	$22,474.07	$16,895.77	$5,578.30	Yes	r	
2016	State Representative – District 22	BIDDIE FARNSWORTH	Republican	No	$20,381.40	$16,634.66	$3,746.74	Yes	r	
2016	State Representative – District 22	EDWARD SCHWERT	Libertarian	No	$0.00	$0.00	$0.00	Yes		

2006	State Representative – District 22	KARL KOHLHOFF	Republican	Yes	$31,946.65	$31,946.65	$0.00	No	p
2006	State Representative – District 22	TERRI LEA TOBEY	Republican	No	$13,400.00	$13,400.00	$0.00	No	*
2006	State Representative – District 23	BARBARA MCGUIRE	Democrat	Yes	$30,755.79	$19,642.83	$11,112.96	Yes	
2006	State Representative – District 23	FRANK PRATT	Republican	Yes	$44,959.68	$13,727.94	$31,231.74	Yes	
2006	State Representative – District 23	JOHN PILLMORE	Republican	Yes	$48,810.74	$24,811.69	$23,999.05	Yes	
2006	State Representative – District 23	KRISTA PACION	Democrat	Yes	$14,766.95	$14,766.95	$0.00	No	
2006	State Representative – District 23	PETE RIOS	Democrat	Yes	$47,739.20	$16,114.26	$31,624.94	Yes	
2006	State Representative – District 24	JOSEPH MEL MELCHIONNE	Republican	Yes	$35,235.70	$26,096.73	$9,138.97	Yes	
2006	State Representative – District 24	KEN ROSEVEAR	Republican	Yes	$31,965.03	$15,367.58	$16,597.45	Yes	
2006	State Representative – District 24	LYNNE PANCRAZI	Democrat	Yes	$35,918.95	$16,116.95	$19,802.00	Yes	
2006	State Representative – District 24	RODNEY MARTIN	Reform Party	No	$0.00	$0.00	$0.00	Yes	
2006	State Representative – District 24	THERESA ULMER	Democrat	Yes	$48,727.63	$13,346.03	$35,381.60	Yes	
2006	State Representative – District 25	GAIL GRIFFIN	Republican	No	$28,790.01	$8,154.05	$18,640.96	Yes	*
2006	State Representative – District 25	JENNIFER J BURNS	Republican	Yes	$30,266.00	$25,615.57	$26,650.43	Yes	p
2006	State Representative – District 25	MANUEL V ALVAREZ	Democrat	Yes	$49,476.68	$16,303.76	$33,172.92	Yes	p
2006	State Representative – District 25	PAT FLEMING	Democrat	Yes	$49,323.19	$17,543.87	$31,779.32	Yes	p
2006	State Representative – District 26	ROGER C CONDRA	Republican	Yes	$20,642.40	$20,642.40	$0.00	No	p

2006	State Representative - District 27	WILLIAM H MOORE	Other	No	$3,237.65	$3,047.65	$250.00	Yes			
2006	State Representative - District 28	CAROL SOMERS	Republican	No	$53,620.00	$53,620.00	$0.00	No	*		
2006	State Representative - District 26	DAVID JORGENSON	Republican	Yes	$19,607.29	$6,577.61	$20,085.68	Yes	p		p
2006	State Representative - District 26	LENA SARAINIK	Democrat	Yes	$37,404.36	$15,818.79	$21,585.57	Yes			p
2006	State Representative - District 26	LISA LOVALLO	Republican	No	$74,609.93	$74,598.93	$11.00	No	*		
2006	State Representative - District 26	PETER HERSHBERGER	Republican	No	$61,459.44	$49,046.82	$12,616.62	Yes	*		*
2006	State Representative - District 27	GENE CHEWNING	Republican	No	$3,953.97	$2,018.01	$1,935.96	Yes			*
2006	State Representative - District 27	OLIVIA CAJERO BEDFORD	Democrat	Yes	$35,375.36	$18,933.40	$16,441.96	Yes			p
2006	State Representative - District 27	PHIL LOPES	Democrat	Yes	$27,558.29	$13,258.36	$14,299.93	Yes			p
2006	State Representative - District 28	BILL PHILLIPS	Republican	Yes	$30,270.40	$19,628.22	$10,642.18	Yes			
2006	State Representative - District 28	DAVID BRADLEY	Democrat	Yes	$31,757.07	$20,898.54	$10,858.53	Yes	p		
2006	State Representative - District 28	MATT HEINZ	Democrat	Yes	$24,484.67	$24,484.67	$0.00	No	p		
2006	State Representative - District 28	STEVE FARLEY	Democrat	Yes	$31,638.41	$20,917.51	$10,717.90	Yes	p		
2006	State Representative - District 28	TED PREZELSKI	Democrat	No	$2,834.68	$2,834.68	$0.00	No	*		
2006	State Representative - District 29	BETTY LIGGINS	Democrat	No	$553.42	$553.42	$0.00	No	*		
2006	State Representative - District 29	BRUCE P MURCHISON	Republican	Yes	$30,438.00	$17,343.26	$13,096.74	Yes			p
2006	State Representative - District 29	LINDA LOPEZ	Democrat	Yes	$19,571.32	$10,649.29	$8,922.03	Yes	p		p

2006	State Representative – District 29	PATICIA ANNE PUIG	Democrat	No	$1,689.30	$1,538.66	$150.64	No	*	
2006	State Representative – District 29	TOM PREZELSKI	Democrat	No	$7,896.39	$4,430.51	$3,465.88	Yes	*	*
2006	State Representative – District 3	DORIS GOODALE	Republican	Yes	$25,800.72	$25,800.72	$0.00	No	p	
2006	State Representative – District 3	LUIS LOPEZ	Democrat	Yes	$32,035.36	$20,363.55	$11,671.81	Yes		p
2006	State Representative – District 3	NANCY MCLAIN	Republican	Yes	$43,013.14	$32,813.01	$10,200.13	Yes	p	p
2006	State Representative – District 3	RAY CULLISON II	Republican	Yes	$30,434.29	$30,434.29	$0.00	No	p	
2006	State Representative – District 3	TRISH GROE	Republican	No	$2,417.25	$2,417.25	$0.00	Yes	*	*
2006	State Representative – District 30	CLARENCE BOYKINS	Democrat	Yes	$46,009.51	$14,830.65	$31,178.86	Yes		p
2006	State Representative – District 30	DAVID GOWAN	Republican	Yes	$51,215.43	$51,215.43	$0.00	No	p	
2006	State Representative – District 30	FRANK CALLEGARI	Republican	Yes	$12,995.23	$12,995.23	$0.00	No	p	
2006	State Representative – District 30	JONATHAN PATON	Republican	No	$33,342.84	$30,505.67	$2,837.17	Yes	*	*
2006	State Representative – District 30	MARIAN MCCLURE	Republican	No	$39,998.15	$33,705.96	$6,292.19	Yes	*	*
2006	State Representative – District 4	DEBRA BOEHLKE	Democrat	Yes	$32,204.24	$18,303.65	$13,900.59	Yes	p	p
2006	State Representative – District 4	JUDY BURGES	Republican	Yes	$32,856.66	$22,296.72	$10,559.94	Yes		p
2006	State Representative – District 4	SUE DOLPHIN	Democrat	No	$4,584.62	$2,839.28	$1,745.34	Yes	*	*
2006	State Representative – District 4	TOM BOONE	Republican	Yes	$32,843.00	$19,875.00	$12,968.00	Yes		p
2006	State Representative – District 5	BILL KONOPNICKI	Republican	No	$4,618.31	$1,655.22	$2,963.09	Yes		

2008	State Representative – District 5	DAVE RODRIGUEZ	Democrat	No	$0.00	$0.00	$0.00	No			
2008	State Representative – District 5	JACK A BROWN	Democrat	No	$2,939.05	$363.20	$2,552.85	Yes			
2008	State Representative – District 6	CARL SEFL	Republican	Yes	$52,772.07	$52,772.07	$0.00	No	p		
2008	State Representative – District 6	CLARK THOMAS	Republican	Yes	$49,147.62	$49,147.62	$0.00	No	p		
2008	State Representative – District 6	DOUG CLARK	Republican	No	$22,964.44	$22,422.01	$562.43	Yes	-		
2008	State Representative – District 6	SAM CRUMP	Republican	No	$41,450.36	$37,196.64	$4,253.72	Yes	-		
2008	State Representative – District 7	DAVID BURNELL SMITH	Republican	No	$43,243.45	$41,668.31	$1,817.54	No			
2008	State Representative – District 7	HOWARD SPRAGUE	Republican	No	$3,705.99	$3,705.99	$0.00	No			
2008	State Representative – District 7	JEANNE LUNN	Democrat	Yes	$31,658.36	$14,656.87	$16,901.49	Yes		p	
2008	State Representative – District 7	JIM IANNUZZI	Libertarian	No	$0.00	$0.00	$0.00	Yes			
2008	State Representative – District 7	MARILYN FOX	Democrat	Yes	$31,077.30	$14,514.81	$16,562.49	Yes		p	
2008	State Representative – District 7	NANCY BARTO	Republican	No	$47,627.41	$43,189.63	$4,437.78	Yes		-	
2008	State Representative – District 7	RAY BARNES	Republican	No	$21,563.96	$16,693.98	$4,869.98	Yes		-	
2008	State Representative – District 8	CAROLYN M SCHOENBECK	Republican	Yes	$56,244.00	$56,244.00	$0.00	No	p		
2008	State Representative – District 8	JIM BURKE	Republican	No	$34,811.58	$33,809.42	$1,002.16	No	-		
2008	State Representative – District 8	JOHN KAVANAGH	Republican	Yes	$58,746.11	$57,601.47	$1,144.64	Yes	p	p	
2008	State Representative – District 8	MICHELE REAGAN	Republican	No	$65,723.37	$37,963.99	$27,759.64	Yes	-	-	

2006	State Representative – District 8	STEPHANIE RIMMER	Democrat	Yes	$52,971.70	$18,985.15	$33,986.55	Yes		p
2006	State Representative – District 8	TRAVIS JUNION	Republican	Yes	$18,296.37	$18,296.37	$0.00	No	p	
2006	State Representative – District 8	WILLIAM H SANDBERG	Democrat	Yes	$19,796.36	$6,119.10	$13,677.26	Yes		p
2006	State Representative – District 9	BOB STUMP	Republican	No	$8,625.73	$8,397.32	$228.41	Yes		-
2006	State Representative – District 9	DAVID FRALEY	Republican	No	$4,783.05	$4,783.05	$0.00	No		
2006	State Representative – District 9	RICK MURPHY	Republican	No	$6,328.04	$2,429.63	$3,898.41	Yes		-
2006	State Representative – District 9	SHERI VAN HORSEN	Democrat	Yes	$31,627.46	$16,241.31	$15,386.15	Yes		p
2006	State Senator – District 1	ELISE TOWNSEND	Republican	No	$41,421.06	$41,421.06	$0.00	No		
2006	State Senator – District 1	JO KELLEHER	Democrat	Yes	$33,402.56	$21,707.56	$11,695.00	Yes		p
2006	State Senator – District 1	TERRY DUNN	Libertarian	No	$0.00	$0.00	$0.00	Yes		
2006	State Senator – District 1	TOM O'HALLERAN	Republican	No	$117,816.39	$115,781.52	$2,034.87	Yes		-
2006	State Senator – District 1	WILLIAM STOLL	Republican	No	$102,533.18	$102,533.18	$0.00	No		
2006	State Senator – District 10	DANIEL M POLAND	Libertarian	No	$0.00	$0.00	$0.00	No		
2006	State Senator – District 10	LINDA GRAY	Republican	Yes	$32,106.19	$14,250.33	$17,855.86	Yes		
2006	State Senator – District 10	MARTIN JAMES MONROE	Democrat	Yes	$30,330.96	$13,050.64	$17,280.32	Yes		
2006	State Senator – District 11	ANN WALLACE	Democrat	Yes	$67,711.43	$15,386.94	$52,324.49	Yes		p
2006	State Senator – District 11	BARBARA LEFF	Republican	No	$66,212.44	$26,103.48	$40,108.96	Yes		-

2006	State Senator – District 12	ROBERT BLENDU	Republican	No	$9,631.27	$9,631.27	$0.00	Yes		
2006	State Senator – District 13	RICHARD MIRANDA	Democrat	No	$8,893.00	$7,774.31	$1,118.69	Yes		
2006	State Senator – District 14	DEBBIE MCCUNE-DAVIS	Democrat	No	$9,470.36	$8,085.39	$1,384.97	Yes		
2006	State Senator – District 15	ANDREW SMIGIELSKI	Libertarian	No	$0.00	$0.00	$0.00	Yes		
2006	State Senator – District 15	JOHN WILLIAMS	Libertarian	No	$0.00	$0.00	$0.00	No		
2006	State Senator – District 15	KEN CHEUVRONT	Democrat	Yes	$32,699.14	$14,781.42	$17,917.72	Yes		
2006	State Senator – District 16	DANIEL VERES	Republican	Yes	$31,903.00	$16,356.68	$15,546.32	Yes		
2006	State Senator – District 16	LEAH LANDRUM	Democrat	Yes	$32,433.00	$24,283.77	$8,149.23	Yes		
2006	State Senator – District 17	MEG BURTON CAHILL	Democrat	Yes	$33,422.00	$15,376.03	$18,045.97	Yes		
2006	State Senator – District 17	ROSE CRUTCHER	Republican	Yes	$65,426.92	$15,711.51	$50,115.41	Yes		
2006	State Senator – District 18	JOE BROWN	Republican	No	$646.48	$646.48	$0.00	No		
2006	State Senator – District 18	KAREN S JOHNSON	Republican	No	$19,365.41	$14,006.55	$5,357.46	Yes		
2006	State Senator – District 18	RACHEL KIELSKY	Libertarian	No	$0.00	$0.00	$0.00	Yes		
2006	State Senator – District 19	CHUCK GRAY	Republican	No	$41,369.13	$27,742.94	$13,626.19	Yes		
2006	State Senator – District 19	STEVEN ZACHARY	Democrat	Yes	$46,212.09	$11,938.37	$34,273.72	Yes		
2006	State Senator – District 2	ALBERT HALE	Democrat	No	$4,465.52	$200.00	$4,265.52	Yes		
2006	State Senator – District 2	MARK HALGHWOUT	Other	No	$11,632.14	$1,866.17	$9,765.97	Yes		

2006	State Senator – District 2	ROYCE JENKINS	Republican	Yes	$31,403.89	$25,150.39	$6,253.50	Yes		p
2006	State Senator – District 20	DONNA GRATEHOUSE	Democrat	Yes	$30,904.77	$16,323.11	$14,581.66	Yes		
2006	State Senator – District 20	JOHN HUPPENTHAL	Republican	Yes	$32,962.34	$15,041.00	$17,921.34	Yes		
2006	State Senator – District 21	JAY TIBSHRAENY	Republican	No	$18,208.81	$15,915.80	$2,293.01	Yes		
2006	State Senator – District 22	GLENN RAY	Democrat	Yes	$30,757.17	$13,782.54	$16,974.63	Yes		p
2006	State Senator – District 22	JOE BEDGOOD	Republican	Yes	$24,203.92	$24,203.92	$0.00	No	p	
2006	State Senator – District 22	THAYER VERSCHOOR	Republican	No	$39,173.58	$21,594.29	$16,579.29	Yes	*	*
2006	State Senator – District 23	CHERYL CHASE	Republican	No	$41,971.79	$35,240.44	$6,726.35	Yes		*
2006	State Senator – District 23	REBECCA RIOS	Democrat	Yes	$68,325.42	$23,116.18	$45,209.24	Yes		p
2006	State Senator – District 24	AMANDA AGUIRRE	Democrat	Yes	$46,594.07	$14,651.21	$31,942.86	Yes		
2006	State Senator – District 24	RUSS JONES	Republican	Yes	$68,463.96	$23,514.66	$44,949.30	Yes		
2006	State Senator – District 24	STANLEY LENIHAN	Reform Party	No	$1,036.76	$130.00	$906.76	Yes		
2006	State Senator – District 25	MARSHA ARZBERGER	Democrat	No	$20,772.55	$10,455.30	$10,317.25	Yes		*
2006	State Senator – District 25	MARY ANN BLACK	Republican	Yes	$62,095.39	$37,433.26	$24,662.13	Yes		p
2006	State Senator – District 26	AL MELVIN	Republican	Yes	$91,808.11	$58,537.78	$33,270.33	Yes	p	p
2006	State Senator – District 26	CHARLENE FERNANDEZ	Democrat	No	$29,366.77	$3,303.25	$26,063.52	Yes		*
2006	State Senator – District 26	TONI HELLON	Republican	No	$114,977.72	$94,375.52	$20,602.20	No	*	

2006	State Senator – District 27	JORGE LUIS GARCIA	Democrat	No	$2,206.99	$206.99	$2,000.00	Yes		
2006	State Senator – District 28	JOHN MICHAEL STEIMER	Write In	No	$0.00	$0.00	$0.00	Yes		
2006	State Senator – District 28	PAULA ABOUD	Democrat	Yes	$21,985.25	$21,433.56	$551.69	Yes		
2006	State Senator – District 28	TED DOWNING	Democrat	Yes	$29,754.71	$29,754.71	$0.00	No		
2006	State Senator – District 29	VICTOR SOLTERO	Democrat	No	$7,635.70	$5,750.44	$1,885.26	Yes		
2006	State Senator – District 3	NOAH K HARRIS	Democrat	No	$3,150.72	$279.31	$2,871.41	Yes		
2006	State Senator – District 3	RON GOULD	Republican	No	$11,248.65	$5,002.47	$6,246.18	Yes		
2006	State Senator – District 30	JEFFREY CHIMENE	Democrat	Yes	$63,338.36	$25,668.12	$37,670.24	Yes		p
2006	State Senator – District 30	TIM BEE	Republican	No	$73,547.90	$26,850.14	$46,697.76	Yes		-
2006	State Senator – District 4	ED GOGEK	Democrat	Yes	$33,722.74	$18,905.00	$14,817.74	Yes		
2006	State Senator – District 4	JACK HARPER	Republican	Yes	$32,963.00	$21,729.27	$11,233.73	Yes		
2006	State Senator – District 4	WILLARD WHALEN	Republican	Yes	$20,708.00	$20,708.00	$0.00	No		
2006	State Senator – District 5	JAKE FLAKE	Republican	No	$15,906.53	$10,534.09	$5,372.44	Yes		-
2006	State Senator – District 5	PHIL COBB	Democrat	Yes	$18,970.46	$11,932.55	$7,037.91	Yes		p
2006	State Senator – District 6	JIM LARSON	Democrat	Yes	$31,695.17	$15,094.50	$16,600.67	Yes		p
2006	State Senator – District 6	PAMELA GORMAN	Republican	No	$43,657.39	$38,105.61	$5,551.78	Yes	-	-
2006	State Senator – District 6	TED CARPENTER	Republican	Yes	$44,129.33	$44,129.33	$0.00	No	p	

2006	State Senator – District 7	JIM WARING	Republican	No	$80,168.28	$9,468.70	$70,699.58	Yes			*
2006	State Senator – District 7	LISA BLACK	Democrat	Yes	$68,368.00	$17,278.07	$51,089.93	Yes			p
2006	State Senator – District 8	CAROLYN S ALLEN	Republican	No	$159,000.85	$148,123.43	$10,877.42	Yes	*		*
2006	State Senator – District 8	COLETTE ROSATI	Republican	Yes	$57,322.00	$57,322.00	$0.00	No	p		
2006	State Senator – District 8	DAN OSERAN	Democrat	Yes	$30,556.63	$12,690.63	$17,866.00	Yes			p
2006	State Senator – District 9	ROBERT BURNS	Republican	No	$22,649.29	$4,843.24	$17,806.05	Yes			*
2006	State Senator – District 9	STEVE POE	Democrat	Yes	$32,526.79	$23,084.83	$9,441.96	Yes			p
					$6,481,390.50	$4,058,565.22	$2,422,886.28				

For race analysis:

* designates traditional candidate

p designates participating candidate

Traditional candidate vs. participating candidate spending in primary and general	
sum of participating candidates in the primary =	$2,492,046.34
number of participating candidates in primary =	114
spending in Primary per participating candidate =	$21,860.06
sum of traditional candidates in the primary =	$1,566,458.88
number of participating candidates in primary =	92
spending in primary per traditional candidate =	$17,026.73
sum of participating candidates in general =	$1,755,087.59
number of participating candidates in general =	85
spending in general per participating candidate =	$20,648.09
sum of traditional candidates in general =	$644,106.77
number of traditional candidates in general =	73
spending in general per traditional candidate =	$8,823.38

Following calculations made using only races where a traditional candidate faced on or more participating candidates	
sum of traditional candidates who faced a participating candidate in the primary =	$845,628.78
number of traditional candidates who faced a participating candidate in the primary =	31
spending in primary per traditional candidate who faced a participating candidate =	$27,278.35
sum of participating candidates in those elections =	$1,023,537.78
number of participating candidates in those elections =	34
spending in primary per participating candidate in those elections =	$30,104.05
sum of traditional candidates who faced a participating candidate in the general =	$553,550.89
number of traditional candidates who faced a participating candidate in the general =	36
spending in general per traditional candidate who faced a participating candidate =	$15,376.41

sum of participating candidates in those elections =	$1,017,263.25
number of participating candidates in those elections =	46
spending in general per participating candidate in those elections =	$22,114.42

Following calculations made using same method as above and ignoring traditional candidates who spent more than the spending cap and their participating opponents	
sum of traditional candidates who faced a participating candidate in the primary =	$425,866.08
number of traditional candidates who faced a participating candidate in the primary =	26
spending in primary per traditional candidate who faced a participating candidate =	$16,379.46
sum of participating candidates in those elections =	$849,106.19
number of participating candidates in those elections =	31
spending in primary per participating candidate in those elections =	$27,390.52

sum of traditional candidates who faced a participating candidate in the general =	$332,718.31
number of traditional candidates who faced a participating candidate in the general =	33
spending in general per traditional candidate who faced a participating candidate =	$10,082.37
sum of participating candidates in those elections =	$874,336.96
number of participating candidates in those elections =	43
spending in general per participating candidate in those elections =	$20,333.42

Calculations made with only top 10% of spenders	
Top 10% in primary spending total =	$1,311,528.49
Number of candidates in top 10% =	21
Primary spending per candidate in top 10% =	$62,453.74
Top 10% in general spending total =	$980,323.70
Number of candidates in top 10% =	21
General spending per candidate in top 10% =	$46,682.08

Calculations made with all traditional, major-party candidates	
Traditional major party candidate spending total =	$2,218,126.64
Number of traditional major party candidates =	77
Total spending per traditional major party candidate =	$28,806.84

U.S. District Court for the District of Arizona

(Filed Jul. 17, 2009)

[Title Omitted In Printing]

PRIMARY FUNDING OVERVIEW REPORT						CITIZENS CLEAN ELECTIONS COMMISSION		
CANDIDATE NAME:	**GOODALE, DORIS**			**Max Funding Possible**	**Initial Funding**	**Equalizing Funding**	**Total Funds Issued To Date**	**Balance of Funds Available**
CANDIDATE ID:	20060301[illegible]							
OFFICE SOUGHT:	State Representative – District 3			$58,146.00	$19,382.00	$6,831.90	$26,213.90	$31,932.10

Date Initiated	Date	Current Stage	Funding Type	Basis of Matching (Independent expenditure, traditional candidate exceeded trigger threshold)	Trigger Amount or Cost of Ind. Expenditure	Funding Amount	Funding To Date From Source
06/30/2008	06/30/2008	Paid/ Completed	Primary Initial	Initial Funding		$12,921.00	$12,921.00
07/01/2008	07/01/2008	Paid/ Completed	Primary Initial	Initial Funding		$6,461.00	$19,382.00
08/06/2008	08/07/2008	Paid/ Completed	Primary Ind Expenditure	1452 – HOME BUILDERS ASSN OF CENTRAL AZ POLITICAL ACTION COMMITTEE Benefits – 20060[illegible] – TRISH GROE On 07/29/2008	$2,196.12	$2,064.35	$2,064.35
08/06/2008	08/07/2008	Paid/ Completed	Primary Ind Expenditure	1452 – HOME BUILDERS ASSN OF CENTRAL AZ POLITICAL ACTION COMMITTEE	$2,196.12	$2,064.35	$4,128.70
08/25/2008	08/27/2008	Paid/ Completed	Primary Equalizing	20060[illegible] – GROE 2008	$24,536.84	$1,869.58	$1,869.58
08/25/2008	08/27/2008	Paid/ Completed	Primary Equalizing	20060[illegible] – COMMITTEE TO ELECT NANCY MCLAIN	$23,434.75	$933.62	$933.62

INSTITUTE FOR JUSTICE
Timothy D. Keller (019844)
Jennifer M. Perkins (023087)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
P: 480-557-8300/F: 480-557-8305

INSTITUTE FOR JUSTICE
William R. Maurer (WSBA 25451)[1]
101 Yesler Way, Suite 603
Seattle, WA 98104
P: 206-341-9300/F: 206-341-9311

Attorneys for Plaintiff-Intervenors

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*,

Plaintiffs,

and

DEAN MARTIN, a citizen of the State Of Arizona, *et al.*,

Plaintiff-Intervenors

vs.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; *et al.*,

Defendants.

Civil Action No. 08-1550-PHX-ROS

Hon. Roslyn O. Silver, presiding

DECLARATION OF JOSHUA L. HEATH IN SUPPORT OF PLAINTIFF-INTERVENORS' RESPONSE TO MOTION FOR SUMMARY JUDGMENT BY CLEAN ELECTIONS, INC.

---

[1] Admitted *pro hac vice*.

and

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant-Intervenor.

(Filed Jul. 17, 2009)

I, JOSHUA L. HEATH, pursuant to 28 U.S.C. § 1746(2), hereby declare under penalty of perjury as follows:

1. I am twenty-five years of age, of sound mind, and willing to testify to all matters set forth herein under oath in a court of law or otherwise. I have personal knowledge of all facts set forth in this Declaration.

2. I am a citizen of the United States and a resident of Virginia Beach County, Virginia.

3. I am currently a law clerk at the Institute for Justice. In the past I have worked as a judicial intern at Portsmouth General District Court in Portsmouth, Virginia, and also worked as a personal intern to Arizona State Senator Jack Harper during my undergraduate studies at Grand Canyon University in Phoenix, Arizona.

4. I was asked by counsel for Plaintiff-Intervenors to review the data sources referenced in Defendant-Intervenors' Memorandum in Support of Motion for Summary Judgment, Donald Green's Declaration in Support of Motion for Summary Judgment, and Angela Migally's Declaration in Support of Motion for Summary Judgment.

* * *

27. However, complete data from Wisconsin Campaign Finance Project reveals that although $6,317,736 were spent in 2006 (a number similar to the amount cited by Green for 2006), in 1998 $3,779,483 (in 2006 dollars) were spent. Attached to this Declaration as Attachment 11 is a true and correct copy of the material located at Wisconsin Campaign Finance Project, *Arizona Data*, http://campfm.polisci.wisc.edu/ArizonaData.asp (last visited July 8, 2009), which I downloaded from such site. This material has not been altered or manipulated in any way.

28. The Project's 1998 figure is 183.32% higher than the figure that Defendant-Intervenor cites, and thus reflects only a 67.16% increase in total spending from 1998 to 2006 rather than the 400% increase that Dr. Green states. The average spending in 1998, according to the Project's data, was $21,847 (2006 dollars), which is 189.86% higher than the figure Defendant-Intervenor asserts. *Id.* Again rather than 400% increase Defendant-Intervenor claims, the increase amounts to a mere 40.38% increase. In other words Defendant-Intervenor has grossly exaggerated the amount of increased spending by a multiplier of nearly 10.

29. All 1998 expenditure amounts have been adjusted for inflation using the same Consumer Price Index inflation calculator cited by Ms. Migally in her declaration; a calculator on which Dr. Green also relied in calculating his own data. Bureau of Labor Statistics,

Overview of BLS Statistics on Inflation and Prices, http://www.bls.gov/bls/inflation.htm (last visited July 9, 2009).

30. The data from followthemoney.org also similarly reveals the same errors. This even more comprehensive site which has recorded 98% of all reports to date, records $5,349,845 dollars spent in 1998, as opposed to $6,926,010 in 2006, which is 301.04% higher than the figure Dr. Green relied on, and an average of $30,571 per candidate in 1998 as opposed to $34,287 in 2006, 305.61% higher than the figure Dr. Green relied on. This amounts to a total increase in spending from 1998 to 2006 of only 29.46% and an increase in average spending of only 12.16%. Defendant-Intervenors' inaccurate 400% figure is nearly 13 times the actual amount of increase in total spending and nearly 33 times the actual amount of increase in average spending. Attached to this Declaration as Attachment 12 is a true and correct copy of the materials located at Followthemoney.org, *State Overview: Arizona 1998*, http://www.followthemoney.org/database/state_overview.phtml?s=AZ&y=1998 (last visited July 16, 2009), which I downloaded from such site. This material has not been altered or manipulated in any way. Attached to this Declaration as Attachment 13 is a true and correct copy of the materials located at Followthemoney.org, *State Overview: Arizona 2006*, http://www.followthemoney.org/database/state_overview.phtml?s=AZ&y=2006 (last visited July 16, 2009), which I downloaded from such site.

This material has not been altered or manipulated in any way.

* * *

I, Joshua Logan Heath, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the United States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 16th day of July, 2009, in Tempe, Arizona.

/s/ Joshua L. Heath
Joshua L. Heath

INSTITUTE FOR JUSTICE
Timothy D. Keller (019844)
Jennifer M. Perkins (023087)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
P: 480-557-8300/F: 480-557-8305

INSTITUTE FOR JUSTICE
William R. Maurer (WSBA 25451)[1]
101 Yesler Way, Suite 603
Seattle, WA 98104
P: 206-341-9300/F: 206-341-9311

Attorneys for Plaintiff-Intervenors

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*, Plaintiffs, and DEAN MARTIN, a citizen of the United States Of Arizona, *et al.*, Plaintiff-Intervenors vs. KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; *et al.*, Defendants,	Civil Action No. 08-1550-PHX-ROS DECLARATION OF DAVID M. PRIMO, Ph.D. IN SUPPORT OF THE PLAINTIFF-INTERVNORS' RESPONSE TO DEFENDANT-INTERVENOR CLEAN ELECTIONS INSTITUTE, INC.'S MOTION FOR SUMMARY JUDGMENT (Filed Jul. 17, 2009)

[1] Admitted *pro hac vice*.

and	)	(Assigned to the
	)	Honorable
CLEAN ELECTIONS INSTITUTE, INC.	)	Roslyn O. Silver)
	)	
Defendant-Intervenor.	)	

I, David M. Primo, declare under penalty of perjury that the following is true:

1. I am a citizen of the United States, a resident of the State of New York, and over the age of 18 years. I make this declaration in support of Plaintiff-Intervenors' Response to Defendant-Intervenor Clean Elections Institute, Inc.'s Motion for Summary Judgment based on my personal knowledge of the facts stated herein.

2. I have been asked by counsel for the Plaintiff-Intervenors to evaluate the effect of the matching funds provision of the Arizona Clean Elections law on candidate behavior. I was paid $225 per hour for the work on my initial and rebuttal reports; in addition, I will be compensated $250 per hour for any subsequent testimony.

3. In his declaration, Prof. Donald Green writes in statement 13, "If anything Arizona's matching fund system may be credited with a dramatic increase in the overall quantity of campaign communication, as gauged by the number of candidates and their cumulative campaign expenditures. In 1998, 177 legislative candidates spent a total of $1,333,999

(in 2006 dollars); by 2006, 206 legislative candidates spent a total of $6,487,133."

4. This assertion was used by Defendant-Intervenor to claim that the act has resulted in a "surge" in campaign spending.

5. It has come to my attention that both Prof. Green's claim and Defendant-Intervenor's interpretation of Prof. Green's findings are incorrect because Prof. Green was working with incomplete data. Because the source of Prof. Green's data was previously unclear, I was unaware that Prof. Green relied on such faulty data when I wrote my expert rebuttal report or my declaration in support of the Plaintiff-Intervenors' Motion for Summary Judgment.

6. The National Institute on Money in State Politics makes available comprehensive state-level campaign finance data on its website, followthe money.org. The data is commonly used by researchers in the political science field working on campaign finance issues.

7. The followthemoney.org database indicates that total spending by legislative candidates in 1998 Arizona legislative elections was $5,349,925 (in 2006 dollars), not $1,333,999, as Prof. Green reported. Put another way, Prof. Green's figures underreported total spending in 1996 by over 300%. Once the correct figures for 1998 and 2006 are used, the difference between total 1998 and 2006 spending is much smaller than reported by Prof. Green.

8. The difference between 1998 and 2006 spending is even more muted when average spending per candidate is examined. Average spending per candidate in Senate races was virtually unchanged from 1998 to 2006, and average spending in House races increased by only 21%. Overall spending per candidate in all legislative races increased by a mere 12%.

9. Data from the followthemoney.org website clearly shows that many states have seen a surge in campaign spending since 1998. Arizona is not one of them.

10. Finally, Prof. Green's focus on totals obscures a more important effect of the Clean Elections law: it alters who speaks, and when. This effect is important regardless of aggregate levels of spending.

11. My expert report demonstrated that the matching provision of the Clean Elections law changes the timing of contributions, the timing of expenditures, and the strategies of candidates, with deleterious effects on free expression.

12. In conclusion, Prof. Green's assertion that campaign spending has increased dramatically since the inception of Clean Elections is incorrect. In absolute terms, spending has increased modestly since Clean Elections has been enacted. Moreover, the change in total spending masks the harms to free expression for candidates choosing not to accept public monies in campaigns.

I certify and declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief. Executed this 17th day of July, 2009, in Rochester, NY.

/s/ David M. Primo
David M. Primo

BRADLEY S. PHILLIPS (*pro hac vice*)
Brad.Phillips@mto.com
GRANT A. DAVIS-DENNY (*pro hac vice*)
Grant.Davis-Denny@mto.com
ELISABETH J. NEUBAUER (*pro hac vice*)
Elisabeth.Neubauer@mto.com
PUNEET K. SANDHU (*pro hac vice*)
Puneet.Sandhu@mto.com
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

MONICA YOUN (*pro hac vice*)
monica.youn@nyu.edu
ANGELA MIGALLY (*pro hac vice*)
angela.migally@nyu.edu
THE BRENNAN CENTER FOR JUSTICE AT NYU
SCHOOL OF LAW
161 Avenue of the Americas
New York, NY 10013
Telephone: (212) 992-8158
Facsimile: (212) 995-4550

TIMOTHY M. HOGAN (004567)
ARIZONA CENTER FOR LAW IN THE
PUBLIC INTEREST
202 E. McDowell Road, Suite 153
Phoenix, AZ 85004
Telephone: (602) 258-8850

Attorneys for Defendant-Intervenor
CLEAN ELECTIONS INSTITUTE, INC.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*, Plaintiffs, and DEAN MARTIN, *et al.*, Plaintiff-Intervenors, vs. KEN BENNETT, *et al.*, Defendants, and CLEAN ELECTIONS INSTITUTE, INC., Defendant-Intervenor.	CASE NO. CV-08-1550-PHX-ROS (Assigned To The Honorable Roslyn O. Silver) **DEFENDANTS' AND DEFENDANT-INTERVENOR'S JOINT RESPONSE TO PLAINTIFFS' SEPARATE STATEMENT** (Filed Jul. 17, 2009)

Defendants and Defendant-Intervenor (collectively "Defendants") submit this joint response to Plaintiffs' separate statement of undisputed material facts in support of their summary-judgment motion, in compliance with Federal Rules of Evidence 56(e) and Local Rules 7.2(m)(2) and 56.1(b).

* * *

Statement of Undisputed Fact	**Plaintiffs' Response and Support**
* * *	
36. The CCEC awarded matching funds in the	36. NOT DISPUTED. **EVID. OBJECTIONS:**

total amount of $12,574.25 to Carl Seel based on the expenditures made by Sam Crump on August 14, 28 and 29, 2008. (Bouie MSJ Dec., pp. 13:23-28, 14:1-13.)	*See* Bouie MSJ Decl. Objections below.

* * *

44. Based on McComish's reported expenditure of approximately $43,080.40, on or about August 7, 2008, his participating candidate opponent Jeff Dial was awarded $14,755.64 in matching funds; on or about August 8, 2008, his participating opponent Andy Swan was given $13,864.90; and on or about August 14, 2008, his participating opponent Frank Schmuck was given $13,665.64 in matching funds. (McComish MSJ Dec., p. 5:19-28.)	44. **IN DISPUTE.** The record contains evidence contradicting this "fact." *See* Additional Facts Nos. 20 and 21 below. The amount and dates that matching funds were issued to Mr. Swann and Rep. Dial is NOT DISPUTED. **EVID. OBJECTIONS:** *See* McComish MSJ Decl. Objections below.
45. By August 14, 2008, based on McComish's reported expenditure of $43,080.40, his participating opponents received a total of $42,286.18 in matching funds in addition to $58,146.00 in lump sum public financing, or nearly $100,000. (McComish MSJ Dec., pp. 5:19-28, 6:1-2.)	45. NOT DISPUTED but neither relevant nor material to any issue on summary judgment. **EVID. OBJECTIONS:** *See* McComish MSJ Decl. Objections below.

* * *

49. By August 20, 2008, McComish's participating opponents had received a total of $82,081.98 in matching funds, plus their original $58,146.00 lump sum of public financing, for a grand total of $140,227.98 as against direct and independent expenditures in support of the McComish campaign of less than $50,000. (McComish MSJ Dec., p. 7:3-10.)	49. NOT DISPUTED. **EVID. OBJECTIONS:** *See* McComish MSJ Decl. Objections below.

* * *

64. McLain's primary campaign expenditures exceeded the primary election spending limit for her opposing participating candidate, and at least $833.62 in "equalizing" matching funds were triggered to Doris Goodale on or about August 27, 2008. (McLain MSJ Dec., p. 4:14-28.)	64. NOT DISPUTED. **EVID. OBJECTIONS:** *See* McLain MSJ Decl. Objections below.

* * *

101. When their clients are faced by opposing participating candidates, political campaign consultants	101. NOT DISPUTED. The statement is not material, however, to any issue in dispute for

in Arizona routinely advise their traditional candidate clients to minimize the competitive disadvantage of Matching Funds by minimizing fundraising or spending to minimize matching funds and/or to alter their mode of fundraising and spending in ways that minimize the benefit of matching funds. (Osborn MSJ Dec., pp. 7-28:1-16, Exs. 3-7, 9-10; McComish MSJ Dec., p. 7:10-21; Subach MSJ Dec. CCEC, Ex. 2 ("But with those candidates who choose not to participate in public funding, the candidates have to concern themselves not only with complying with reporting requirements for campaign contributions, but also avoiding expenditures that could trigger matching funds to their opponents").)	purposes of summary judgment. The "advice" given to traditional candidates does not establish that such candidates in fact alter their fundraising or spending actions based upon the availability of matching funds to their participating opponents. To the contrary, the evidence shows that traditional candidate spending has *increased* since the implementation of the Clean Elections Act. *See* Additional Facts Nos. 44-48 below. **EVID. OBJECTIONS:** Exhibit 2 to the Subach CEI Declaration constitutes inadmissible hearsay. Fed. R. Evid. 801, 802. *See* Osborn and McComish MSJ Decl. Objections below.
*	* *
133. Corporation Commissioner Sam George's self-financed traditional candidacy in the 2008 primary and general	133. NOT DISPUTED. However, the portions of the Osborn Declaration cited do not provide any support for this "fact."

election triggered nearly one million dollars in matching funds to his "solar team" teammates, Paul Newman and Sandra Kennedy. (Osborn MSJ Dec., p. 43:1-15, Ex. 8; ECF 145-3 (Newman Dep.), 35:21-25, 36:1-17, 37:15-25, 38:1-16, 41:1-4, 45:5-11, 53:5-24, 54:1-25, 56:3-21, 72:9-25, 73:1-25, 74:1-22, 77:15-25, 78:1-25, 79:1-24, 80:1-20, Exs. 1, 3, 4; ECF 145-7 (George Dep.), 65:10-24; ECF 145-4 (Kennedy Dep.) 22:3-16, 66:14-25, 67:1-25, 68:1-14, Exs. 1, 4.)	*See* Additional Facts No. 133 below. **EVID. OBJECTIONS:** Exhibit 8 to the Osborn Declaration is a newspaper article that is hearsay and it is not referenced in the designated portion of Dr. Osborn's declaration or is there any indication that it is being used for any purpose other than the truth of the matters asserted therein. As such, it is inadmissible hearsay. Fed. R. Evid. 801, 802. *See* Osborn MSJ Decl. Objections below.
* * *	
190. The professional lobbyist hired by the Commission two years ago is Mike Williams through his lobbying firm, Williams and Associations (hereinafter "Mike Williams"). (Osborn MSJ Dec., pp. 31:27-28, 32-36:1-3; CCEC Dep. (Lang), pp. 296-97; CCEC Dep. (Ruiz), pp. 102, 131, Exs. 4, 5.)	190. NOT DISPUTED. The asserted "fact" is neither material nor relevant to any issue on summary judgment. **EVID. OBJECTIONS:** *See* Osborn MSJ Decl. Objections below.

191. Mike Williams has the reputation of being a highly effective and influential lobbyist for powerful special interests. (Osborn MSJ Dec., pp. 31:27-28, 32-36:1-3; Sinema Dep., pp. 22-24.)	191. NOT DISPUTED. The asserted "fact" is neither material nor relevant to any issue on summary judgment. **EVID. OBJECTIONS:** *See* Osborn MSJ Decl. Objections below.
192. Since 2007, Mike Williams' contract with the Commission has ranged from $70,000 to $90,000 per year, which is a substantial amount of compensation for a lobbyist in Arizona. (Osborn MSJ Dec., pp. 31:27-28, 32-36:1-3; Sinema Dep., pp. 22-24; CCEC Dep. (Lang), pp. 296-97; CCEC Dep. (Ruiz), pp. 102, 131, Exs. 4, 5.)	192. **IN DISPUTE.** The deposition testimony and exhibits cited do not support this purported "fact." *See* Additional Facts No. 79 below. In any event, the asserted "fact" is neither material nor relevant to any issue on summary judgment. **EVID. OBJECTIONS:** *See* Osborn MSJ Decl. Objections below.
193. The CCEC has an active program to lobby the Arizona State Legislature and the Governor's office on legislation relating to the operation of their agency and elections in general. (Osborn MSJ Dec., pp. 31:27-28, 32-36:1-3; CCEC Dep. (Lang), pp. 270-310, Ex. 30; CCEC Dep. (Ruiz), pp. 102, 131, Exs. 4, 5, 8 (D01056 et seq.).)	193. **IN DISPUTE.** The deposition testimony and exhibits cited do not support this purported "fact." *See* Additional Facts No. 80 below. In any event, the asserted "fact" is neither material nor relevant to any issue on summary judgment. **EVID. OBJECTIONS:** *See* Osborn MSJ Decl. Objections below.

194. Mike William's lobbying contract with the CCEC is priced for the purposes of pursuing a proactive agenda. (Osborn MSJ Dec., pp. 31:27-28, 32-36:1-3.)	194. **IN DISPUTE.** Defendants dispute this "fact" because it is not clear what the term "proactive agenda" means. Further, the record contains evidence contradicting this purported "fact." *See* Additional Facts No. 79 below. In any event, the asserted "fact" is neither material nor relevant to any issue on summary judgment. **EVID. OBJECTIONS:** *See* Osborn MSJ Decl. Objections below.
195. Through Mike Williams, the Commission has lobbied to block legislative action that threatened its existence, such as amendments that the Commission feared would have made it more likely that voters might repeal the Clean Elections Act. (Osborn MSJ Dec., pp. 31:27-28, 32-36:1-3.)	195. NOT DISPUTED. **EVID. OBJECTIONS:** *See* Osborn MSJ Decl. Objections below.
196. During the 2009 legislative session, the CCEC has been lobbying members through Mike	196. **IN DISPUTE.** The record contains evidence contradicting this "fact." *See* Additional

Williams, with Executive Director Todd Lang's direct involvement, to amend the Clean Elections Act to eliminate its matching funds component and replace it with massively increased contribution limits for both participating and traditional candidates. (Osborn MSJ Dec., p. 41:11-19; CCEC Dep. (Lang), pp. 270-310, Ex. 30; CCEC Dep. (Ruiz), pp. 102, 131, Ex. 10 (D01845-1048).)	Facts Nos. 117-122 below. **EVID. OBJECTIONS:** *See* Osborn MSJ Decl. Objections below.

* * *

Statement of Additional Fact	**Evidentiary Support**

* * *

5. Mr. Bouie's reported campaign expenditures during the primary election period triggered $11,171.61 in matching funds for Mr. Carl Seel on or about August 13, 2008.	5. Declaration of Tanja K. Shipman in Support of Defendants' Response to Plaintiffs' and Plaintiff-Intervenors' Motions for Summary Judgment ("Shipman Resp. Decl.") Ex. 14 (Seel CCEC 2008 Primary Elections Funding Overview).

* * *

8. Mr. Bouie reported accepting individual, lobbyist and PAC contributions totaling $22,598.52 during the July 10, 2008 to August 13, 2008 time period.	8. Shipman Resp. Decl. Ex. 11 at 6-18 (Bouie 2008 Pre-Primary Election Report).
9. Participating candidates may only spend public funds to benefit his or her own campaign and any "common" advertising would necessarily have to be paid for on a pro-rated basis.	9. Lang Resp. Decl. at ¶ 6.

* * *

19. Rep. McComish triggered matching funds of $2,718.01 for his opponents in the primary on August 20, 2008 and, after that date, he reported spending money on newspaper ads, political consultants and polling/ research on August 29, 2008 for a total cost of $7,359.00.	19. Shipman Resp. Decl. Ex. 21 at 7 (2008 McComish Post-Primary Election Report).

* * *

21. Matching funds in the amount of $13,665.64 were issued to Frank Schmuck on or about August 7, 2008.	21. Lang Resp. Decl. at ¶ 9 & Ex. B.

22. The mailer contained at Ex. JM3 of Rep. McComish's Declaration has a picture of a lion and states "Courageous Leadership . . . Representative John McComish sees what is possible, and is willing to do what is needed to make Arizona a better place to live, work and raise a family." (Ellipses in original.)	22. Declaration of John McComish in Support of Plaintiffs' Motion For Summary Judgment ("McComish MSJ") [Dkt. 3156] at Ex. JM5.
23. The mailer at Ex. JM2 of Rep. McComish's Declaration has a picture of Rep. McComish and states "Advocates for Arizona Business."	23. McComish MSJ Decl. [Dkt. 316] at Ex. JM2.
24. Rep. McComish did not contact the CCEC or raise any objection with the CCEC regarding the matching funds issued as a result of this expenditure.	24. Lang Resp. Decl. at ¶ 11.
25. The Arizona Association of Realtor PAC made numerous other independent expenditures supporting Rep. McComish's campaign on August 25, 2008, October 7, 2008, October 21, 2008, October	25. Shipman Resp. Decl. at Ex. 19 at 4 (2008 AZ Assoc. of Realtors' PAC Post-Primary Election Report), Ex. 20 at 5-7 (2008 AZ Assoc. of Realtors' PAC Post-General Election Report).

27, 2008 and October 29, 2008, which Rep. McComish does not complain about.	

* * *

27. Rep. McComish triggered matching funds of $2,718.01 for his opponents in the primary on August 20, 2008 and, after that date, he reported spending money on newspaper ads, political consultants and polling/ research on August 29, 2008 for a total cost of $ 7,359.00.	27. Shipman Resp. Decl. Ex. 21 at 7 (McComish 2008 Post-Primary Election Report).

* * *

31. Rep. McLain's expenditures triggered only $833.62 in matching funds to Doris Goodale on or about August 27, 2008.	31. Lang Resp. Decl. Ex. C (2008 CCEC Overview report for Doris Goodale).

* * *

84. Commissioner Daniels also stated that "[Todd Lang] felt like he needed some help, because there's been a lot of issues at the legislature trying to sweep the funds, which is still going on. Trying to basically gut Clean Elections, a number of issues. So they were monitoring various	84. Shipman Decl. Ex. 26 at 267:6-18 (Daniels Depo.).

pieces of legislation. Very rarely do they take a stand on an issue. They monitor it to see what it's going to affect them, but they do take issues sometimes. And I know he does bring that to the Commission. I have not always been in agreement with where the Commission is as a majority on those issues, but obviously, I'm one member."	

* * *

117. The Commission supported the recent proposals made by Representatives Chad Campbell (a traditional candidate in 2008), Kyrsten Sinema (a participating candidate in 2008), Michele Reagan (a traditional candidate in 2008), David Gowan (a participating candidate in 2008), Andrew Tobin (a traditional candidate in 2008), and Rich Crandall (a participating candidate in 2008) in HB 2603.	117. Lang Resp. Decl. at ¶ 22.
118. The Executive Director of the Commission understood the purpose of the legislator's proposals in	118. Lang Resp. Decl. at ¶ 22.

HB2603 to open dialogue about the issue and to provide a temporary means by which to continue supporting the desire of the electorate by sustaining Arizona's public funding system in the wake of a possible ruling that matching funds are unconstitutional.	
119. The Commission sought language making this "lump sum" approach a temporary measure that would only be implemented if the court ruled them unconstitutional and be immediately repealed should any such decision be reversed on appeal which was not contained in the final version of the bill, however.	119. Lang Resp. Decl. at ¶ 22.
120. One of the most important elements of HB 2603 was the provision that it be repealed after 2010.	120. Lang Resp. Decl. at ¶ 22.
121. The Commission has a duty to ensure that the purposes of the Act are carried out – one of which is to preserve the public	121. Lang Resp. Decl. at ¶ 22.

fisc and another of which is to ensure that public financing remains a viable alternative.	

* * *

DATED: July 17, 2009

Arizona Attorney General's Office
TERRY GODDARD
MARY O'GRADY
BARBARA A. BAILEY
TANJA K. SHIPMAN

By: s/ Tanja K. Shipman

Attorneys for Defendants

DATED: July 17, 2009

Munger, Tolles & Olson LLP
BRADLEY S. PHILLIPS
GRANT A. DAVIS-DENNY
ELISABETH J. NEUBAUER
PUNEET K. SANDHU

By: s/ Elisabeth J. Neubauer

Attorneys for Defendant-Intervenor

BRADLEY S. PHILLIPS *(pro hac vice)*
Brad.Phillips@mto.com
GRANT A. DAVIS DENNY *(pro hac vice)*
Grant.Davis-Denny@mto.com
ELISABETH J. NEUBAUER *(pro hac vice)*
Elisabeth.Neubauer@mto.com
PUNEET K. SANDHU *(pro hac vice)*
Puneet.Sandhu@mto.com
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

MONICA YOUN *(pro hac vice)*
monica.youn@nyu.edu
ANGELA MIGALLY *(pro hac vice)*
angela.migally@nyu.edu
THE BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas
New York, NY 10013
Telephone: (212) 992-8158
Facsimile: (212) 995-4550

TIMOTHY M. HOGAN (004567)
ARIZONA CENTER FOR LAW IN THE PUBLIC
INTEREST
202 E. McDowell Road, Suite 153
Phoenix, AZ 85004
Telephone: (602) 258-8850

Attorneys for Defendant-Intervenor
CLEAN ELECTIONS INSTITUTE, INC.

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, et al., Plaintiffs, and DEAN MARTIN, et al., Plaintiff-Intervenors, vs. KEN BENNETT, et al., Defendants, and CLEAN ELECTIONS INSTITUTE, INC. Defendant-Intervenor.	CASE NO. CV-08-1550-PHX-ROS (Assigned to the Honorable Roslyn O. Silver) **DECLARATION OF DONALD GREEN IN SUPPORT OF DEFENDANT-INTERVENOR CLEAN ELECTIONS INSTITUTE, INC.'S OPPOSITION TO PLAINTIFFS' AND PLAINTIFF-INTERVENORS' MOTION FOR SUMMARY JUDGMENT** (Filed Jul. 17, 2009)

I, Donald P. Green, declare as follows:

1. I submit this declaration in support of Defendant-Intervenor's Opposition to Plaintiffs' and Plaintiff-Intervenors' Motion for Summary Judgment. I have been retained by Defendant-Intervenor to provide my opinions to the Court, including those set forth in this affidavit. I have personal knowledge of the matters set forth here, except as I have indicated. I am being compensated for my services in this action at a rate of $250 per hour.

2. I have spent my entire professional career studying, writing, teaching and lecturing about American politics and the American election system in particular. I am the A. Whitney Griswold Professor of Political Science at Yale University. In addition, I serve as the director of the Yale Institution for Social and Policy Studies, an interdisciplinary policy center. I am currently serving my fifth consecutive three-year term as Director.

3. I received my doctorate in political science from University of California, Berkeley in 1988. My area of expertise lies in campaigns, elections, survey research, research design and statistical analysis.

4. I also have published extensively on, among other things, the topics of campaigns and elections in leading political science journals such as the *American Political Science Review*, *American Journal of Political Science*, *Journal of Politics*, *Electoral Studies*, *Political Research Quarterly*, and *Political Analysis*. Several of my publications focus on campaign finance and use statistical models to estimate the effects of campaign spending. I also co-authored a book entitled *Get Out The Vote: How to Increase Voter Turnout* (Brookings Institution Press, 2008), which reports the results of more than one hundred studies of political campaigns and voter mobilization drives.

5. In 2005, I was elected to the Council of the American Political Science Association. I currently serve on the Board of Overseers of the American National Election Study. My scholarship has won

recognition from the National Science Foundation and substantial financial support from James Irvine Foundation, Pew Charitable Trusts, Smith Richardson Foundation, Harry Frank Guggenheim Foundation, and Russell Sage Foundation. In 2004, I was elected Fellow of the American Academy of Arts and Sciences.

6. At issue in this litigation are, I understand, assertions that the matching fund provisions of the Arizona Clean Elections Act deter nonparticipating candidates from making expenditures beyond the matching funds threshold.

7. It is my opinion, to a reasonable degree of scientific certainty, that candidate spending has not been chilled since the enactment of Arizona's Clean Elections Act.

8. Statistical analysis regarding candidate expenditures in legislative races in Arizona before and after the enactment of the Citizens Clean Elections Act demonstrates that nonparticipating candidates under the current system spend at levels that equal or exceed those observed before the introduction of matching funds.

9. Evidence adduced by both Plaintiffs' expert and Plaintiff-Intervenors' expert has failed to refute these statistical findings.

1. Spending by Independent Expenditure Organizations and Candidates Has Not Been Chilled But Has Increased Since the Enactment of Public Funding

10. I reviewed all legislative candidate expenditures in 1998 and 2006 and examined patterns of spending by nonparticipating candidates in 2006 that were opposed in the general election by at least one participating opponent. Based on the results of my analysis, it is my opinion that legislative candidates have not been deterred from spending over the matching funds threshold and that candidate spending has increased dramatically since the enactment of the public funding system.

11. If matching funds were to deter nonparticipating candidates from making expenditures, as Plaintiffs' claim, one would expect such expenditures to cluster around the level at which matching funds would be triggered. I observed no such clustering at or around the matching fund threshold. Looking at the smooth distribution of these nonparticipating candidates' expenditures, one would not guess that the matching fund threshold was $17,918, because there is no tendency for spending to cluster at or around this figure.

12. Of the 46 nonparticipating candidates facing a participating opponent in the general election in 2006, 39 spent less than $15,000 and therefore never

reached the matching threshold.[1] Just one candidate subject to the $17,918 threshold spent between $15,000 and $26,000. The remaining 6 candidates spent between $26,000 and $149,000.

* * *

20. Much of the rhetorical force behind the notion that matching funds "deter" nonparticipating candidates from spending derives from anecdotes about specific candidates who express misgivings about spending against participating opponents. However, adducing examples of candidates who claim that they do not want to spend for fear of providing matching funds for their competitor in no way establishes that this concern translates into actual changes in what candidates actually do.

21. Plaintiffs' expert, Dr. Marcus Osborn, opines that to a reasonable degree of scientific certainty, matching funds "deter" spending; however, he bases this opinion on anecdotes and speculation about how matching funds might impact candidate spending. Osborn Decl., at 11-28.

22. Such anecdotal evidence is not supported by the data on candidate spending. These anecdotes run counter to statistical trends since the advent of public funding showing increasing amounts of fundraising and spending over time by nonparticipating candidates,

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[1] One candidate, Pete Hershberger, spent $12,415 and was subject to a reduced threshold of $11,945.

even those who face participating opponents. As such, it is my opinion that Dr. Osborn's reliance on anecdotal evidence, in the face of data to the contrary, renders his opinion unpersuasive.

23. Dr. Osborn cites Mr. Michael Miller's 2008 article in *PS: Political Science and Politics* as a basis for his opinion that matching funds chills speech. Osborn Decl. at 11. Dr. Osborn mischaracterizes both the source of Miller's article and Miller's conclusions. Furthermore, Dr. Osborn's wholesale adoption of Miller's methodology overlooks several deficiencies in the Miller article which call the conclusions into question.

24. Dr. Osborn characterizes *PS: Political Science and Politics* as "peer reviewed," but I can say from experience, having published in that journal on more than one occasion, that it is peer reviewed only in the weakest sense of that term. *Id.* This journal essentially publishes brief pieces that are thought to be timely or provocative; serious and extensive pieces of research are redirected to other academic journals.

25. Dr. Osborn also mischaracterizes the findings themselves. For example, Dr. Osborn's declaration describes Mr. Miller's research as finding "that every non-participating candidate felt constrained by the matching funds component of the Clean Elections Act." *Id.*

26. However, Mr. Miller did not survey every non-participating candidate. Instead, he attempted to survey 186 candidates running in the 2006 election

cycle and succeeded in getting responses from 69 of them. According to Mr. Miller's Table 2, 67.6% of his survey sample "accepted Clean Elections Funds," which implies that his sample contains just 22 non-participating candidates. Osborn Decl., Ex. 3 at 528.

27. Dr. Osborn references quotations from Miller's in-depth interviews as evidence of how every non-participating candidate felt constrained by the matching funds component of the act. However, the quotations arise from interviews with just 16 candidates, of whom 4 were nonparticipating candidates. So when Mr. Miller says that "[s]tories like this one were echoed by every candidate who had ever run traditionally against a Clean Elections opponent," he is in fact describing the comments of just 4 candidates. *Id.* at 529.

28. More importantly, when drawing inferences from the Miller study, Dr. Osborn completely overlooks an even more glaring deficiency, namely, the fact that it lacks a control group. Granted, the candidates talk about the strategic "considerations" that they took into account when allocating campaign resources, but this evidence does not establish a causal link between the matching fund system and how candidates actually spent their money. At a minimum, Mr. Miller should have traced the spending and fundraising behavior of these candidates under the new system in comparison with their spending patterns under the old system.

29. Establishing a causal connection between the matching fund provisions and actual campaign spending decisions based on an uncritical reading of interview transcripts is particularly problematic given that Mr. Miller's respondents are sophisticated politicians who clearly understand the policy implications of their complaints about the campaign finance system. These respondents have an incentive to report that their behavior was shaped by the law.

30. Next, Dr. Osborn cites Mr. Miller's data suggesting that between 2002 and 2006 candidates spend at least one-third of their resources in the final week of the campaign. Osborn Decl. at 12. Again, there is no control group. No effort is made to compare this figure to what candidates spent before matching funds went into effect in Arizona or to compare this figure to what candidates typically spend in state legislative races in other places that lack a public financing system. Given that the crescendo of campaign activity culminates on Election Day, it should not be surprising that a sizeable amount of money is raised and spent at that time.

31. Another way to look at the evidence is to note that the fact that two-thirds of resources are *not* spent until the last week of the election cycle, which contradicts Dr. Osborn's assertion that matching funds provisions deter traditional candidates from aggressively communicating with potential voters at the beginning of the campaign because these expenditures trigger matching funds early in the election cycle.

32. It should be noted that Dr. Osborn's claim that matching funds "deter" spending and communication is also at odds with Plaintiff Intervenor's expert Professor Primo's theory that matching funds cause non-participating candidates to spend and fundraise heavily "early in the campaign and late in the campaign." Primo Decl. at 9. Evidently, there is no agreement on how these incentives work theoretically or what it means in terms of dollars to "deter" communication.

33. Dr. Osborn also bases his opinion on the testimony of several Plaintiffs who raise or have raised legal challenges to matching funds. Again, opinions based on an uncritical reading of sophisticated political actors who clearly understand the legal implications of their testimony are dubious. Especially, when all statistical data demonstrates that spending by non-participating candidates has not decreased or clustered around the trigger matching threshold.

34. Dr. Osborn relies on the deposition and trial transcripts of Ms. Maria Weeg and Mr. William Witaker, both Plaintiffs in a legal challenge involving matching funds in another lawsuit, as evidence that matching funds chill the making of expenditures. Osborn Decl. at 17. This may well have been these Plaintiffs' position when trying to prevent an opposing candidate from accessing funds, but there is no evidence that before donating to this race, these Plaintiffs decided to do so based on this presupposition about matching funds.

35. Dr. Osborn also relies on the testimony of Plaintiffs and Plaintiff-Intervenors in the instant case. Osborn Decl. at 18-28. Concluding that there is a causal connection between the matching fund provisions and actual campaign spending decisions based on the testimony of these Plaintiffs is particularly problematic given that Plaintiffs have an incentive to report that their behavior was shaped by the law.

36. Dr. Osborn does reference testimony of witnesses who are not Plaintiffs in this case; however, such testimony is either speculative or says nothing about the extent of this influence or the method by which the extent of this influence has been established empirically. Osborn Decl. at 13-15.

37. Dr. Osborn cites testimony taken in the deposition of Commissioner Lori Daniels. But the quotations in Dr. Osborn's declaration merely quote Commissioner Daniels as saying that the availability of matching funds "can influence" a candidate's expenditures. Similarly, she says that the availability of matching funds "can influence" whether an independent expenditure is made. Osborn Decl. at 13. Beyond admitting the law's potential to influence behavior; her testimony says nothing about the extent of this influence or the method by which the extent of this influence has been established empirically. Furthermore, Commissioner Daniels has testified that her own fundraising and spending decisions were not influenced by matching funds and that she does not believe in publicly funded elections. Ex. 1 Daniels Dep. 74:3-75:3; 89:18-90:9.

38. The same goes for quotations attributed to Todd Lang and Representative Lujan. Dr. Osborn' quotes Mr. Lang as saying "I suppose a person might refrain in contributing if they thought it might trigger matching funds." Osborn Decl. at 14. However, this statement is too speculative to base any causal connection between matching funds and candidate spending.

39. Representative Lujan is quoted as saying "I would agree with that, yes." in response to leading questions asked by Plaintiffs' counsel. Osborn Decl. at 15. In my opinion such statements are insufficient to establish the causal connection that Dr. Osborn's seeks to establish, especially in light of statistical evidence to the contrary.

III. Dr. Primo's Statistical Analysis Does Not Demonstrate that Matching Funds Impact the Timing of Expenditures Made by Privately Funded Candidates

40. Plaintiff-Intervenor's expert, Dr. David M. Primo, alleges that the current system of matching funds compels "rational" candidates to change the timing of their fundraising and campaign expenditures to minimize the effectiveness of any matching funds that are awarded. He hypothesizes that "in the primary, a candidate may want to wait until the last two or three days before the primary election to unleash a barrage of spending." He also hypothesizes that in the general election "as the campaign draws

to a close, a candidate may wait to raise money from donors until the very last minute, or if expenses can be incurred on credit, until after the general election is completed." Primo Decl., at 3.

41. I disagree with these claims on both empirical and theoretical grounds.

42. The statistical evidence that Professor Primo adduces to support the claim about timing is flimsy and unpersuasive. First, the analysis suffers from a flawed research design. The regression analysis he offers as evidence cannot plausibly isolate the causal effect of the public financing system. Even if I were to put aside this flawed design, a careful examination of this statistical evidence suggests just the opposite conclusion: the system of matching funds has little or no effect on the timing of spending or fundraising by nonparticipating candidates who face participating opponents.

43. From a theoretical standpoint, this result is not surprising. The strategic incentives associated with the matching fund system are overshadowed by other strategic incentives that impel nonparticipating candidates to raise and spend beyond the matching threshold.

44. Before examining the statistical results of this comparison, I examine Professor Primo's research design. Professor Primo's analysis compares two types of candidates. Type 2 candidates are "privately funded candidates who face at least one publicly financed opponent who receives matching funds as a result of a

privately funded candidate's spending or fundraising behavior." Type I candidates are "privately funded candidates who either face only privately funded candidates or face publicly financed opponents, none of whom receive a match in the election." Primo Decl. at 5.

45. This comparison is further restricted to candidates who run in districts that are contested by major party candidates who raise or spend at least some nonnegative amount in each reporting period. In constructing this comparison, his aim is to isolate the causal influence of strategic incentives created by Arizona's campaign finance system. It is my opinion that Professor Primo's comparison between these types of candidates is overly simplistic and does not lend itself to reliable causal inferences.

46. The key assumption underlying this comparison is that in any given election cycle the two types of candidates are identical except for the strategic incentives presented by matching funds. In the appendix of his report, Professor Primo relaxes this assumption slightly by controlling for party and whether the candidate held prior office. *See* Primo Decl., app. C. Restated, his key assumption is that in any given election cycle, candidates of the same party and prior office-holding experience are identical except for the strategic incentives presented by matching funds.

47. This dubious assumption is backed up by neither theory nor evidence. Candidates are not

randomly assigned to districts or to participating or nonparticipating opponents. On the contrary, their own decision to participate or not is presumably based on strategic and ideological considerations that are unmeasured in Professor Primo's regression model. Much of Professor Primo's published work focuses on modeling the strategic incentives that political actors confront; here, however, his analysis ignores the fact that candidates may strategically enter certain races and not others and the fact that they may base their decision to participate in the public funding system on unobserved factors that may be correlated with their ability to raise and spend campaign funds.

48. It is my opinion that no refereed political science journal would accept the kind of simplistic comparison that Professor Primo devises, and for good reason: given the potential for unobserved factors to throw off this comparison, this type of analysis does not lend itself to reliable causal inferences.

49. Putting aside this design defect, there is nothing in Professor Primo's statistical presentation that establishes the claim that the prospect of matching funds fundamentally alters the way in which candidates raise and spend money. The statistical results of Dr. Primo's analysis are not statistically significant, even by the most generous interpretation of that term.

50. The essence of Professor Primo's argument is that the gap between the two types of candidates

grows larger as we move from the middle of the election season to the end. However, the statistical test that he performs does not test this hypothesis. Instead, he tests the hypothesis that at a *given point in time*, the two types of candidates raise and spend different amounts. This is an elementary error and one that grossly overstates the degree of support for his claim that incentives cause the gap between Type 1 and Type 2 candidates to widen at the end of the campaign.

51. In his rebuttal report, Professor Primo acknowledged that an implication of his argument is that the gap between the two types of candidates *grows larger* as we move from the middle of the election season to the end and conceded that his analysis did not demonstrate this pattern. Ex. 2 Primo Rebuttal Report, dated Apr. 27, 2009, at 8.

52. Additionally, while convention dictates that statistical significance be accorded to patterns that would obtain by chance less than 5% of the time, Professor Primo loosens this standard to 10%. Primo Decl. at 7-8. Moreover, because he calculates one-tailed tests despite the lack of strong prior evidence that the gap between spending by the two types of candidates could only go in one direction, he effectively loosens the standard of statistical significance to 20%. Even with this permissive standard, I find that his results are not statistically significant when the calculations are performed properly.

53. I have recalculated the significance test in an appropriate manner, and the results are quite clear. There is no support for the claim that the gap in spending between the two types of candidates changes significantly over time.[2] In order for a statistical effect to be dubbed "statistically significant," it must have less than a 5% probability of occurring by chance. In this case, the probability of seeing gaps in spending at least as large as what the data actually show is never less than 39.9%. In other words, the pattern of results that Professor Primo presents are about what we would expect to see simply by chance if the two types of candidates were unaffected by matching fund incentives.

54. From a theoretical standpoint, this result is not surprising. The argument that candidates alter their fundraising and spending patterns in light of

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[2] My calculations are based on the following procedure. Using the results presented in Professor Primo's Appendix C, I conducted a series of meta analysis regression models. These models test whether the coefficients in his Appendix change systematically over time, or instead change in ways that could be attributed to chance variation. I considered a wide array of interpretations of Professor Primo's hypothesis that Type 2 candidate raise/spend more than Type 1 candidates "early in the campaign and late in the campaign". I first operationalized "late" by examining whether the coefficients after PR1 and GE1 are predicted by a linear time trend. Next, I consider whether a dummy variable for the last period predicts coefficients for periods after PR1 and GE1. Finally, I considered a quadratic specification in which the coefficients are regressed on time and time squared in order to test whether the results dip in the middle period.

the incentives that Professor Primo identifies is based on an incomplete account of the incentives that candidates face during a campaign.

55. Candidates who choose to run based on private contributions may place little emphasis on the timing of their fundraising and spending activity given the many other objectives that they are pursuing at the same time. For example, candidates have strong incentives to raise money as quickly and as vigorously as possible, because fundraising tends to be an activity that builds on itself.[3] Putting off fundraising may be problematic because it impairs one's ability to convince current donors that a growing number of fellow donors have recently contributed. Professor Primo's rendering of the strategic logic of the campaign finance system ignores the strategic imperatives of the broader campaign. This may explain why his statistical results are so flimsy: the pressure to raise and spend money late in the campaign is evidently too weak to be detected even when studying the behavior of candidates in hundreds of election campaigns.

56. Even if I were to set aside these fundamental design defects and the statistical insignificance of his findings, the fundraising differences between Type 1 candidates and Types 2 candidates is quite small

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[3] Krasno, Jonathan S., Donald Philip Green, and Jonathan A. Cowden. 1994. The Dynamics of Campaign Fundraising in House Elections. *Journal of Politics* 56(2): 459-474.

substantively. The key finding, according to Professor Primo, is that Type 2 House candidates fundraise substantially more than Type 1 candidates in the final GE5 period. Primo Decl. at 11. But the anti-log of 3.97 is $52.98, while the anti-log of 5.58 is just $265, so the difference in fundraising amounts to a meager $212.02. In the Senate, the corresponding figure for GE5 is $54.92. So even if all of the difference in fundraising were traced to the incentives created by the campaign finance system, the political consequences are negligible.

IV. Campaign Contribution Limits are Insufficient to Eliminate the Reality or Appearance of Corruption

57. Dr. Osborn asserts that public funding of campaigns is unnecessary if the goal is to limit the appearance of corruption. In his view, disclosure and contribution limits are sufficient, because, according to his statistical analysis, contribution limits have the effect of "reducing interest group influence". Osborn Decl. at 36.

58. Dr. Osborn's thesis that contribution limits are sufficient to prevent the reality or appearance of corruption runs counter to the testimony given by those close to the fundraising process. Several deponents pointed out that lobbyists are able to skirt campaign contribution limits and curry favor with legislators by directing donors to the candidate or by

"bundling" contributions. Mr. Querard talks about lobbyists who say:

> hey, I'd like to put together an event for you and that lobbyist may actually take care of a lot of the work involved in the fundraiser to where you may be calling your Rolodex of your friends and the people you know or all the business cards you've collected at the Capitol and that may be your contribution . . . Ex. 3 Querard Dep. 43

59. This point is echoed by Mr. Smolden, who notes that hosting a fundraiser is one way that lobbyists assist candidates in raising money and by Mr. Martin, who recalls how lobbyists on his fundraising committee collected donations on his behalf from their clients. Ex. 4 Smolden Dep.10:6-10:23. Ex. 5 Martin Dep. 64. Although each of the campaign donations falls below the contribution threshold, the aggregate amounts raised by lobbyists can be considerable, as Ms. Lubin explains:

> Typically, the lobbyist makes a personal donation. Their client, the principals often make donations to candidates. And in addition, they hold fundraisers for that candidate which may include employees, members of the board of that organization, or supporters. And it's usually – even though they're individual checks, it will become obvious to the candidate whether by looking at their own campaign finance report or by having the lobbyist tell you, oh, we raised $10,000 for

you tonight. So some people call it bundling. Ex. 6 Lubin Dep, 19.

60. Bundling apparently amplifies the influence of lobbyists. As Mr. Hoffman explains, lobbyists gain special access to legislators who are beholden to them for campaign resources. In my view, the threat of corruption is very real under these conditions. Contrary to Dr. Osborn's assertions, contribution limits alone do not alleviate the threat of corruption because the limits are easily circumvented by bundling. Ex. 7 Hoffman Dep. 20.

61. Dr. Osborn states that under the Arizona Clean Elections Act lobbyists can bundle $5 contributions and therefore, the same opportunity for lobbyists to exert undue influence over publicly financed candidates exists under a publically funded regime. Osborn Decl. at 39.

62. In my opinion, the threat of corruption associated with the bundling of small contributions in a public funding system does not compare with the threat of corruption from bundling large contributions in a private system.

63. Privately financed candidates are beholden to lobbyists who bundle tens of thousands of dollars in $300 contributions because it is difficult and costly to raise that kind of money. Candidates appreciate the efforts of lobbyists because the candidates could not easily raise this type of money without bundlers.

64. Under a public financing system, many people, including candidates, can orchestrate the kind of activity it takes to collect the requisite number of $5 contributions.

65. In his supplemental report, Dr. Osborn offers an additional argument. Dr. Osborn asserts that the lobbying efforts of the Citizens Clean Election Commission create the appearance of corruption:

> The presence of a lobbying effort from a campaign regulatory agency creates the potential for questions from both traditional and publicly financed elected officials that there may be a relationship between the policy positions they take on election issues and their future regulatory treatment. Osborn Decl. at 33-34.

66. No evidence is adduced to show that the CCES in fact exercises its discretion in a discriminatory fashion. And no evidence is adduced to suggest that legislators, interest group leaders, or the public believe the CCES abuses its authority or trades legislators' support for regulatory favors. In other words, Dr. Osborn offers nothing beyond his own assertion that there is "the potential for questions."

V. Studies By Amici Center for Competitive Politics Are Riddled With Defects

67. I have reviewed the two studies cited by Amici Center for Completive Politics and their Amicus Brief. It is my opinion that the designs of the

analysis upon which the studies are based are fundamentally flawed and cannot support the purported conclusions. The evidence generated by these studies is of little value that cannot be said to support the broad ranging conclusions that are offered.

68. The CCP cites to the study "Special Interests, Partisan Pouts, and the Usual Suspects: A Study of Donors to New Jersey's "Clean Elections" Candidates in 2007" to support the proposition that "Clean Elections" programs yield no anti-corruption or anti-appearance of corruption benefits. Br. for Center for Competitive Politics at 14-15.

69. The CCP bases its findings on responses to questionnaires that were sent to donors in two legislative districts who contributed a qualifying contribution to at least one candidate.

70. Based on these responses, the CCP claims that "the donor group most supportive of 'clean elections' was most likely to believe that their own clean legislators favored party and special interest over constituents interests" and that "organized interest groups supplied nearly half of all qualifying contributions to 'clean elections' candidates." Sean Parnell, Laura Renz & Sarah Falkenstein, *Special Interests, Partisan Pouts, and the Usual Suspects: A Study of Donors to New Jersey's "Clean Elections" Candidates in 2007* at 7, 19 (Feb. 2009), *available at* http://www.campaignfreedom.org/docLib/20090223_SR1NJ.pdf.

71. It is my opinion that both the low response rate, the flaws in the crafting of the questionnaire

and more fundamentally the lack of a control group render the results entirely unpersuasive.

72. According to the study, 4864 questionnaires were sent out to two legislative districts. Only 798 responses were returned. *Id.* at 23. This is a response rate of 16%, which is well below the 40% or 50% response rate that is the traditional response standard needed in order to draw reliable descriptive inference.

73. Mailed questionnaires are notorious for eliciting response from the most interested and opinionated respondents, so we can draw no secure inferences about the average donor.

74. Although the authors characterize the donors as interest group members, in fact the survey instrument asks respondents they or their family members are members from a variety of groups.

75. Finally, even if the survey were perfectly executed, there is a deeper flaw, namely the fact that we are not comparing people who are in publicly funded environment with those in a privately funded environment. Nowhere does the report explain why they decided not to use a more traditional control group design or how inferences can be drawn in the absence of a control group design.

76. The conclusions drawn by the author are unsupported by the data themselves.

77. For example, the CCP claims that clean elections programs have yielded no benefit in reducing

the appearance of corruption because "the donor group most supportive of 'clean elections' was most likely to believe that their own clean legislators favored party and special interest over constituents interests." *Id.* at 7. There are two flaws here. The first is that the authors are not comparing respondents operating in a publically funded system with their counterparts in a privately funded system. As a result there is no metric by which to compare the responses that are offered in this survey. Instead, the authors are impressed with the sheer number of respondents who reply in a certain way without telling us how they would respond in a different campaign finance system. This is an elementary research error.

78. The CCP also claims that the survey results demonstrate that "organized interest groups supplied nearly half of all qualifying contributions to 'clean elections' candidates." *Id.* at 19.

79. There are a number of problems with this claim. First, the unrepresentative sample, attenuated as it is by non-responsiveness bias, does not enable us to get an accurate characterization of qualifying contributors. But even if it did, the contributors in this sample are not organized interest groups. They may be reporting that their families are members. And even if the respondent themselves were members, the implication seems to be that they are akin to lobbyists which is simply not reflected in the data themselves. Nothing in the questionnaire asks respondents about their lobbyist activity.

80. The CCP's second study, "Do Taxpayer-Funded Campaigns Actually Save Taxpayer Dollars?," also suffers from debilitating design flaws. The CCP based its conclusion that public funding programs do not reduce government spending by comparing the growth in spending in Maine and Arizona to the US as a whole. *See* Sean Parnell, *Do Taxpayer-Funded Campaigns Actually Save Taxpayer Dollars?* (Sept. 2008), *available at* http://www.campaignfreedom.org/docLib/20080930_Issue_Analysis_4.pdf.

81. The quality of this research design is akin to what one would expect to find in an undergraduate seminar paper. The study compared state spending and tax rates over time but controlled for no other factors. The CCP turned a blind eye to a myriad of other state-level variables such as population size, economic conditions, the age distribution of the population, and budgetary commitments to entitlement programs, each of which could explain state budget growth. This simplistic methodology cannot possible tells us whether campaign finance laws had an effect on state spending.

VI. Corruption Tends to Emerge in Settings That Lack Electoral Competition

82. A lack of electoral accountability is one of the most important determinants of corruption in politics. Historically, the political environments most conducive to corruption have been cities, where party machines dominated elections at all levels, and the

South prior to the Voting Rights Act, where the Democratic Party for decades held a monopoly on state and local power.

83. The inverse relationship between electoral accountability and corruption arises due to the perverse incentives that are created when public officials are insulated from public reprisal. Incumbents in this situation have an incentive to cut ongoing side-deals with those offering quid pro quo exchanges. Lobbyists have an incentive to offer such exchanges because entrenched incumbents make reliable long-term trading partners. The threat that such exchanges will be exposed is diminished by efforts on the part of incumbents and their allies to undermine or co-opt potential challengers.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 17th day of July, 2009 at New Haven, Connecticut.

/s/ Donald P. Green
Donald P. Green

[Certificate of Service Omitted In Printing]

INSTITUTE FOR JUSTICE
Timothy D. Keller (019844)
Jennifer M. Perkins (023087)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
P: 480-557-8300/F: 480-557-8305

INSTITUTE FOR JUSTICE
William R. Maurer (WSBA 25451)[1]
101 Yesler Way, Suite 603
Seattle, WA 98104
P: 206-341-9300/F: 206-341-9311

Attorneys for Plaintiff-Intervenors

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*,

Plaintiffs,

and

DEAN MARTIN, *et al.*,

Plaintiff-Intervenors

vs.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, *et al.*,

Defendants.

Civil Action No. 08-1550-PHX-ROS

PLAINTIFF-INTERVENORS' RESPONSE TO DEFENDANTS' AND DEFENDANT-INTERVENOR'S JOINT STATEMENT OF UNDISPUTED FACTS

(Filed Jul. 17, 2009)

---

[1] Admitted *pro hac vice*.

and

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant-Intervenor.

* * *

40. Plaintiff-Intervenors do not dispute this fact.

* * *

SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION
GOLDWATER INSTITUTE
Nicholas C. Dranias (168528)
500 E. Coronado Rd.
Phoenix, AZ 85004
P: (602) 462 5000/F: 602-256-7045
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH; NANCY MCLAIN; AND TONY BOUIE,

Plaintiffs,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Defendants.

Civil Action No. CV-081550-PHX-ROS

Hon. Roslyn O. Silver, presiding

PLAINTIFFS' RESPONSE TO DEFENDANTS/ DEFENDANT-INTERVENOR'S JOINT STATEMENT OF FACTS AND STATEMENT OF FACTS IN OPPOSITION TO DEFENDANTS/ DEFENDANT-INTERVENOR'S MOTIONS FOR SUMMARY JUDGMENT

(Filed Jul. 17, 2009)

* * *

40. Plaintiffs dispute this paragraph for the following reasons. The asserted fact and supporting evidence are irrelevant and inadmissible under Fed. R. Evid. 401 and 402. *See generally Democratic Party*, 578 F. Supp. at 825, 827, 830, affirmed in relevant part by *Federal Election Comm'n*, 470 U.S. at 499-500. A First Amendment analysis of speech regulations is not properly based on aggregate statistical analysis. Free speech is an individual right, not a right of the collective. Even if shutting down one bookseller resulted in those that remained selling more books, that would hardly justify closing bookstores. Moreover, in the absence of evidence of what would have happened to aggregate expenditure levels in the absence of Matching Funds, there is insufficient foundation for such evidence to have any relevancy – claiming causation would merely advance the fallacy of *post hoc ergo proctor hoc*. Therefore, the asserted statement and supporting evidence do not make any fact that is of consequence to the determination of this action more probable or less probable than it would otherwise be. The asserted fact and supporting evidence are also inadmissible for being prejudicial, confusing and a waste of time under Fed. R. Evid. 403. This is because Green's premise that candidate expenditure clustering should exist between $15,000 and $26,000 is unsupported by any scientific reasoning, and premised on a failure to consider candidate anticipation of independent expenditures, which might trigger matching funds. Green's findings, which show thirty-nine candidates spent less than $15,000, are entirely consistent with

Plaintiffs' theory that candidates engage in widespread behavior to avoid triggering matching funds. And if the entirety of Green Dec., Ex. A is being offered into evidence as expert testimony, it should be held inadmissible under Fed. R. Evid. 601 and 702 due to Green's failure to follow a scientific methodology as evidenced by: 1) his conceded lack of experience and expertise in Arizona campaign finance law, candidate and political action committee consulting, 2) his failure to show how his findings and opinions naturally and directly result from his independent research or otherwise subject his findings to peer review, 3) his deliberate refusal to read evidence he purports to critique, 4) his deliberate refusal to consider all relevant evidence, 5) his failure to formulate any null hypothesis, 6) his embrace of speculation and failure to specify which findings or opinions were offered to a reasonable degree of scientific certainty or otherwise establish that they relate to his fields of expertise, and 7) his admission that his report does not establish an affirmative case of the sort he would subject to peer review. (PSFO, ¶¶ 208-25.) *Daubert*, 509 U.S. at 593.

* * *

TERRY GODDARD
Attorney General
Mary R. O'Grady (011434)
Solicitor General
Barbara A. Bailey (018230)
Tanja K. Shipman (025205)
Assistant Attorneys General
1275 West Washington Street
Phoenix, Arizona 85007-2926
Telephone: (602) 542-3333
Facsimile: (602) 542-8308
Attorneys for Defendants Arizona Secretary of State and Citizens Clean Elections Commission

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*,
Plaintiffs
and
DEAN MARTIN, *et al.*,
Plaintiff-Intervenors,
v.
KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; *et al.*,
Defendants,
and
CLEAN ELECTIONS INSTITUTE, INC.,
Defendant-Intervenor.

No. CV08-1550-PHX-ROS

DECLARATION OF TODD F. LANG IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFFS' AND PLAINTIFF-INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT

(Assigned to the Honorable Roslyn O. Silver)

(Filed Jul. 17, 2009)

I, Todd F. Lang, declare:

1. I am the Executive Director of the Arizona Citizens Clean Elections Commission and I make this declaration based on my personal knowledge of the facts set forth below.

2. The Act creates a voluntary system of public funding in Arizona for state and legislative offices under which matching funds are used as a means by which to distribute funds to particular participating candidate if certain conditions are met. A.R.S. §§ 16-940, *et seq.* (the "Act").

3. A.R.S. § 16-951(A) provides that matching funds are issued to a participating candidate in the primary election when a traditional candidate "has made expenditures during the election cycle to date exceeding the original primary election spending limit, *including any previous adjustments*." (Emphasis added.) The original primary spending limit is capped at three times the spending limit and, as matching funds are issued from various sources, the eligibility for matching funds becomes adjusted.

4. To the extent independent expenditures trigger matching funds they are aggregated toward the cap on the adjusted spending limit under A.R.S. § 16-952(E) but do not affect whether and how much a traditional candidate's expenditures (in the primary) or contributions (in the general) trigger matching funds beyond making any such expenditures or contributions moot because the participating candidate

has already received the maximum allowable matching funds under the Act.

5. Should an independent expenditure fall within the requirements of A.R.S. § 16-958(D), a person making an independent expenditure related to a particular office must file reports "identifying the office and the candidate or group of candidates whose election or defeat is being advocated and stating whether the person is advocating election or advocating defeat." These reports are among the bases for the Commission's determination under the Act that matching funds should be allocated.

6. Participating candidates may only spend public funds to benefit his or her own campaign and any "common" advertising would necessarily have to be paid for on a pro-rated basis. *See* A.R.S. § 16-948(C) and Commission Rule R2-20-702(A). (A true and correct copy of Commission Rule R2-20-702 is attached hereto as Exhibit A.)

7. A traditional candidate that triggers matching funds is not involved in the dissemination of any message that may or may not be created by the participating opponent who receives those matching funds. There is no requirement in the Act that the traditional candidate must use her personal resources to distribute or serve as a conduit for any communication opposing her candidacy.

8. Pursuant to A.R.S. § 16-952(A), an amount "equal to any excess of the reported amount over the primary election spending limit as previously

adjusted, less six per cent for a nonparticipating candidate's fund-raising expenses and less the amount of early contributions raised for that participating candidate for that office as prescribed by § 16-945" was paid to the participating candidate in the 2008 District 6 Republican primary election race.

9. On or about August 7, 2008, matching funds in the amount of $13,665.64 were issued to candidate Frank Schmuck. (A true and correct copy of the Primary Funding Overview Reports for the campaigns of candidates Andy Swann, Jeff Dial and Frank Schmuck in the Republican primary race for Arizona State Representative in District 20 are attached hereto as Exhibit B.)

10. On August 28, 2008, candidate Jeff Dial had received the maximum allowable primary matching funds under section 16-952(E) of the Act.

11. Representative John McComish did not contact Commission staff or raise any formal or informal objection or complaint with the Commission regarding matching funds issued in the 2008 District 20 House of Representatives race as a result of any independent expenditure.

12. Representative Nancy McLain's expenditures triggered only $833.62 in matching funds to Doris Goodale on or about August 27, 2008. (A true and correct copy of the primary funding overview report of Doris Goodale is attached hereto as Ex. C.)

13. In 2006 and 2008, Representative Jim Weiers ran as a traditional candidate in District 10 and his participating opponents in both of those general election races received the maximum allowable funds permitted under the Act. (A true and correct copy of the election disbursements for opponents of Rep. Weiers in the 2006 and 2008 general elections are attached hereto as Ex. D.)

14. Traditional candidates have far fewer restrictions on their campaign finance activities. Traditional candidates are free to accept contributions from political action committees (PACs), but participating candidates may not. Traditional candidates can use personal funds without limit and can spend personal funds at any time during the campaign. Traditional candidates are free to raise and spend as much money as they are able and willing to do. Traditional candidates can raise money at any time in the campaign, while participating candidates must plan and budget carefully because if they run out of money, there is no provision that permits them to raise additional funds for an unforeseen expense.

15. Several traditional and participating candidates have endorsed each other's candidacies in recent Arizona elections. To the extent a participating candidate has spent public money in order to benefit another campaign and not their own campaign, and it was brought to my attention, the participating candidate was subject to an enforcement action.

16. A "slate card" provides information about the voting record or position on a campaign issue of three or more candidates, under A.R.S. §§ 16-901(5)(b)(v) & 16-901(8), and is not an considered an expenditure or contribution to a candidate's campaign. These "slate cards" are issued by political parties to promote candidates who are members of the particular political party and are generally an attempt to "guide" or provide information to voters. The inclusion of particular candidates on a "slate card" does not have anything to do with whether those candidates are campaigning together or on a "team."

17. In order to qualify for public funding under the Act, a candidate must collect a certain number of $5 qualifying contributions but there is no requirement that a candidate wishing to qualify for funding collect an initial sum of "seed money" or early contributions.

18. The relevant Arizona statutory provisions pertaining to the requirement that a candidate obtain a certain number of qualifying signatures to qualify for the ballot is contained in A.R.S. §§ 16-321 *et seq.* and not in the Act.

19. I do not know what plaintiffs mean by the term "reverse targeting" and I have not been involved in any Commission staff recommendation about whether "reverse targeting" has been used in an Arizona state election. In the 2008 election cycle, there were several signs created by Jim Torgeson which, in my opinion, were clearly meant to undermine the

candidates identified on them by associating those candidates with messages meant to discourage voters from electing those candidates. The messages included statements that a candidate "supports illegals" or "they promised to raise taxes help them keep the promise." Representative Waters was running in a very conservative district and Mr. Torgeson had a grudge against Representative Waters and senate candidate Maish and had indicated that he was going to make sure that Representative Waters and senate candidate Maish did not get elected. (A true and correct copy of the Minutes of the October 10, 2008 Commission meeting are attached hereto as Exhibit E.) No candidate received any matching funds as a result of the sign identified as exhibit JM5 in Representative McComish's declaration.

20. No matching funds were paid by the Commission as a result of a press release issued by Equality Arizona during the 2008 Republican primary for the senate seat in District 22 which identified participating candidate Farnsworth. The Commission's records indicate that candidate Farnsworth "maxed out" on the amount of matching funds he could receive under the Act on August 14, 2008. I am also not aware of any request made by candidate Farnsworth to the Commission for matching funds as a result of that press release.

21. The signs identified in Ruiz Depo. Ex. 8 (D01036 *et seq.*) were signs posted by Rep. Quelland during his candidacy which were not found to be in violation of the Clean Elections Act because the

Commission determined that they were posted outside of his district and that they were advertisements for his numerous business ventures. (A true and correct copy of the Minutes of the August 26, 2008 are attached hereto as Exhibit F at 18-34.)

22. The Commission supported the recent proposals made by Representatives Chad Campbell (a traditional candidate in 2008), Kyrsten Sinema (a participating candidate in 2008), Michele Reagan (a traditional candidate in 2008), David Gowan (a participating candidate in 2008), Andrew Tobin (a traditional candidate in 2008), and Rich Crandall (a participating candidate in 2008) in HB2603. I understood the purpose of the legislator's proposals in HB2603 to open dialogue about the issue and to provide a temporary means by which to continue supporting the desire of the electorate by sustaining Arizona's public funding system in the wake of a possible ruling that matching funds are unconstitutional. Indeed, the Commission sought language making this "lump sum" approach a temporary measure that would only be implemented if the court ruled them unconstitutional and be immediately repealed should any such decision be reversed on appeal. That language was not contained in the final version of the bill, however. Instead, one of the most important elements of the bill is the provision that it be repealed after 2010. The Commission has a duty to ensure that the purposes of the Act are carried out – one of which is to preserve the public fisc and another of which is to ensure that public financing remains a viable

alternative. Implementing the "lump sum" approach to public funding proposed in HB2603, however, would be a challenge in the long term under the Act without some alteration to the means by which the Act is funded because of the high cost involved in making those large payments to all candidates who choose to participate in the public funding system (even though not all candidates may need to use the sum proposed to be disbursed). Additionally, because it would be impractical for the "lump sum" approach to provide initial disbursements that were equal to the current maximum amount candidates can receive in matching funds, candidate participation rates would likely decrease as compared to the current system that has matching funds.

23. The Commission staff has drafted a rule that will be presented to the Commission for their consideration and possible preliminary approval at the July 30, 2009 meeting that seeks to eliminate any perceived financial advantages in establishing a "team" of participating and traditional candidates in races involving two or more seats. The rule is not final, but would require a participating candidate to forgo matching funds triggered by another candidate if she intended to engage in coordinated campaign messages or expenditures with the traditional candidate that triggers matching funds. Alternatively the participating candidate could accept the matching funds, but would then be barred from coordinated expenditures with the traditional candidate that triggers the matching funds.

24. When the Commission determines that matching funds should be awarded to a participating candidate as a result of an unreported independent expenditure, it does not have the discretion to award matching funds only to the candidate that reported or requested matching funds. Once it has been determined that matching funds are warranted under the terms of the Act, the Commission "shall" award those funds to eligible candidates. *See* A.R.S. § 16-952.

25. On at least two occasions in the over ten years of the Act's existence, the Commission has taken action to remove two individuals from office – David Burnell Smith and Doug Quelland – only after such individuals were found after investigation to have violated material provisions of the Act. Further, Mr. Smith challenged the Commission's decision before the Office of Administrative Hearing and the Arizona Courts and the Commission's determination was upheld. Representative Quelland is currently exercising his right to challenge the Commission's determination and is scheduled to present his case before the Office of Administrative Hearings in the beginning of August. In other words, both individuals have been or are currently afforded the benefit of full protection and due process under applicable law.

26. Neither myself nor my staff is aware of any entity that provides goods or services on credit in the "ordinary course of business" so that a traditional candidate could take advantage of the exception at A.R.S. § 16-901(5)(b)(xii).

27. The Commission does not label non-participating candidates "dirty," and I am unaware of any evidence that any practice or procedure by the Commission has created a perception that non-participating candidates are "dirty." In fact the Commission refers to non-participating candidates as "Traditional" and clean candidates as "Participating" so that both types of candidates are treated with a non-judgmental label.

28. On September 5, 2006, Commission staff received a complaint from participating candidate Len Munsil's campaign alleging that certain phone calls characterized as a "push poll" were targeting Republican voters in Maricopa County and that they constituted an independent expenditure against the Munsil campaign. Opposing gubernatorial candidate Don Goldwater opposed issuing matching funds and accused Mr. Munsil's campaign of having engineered this "push poll." After investigation, I recommended that the Commission issue matching funds to the Munsil campaign on the basis of these "push polls" in an amount of $80,000. This amount was a discount of a calculation based on the 183,811 votes cast by Maricopa County residents in the 2002 Republican primary by $0.72 (the estimated cost of a call) which produced a figure of $132,343.92. The Commission voted to award the Munsil campaign $80,000 in matching funds on September 7, 2006.

29. Voter Awareness Studies are sponsored by the Commission in order to get a more meaningful understanding of the Commission's education efforts.

Voters who had never heard of the Act or the Commission were "screened" or not asked further questions because they could not provide any feedback on the effectiveness of the public funding education program or provide any opinions about the public funding program because they do not know what it is – which was the sole purpose of these surveys.

30. In the 2008 election cycle, the Victory 2008 PAC made its independent expenditure in opposition to David Stevens' candidacy prior to the time when the Commission had made a determination about whether or not to permit candidate Stevens to receive matching funds.

31. Participation in Arizona's public funding system created by the Act has increased every year since the first year of the system's implementation in 2000. (True and Correct copies of Commission Annual Reports from 2000 through 2008 are attached hereto as Ex. G.)

I declare under penalty of perjury under the laws of the United States that the foregoing asserts of fact are true and correct.

Executed on July 17, 2009, in Phoenix, Arizona.

/s/ Todd F. Lang
Todd F. Lang

491280

Case No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MCCOMISH, NANCY MCLAIN,
and TONY BOUIE,
Plaintiffs-Appellees,

vs.

KEN BENNETT, in his official capacity,
et al,
Defendants-Appellants.

DECLARATION OF State Senator Jack Harper
IN SUPPORT OF MOTION TO VACATE STAY
AND IN OPPOSITION TO ENTRY
OF APPELLATE STAY

(Filed Jan. 29, 2010)

Appeal from the United States District Court for
the State of Arizona Case No. CV-081550-PHX-ROS,
Hon. Roslyn O. Silver, presiding

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1. I am over the age of twenty-one, of sound mind, and willing to testify to the matters set forth herein under oath and in a court of law. I have personal knowledge of the facts set forth in this Declaration.

2. I am a candidate for House of Representatives of the State of Arizona. I am familiar with

Arizona's Clean Elections Act and how matching funds are designed to be triggered by campaign speech in the form of campaign expenditures or contributions. I intend to run as a "traditional candidate," i.e. as a candidate supported by voluntary private contributions, not government subsidies.

3. The Arizona Clean Elections Act matching funds trigger mechanism forces the exercise of First Amendment rights, namely the right to contribute to a political campaign and the right to expend money in support of a political campaign, to disseminate financial resources to competing candidates who are participating in public financing ("participating candidates"). Thus, matching funds cause the exercise of First Amendment rights by one person to disseminate hostile speech by another. Therefore, matching funds impose a state-created negative consequence, punishment, "cost," or competitive disadvantage on traditional candidates, like myself. This punishment is forced upon me and others by the State as a direct result of the exercise of First Amendment rights in contributing to my campaign and in spending funds in support of my campaign and its message. The mere existence of the threat of matching funds in the 2010 election cycle, therefore, punishes and chills my supporters and I [me] [NCD] in exercising our First Amendment rights.

4. Prior to deciding to run for the Arizona House of Representatives, I analyzed the Honorable Judge Roslyn Silver's two prior decisions dealing with the merits of Plaintiffs' challenge to the matching funds

component of Arizona's Clean Elections Act and the impact of *Davis v. FEC*, 128 S. Ct. 2759 (2008). Based on the district court and Supreme Court's stated reasoning and rulings, I formed the belief and opinion that matching funds under the Clean Elections Act were unconstitutional and that the district court and Supreme Court would certainly enjoin them eventually. Accordingly, in reliance upon the district court and Supreme Court's cogent and clear reasoning, on January 1st 2010, I decided to run as a traditional candidate for the 2010 election cycle.

5. My reliance upon the belief and opinion that matching funds under the Clean Elections Act were unconstitutional was further confirmed by the entry by Judge Silver of a permanent injunction striking down the matching funds component of Arizona's Clean Elections Act on January 20, 2009 [10] [NCD], which I was briefed on promptly after issuance.

6. As a traditional candidate for the 2010 election cycle, and in reliance upon the unconstitutionality of matching funds, I have raised more than $7000 in contributions to my committee. My candidate committee has incurred expenses of more than the amount allowable to raise in "early-seed money", in reliance upon the unconstitutionality of matching funds. I cannot refund enough contributions to join the public funding system.

7. If Judge Silver's temporary stay on the enforcement of her permanent injunction were not vacated or if it were extended to cover the 2010

election cycle, allowing matching funds to be issued, I would suffer irreparable harm consisting of immediate difficulties raising contributions from otherwise willing supporters because of the deterrent effect of matching funds. Simply put, my contributors and potential contributors will be less willing to contribute in the same amount if they knew or believed the value of their contribution will be diminished by matching funds disseminating the hostile speech of an opposing participating candidate.

8. The possibility of matching funds being issued in the primary or general election impacts and deters my campaign speech today in the form of diminishing or altering the timing of the campaign expenditures I am willing to make today and in the near future to promote my campaign messages. This is because, as I understand the law, spending money today or in the near future to support my campaign goes towards my primary election spending limit, pushing me closer to the trigger point for matching funds in the primary. The threat of hostile speech being triggered by matching funds, therefore, chills my willingness to engage in campaign speech and expenditures.

9. Additionally, given the repeatedly expressed concerns of my actual and potential contributors that they would not want to contribute as much, or at all, in the face of the prospect of matching funds, the threat of matching funds currently diminishes my campaign expenditures from what they would be in the absence of any such threat because I cannot

spend money as freely when I am more concerned about there being an adequate and continuing flow of contributions to my campaign. This amounts to constructive censorship because I will be forced to refrain from engaging in communication at times and in manners that I would otherwise choose in order to avoid disseminating viewpoints that are hostile to my candidacy.

10. If the matching funds provision of the Arizona Citizens Clean Elections Act is still being enforced during the 2010 election cycle, I will be forced to attempt to minimize the competitive disadvantage that is created by my campaign expenditures during the primary election, either by refraining from making campaign expenditures that I would otherwise make in the absence of matching funds or by adopting a tactic of delaying my expenditures in such a manner as to minimize the benefit any participating candidate may receive from matching funds. This amounts to constructive censorship because I will be forced to refrain from engaging in communication at times and in manners that I would otherwise choose in order to avoid disseminating viewpoints that are hostile to my candidacy.

11. Likewise, if I succeed in the primary and compete during the general election, I will be forced to attempt to minimize the competitive advantage created by my campaign fundraising either by refraining from seeking campaign fundraising or by refusing to accept campaign contributions significantly above the general election spending threshold. This

amounts to constructive censorship because I will be forced to refrain from engaging in communication at times and in manners that I would otherwise choose in order to avoid disseminating viewpoints that are hostile to my candidacy.

12. I do not believe any reasonable person could read *Davis v. FEC*, especially in light of Judge Silver's rulings on the unconstitutionality of matching funds, and rely on matching funds being issued during the 2010 election cycle, without assuming risk far in excess of my reliance on the plain meaning of *Davis* and Judge Silver's rulings. Accordingly, I believe it would be manifestly unreasonable and unjust for any court to allow matching funds to be issued during the 2010 election cycle.

13. If Judge Silver's stay on the enforcement of her permanent injunction were not vacated and instead was extended to cover the 2010 election cycle, I would suffer harm.

I, Jack W. Harper, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the United States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 26th day of January, 2010.

/s/ Jack W. Harper

Case No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MCCOMISH, NANCY MCLAIN,
and TONY BOUIE,
Plaintiffs-Appellees,

vs.

KEN BENNETT, in his official capacity,
et al,
Defendants-Appellants.

DECLARATION OF JOHN MUNGER IN SUPPORT OF MOTION TO VACATE STAY AND IN OPPOSITION TO ENTRY OF APPELLATE STAY

Appeal from the United States District Court for
the State of Arizona Case No. CV-081550-PHX-ROS,
Hon. Roslyn O. Silver, presiding

---

1. I am over the age of twenty-one, of sound mind, and willing to testify to the matters set forth herein under oath and in a court of law. I have personal knowledge of the facts set forth in this Declaration.

2. I am a candidate for Governor of the State of Arizona. I am familiar with Arizona's Clean Elections

Act and how matching funds are designed to be triggered by campaign speech in the form of campaign expenditures or contributions. I intend to run as a "traditional candidate," i.e. as a candidate supported by voluntary private contributions, not government subsidies.

3. The Arizona Clean Elections Act matching funds trigger mechanism infringes and chills my First Amendment rights, namely the right and ability to successfully contribute to my political campaign, my supporters' rights to contribute, and my right to expend money in support of my political campaign, as well as the public's right to disseminate financial resources to competing candidates who are participating in public financing ("participating candidates"). Therefore, matching funds impose a state-created negative consequence, punishment, "cost," "chilling effect," or competitive disadvantage on traditional candidates, like myself, and their supporters that would not exist in a world without matching funds. This punishment is forced upon me and others by the State as a direct result of the exercise of First Amendment rights in contributing to my campaign and in spending funds in support of my campaign and its message. The mere existence of the threat of matching funds in the 2010 election cycle, therefore, punishes and chills my supporters and me in exercising our First Amendment rights.

4. Prior to deciding to run for Governor, I analyzed the Honorable Judge Roslyn Silver's two prior decisions dealing with the merits of Plaintiffs'

challenge to the matching funds component of Arizona's Clean Elections Act and the impact of *Davis v. FEC*, 128 S. Ct. 2759 (2008). Based on the district court and Supreme Court's stated reasoning and rulings, I formed the belief and opinion that matching funds under the Clean Elections Act were unconstitutional and that the district court and Supreme Court would certainly enjoin them eventually. Accordingly, in reliance upon the district court and Supreme Court's cogent and clear reasoning, during early October 2009, I decided to run as a traditional candidate for the 2010 election cycle.

5. My reliance upon the belief and opinion that matching funds under the Clean Elections Act were unconstitutional was further confirmed by the entry by Judge Silver of a permanent injunction striking down the matching funds component of Arizona's Clean Elections Act on January 20, 2009 [10] [NCD per P.O.A.], which I read promptly after issuance.

6. As a traditional candidate for the 2010 election cycle, and in reliance upon the unconstitutionality of matching funds, I have raised more than $200,000.00 in contributions to my committee, and I have personally contributed $840 to my committee. My candidate committee has incurred expenses of more than $140,000.00 in developing my fundraising, campaign strategy and campaign messaging as a traditional candidate, in reliance upon the unconstitutionality of matching funds.

7. If my supporters and I had believed matching funds would likely be available for the 2010 election cycle, it is my firm belief based on many conversations with contributors that I would not have raised or been able to raise contributions in excess of $100,000.00. I base this inference on the repeatedly expressed interest of my contributors in my ability to project my message compared with the ability of my opponents to project their message, which is directly correlated to the amount of money available to my opponent's campaign. Having spoken to innumerable of potential and actual contributors, my consistent understanding in communicating with my contributors about my campaign fundraising was that a majority of them would not have contributed to my campaign had they thought matching funds could be issued to oppose their contribution in the 2010 primary or general election. This opinion was formed based on personal telephone and face to face conversations I have had with numerous contributors.

8. If Judge Silver's temporary stay on the enforcement of her permanent injunction were not vacated or if it were extended to cover the 2010 election cycle, allowing matching funds to be issued, I would suffer irreparable harm consisting of immediate difficulties raising contributions from otherwise willing supporters because of the deterrent effect of matching funds. Simply put, my contributors and potential contributors will be less willing to contribute in the same amount if they knew or believed the value of their contribution will be diminished by

matching funds disseminating the hostile speech of an opposing participating candidate.

9. Even the possibility of matching funds being issued in the primary or general election impacts and deters my campaign speech today in the form of diminishing or altering the timing of the campaign expenditures I am willing to make today and in the near future to promote my campaign messages. This is because, as I understand the law, spending money today or in the near future to support my campaign goes towards my primary election spending limit, pushing me closer to the trigger point for matching funds in the primary. The threat of hostile speech being triggered by matching funds, therefore, chills my willingness to engage in campaign speech and expenditures.

10. Additionally, given the repeatedly expressed concerns of my actual and potential contributors that they would not want to contribute as much, or at all, in the face of the prospect of matching funds, the threat of matching funds currently diminishes my campaign expenditures from what they would be in the absence of any such threat because I cannot spend money as freely when I am more concerned about there being an adequate and continuing flow of contributions to my campaign. This amounts to constructive censorship because I will be forced to refrain from engaging in communication at times and in manners that I would otherwise choose in order to avoid disseminating viewpoints that are hostile to my candidacy.

11. If the matching funds provision of the Arizona Citizens Clean Elections Act is still being enforced during the 2010 election cycle, I will be forced to attempt to minimize the competitive disadvantage that is created by my campaign expenditures during the primary election, either by refraining from making campaign expenditures that I would otherwise make in the absence of matching funds or by adopting a tactic of delaying my expenditures in such a manner as to minimize the benefit any participating candidate may receive from matching funds. This amounts to constructive censorship because I will be forced to refrain from engaging in communication at times and in manners that I would otherwise choose in order to avoid disseminating viewpoints that are hostile to my candidacy.

12. Likewise, if I succeed in the primary and compete during the general election, I will be forced to attempt to minimize the competitive advantage created by my campaign fundraising either by refraining from seeking campaign fundraising or by refusing to accept campaign contributions significantly above the general election spending threshold. This amounts to constructive censorship because I will be forced to refrain from engaging in communication at times and in manners that I would otherwise choose in order to avoid disseminating viewpoints that are hostile to my candidacy.

13. I do not believe any reasonable person could read *Davis v. FEC*, especially in light of Judge Silver's rulings on the unconstitutionality of matching

funds, and rely on matching funds being issued during the 2010 election cycle, without assuming risk far in excess of my reliance on the plain meaning of *Davis* and Judge Silver's rulings. Accordingly, I believe it would be manifestly unreasonable and unjust for any court to allow matching funds to be issued during the 2010 election cycle.

14. If Judge Silver's stay on the enforcement of her permanent injunction were not vacated and instead was extended to cover the 2010 election cycle, I would suffer harm at least proportionate to the monetary value of all contributions made to my campaign as of this date because of matching funds' negation of all or a substantial part of the competitive value in spending such contributions in support of my candidacy and message. This amount is approximately $220,000.00. Additionally, based on my fundraising efforts to date and the campaign projections of my consultants, if matching funds were not enjoined during the 2010 election cycle and, instead, Judge Silver's permanent injunction were stayed or extended to cover all or part of the 2010 election cycle, I estimate that contributions to my campaign, and correspondingly expenditures I would make, would be diminished by at least 50% – or at least $500,000.00 in the future.

15. Accordingly, as a component of any bond required as a condition of maintaining Judge Silver's temporary stay or entering an appellate stay, I would urge the Court to consider my total likely monetary losses of $500,000.00 in addition to the irreparable

harm of free speech being chilled, both mine and that of my supporters.

16. Further, if the Injunction against Matching Funds is stayed pending appeal, and if the Appellants nevertheless lose (which I believe is highly probable), I will be injured irreparably by any interim release to these Appellants of Matching Funds, and even by the mere threat that such funds may be released to them pending appeal once the funds are triggered. Once such funds are released to the Appellants pending appeal, I can never be compensated for the damage they will impose. Such funds will then be spent against me, and I will never be able to recover such damage. Moreover, if the Injunction is stayed pending appeal, my contributors' willingness to contribute as well as my willingness to expend monies will be chilled by the theoretical ability, and/or actuality, of Appellants to receive Matching Funds during said Appeal.

17. For all the above reasons it is my opinion that the only manner in which this Court can avoid irreparable damage to me and my campaign, and my rights to free speech, is to refuse to stay Judge Silver's Injunction pending appeal so that no Matching Monies can be spent during that time (causing me damage); handle this appeal using expeditious procedures allowing determination before the end of the Primary campaign in late August; so that if the Appellants lose (as I believe highly probable) they will not have irreparably damaged me by using irretrievable Matching Funds against me during

appeal, but IF the Appellants win they would still have the use of Matching Funds available in this Primary campaign.

I, John Munger, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the United States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 26th day of January, 2010.

/s/ John Munger

No. 09A736

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,

Plaintiffs-Appellees,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, LOUIS HOFFMAN and LORI DANIELS, in their official capacity as members of the ARIZONA CLEAN ELECTIONS COMMISSION,

Defendants-Appellants,

and

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant Intervenor-Appellant.

On Emergency Application to Vacate Appellate Stay Entered by the United States Court of Appeals for the Ninth Circuit

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DECLARATION OF HERBERT COLEMAN IN SUPPORT OF PLAINTIFFS' EMERGENCY APPLICATION TO VACATE STAY BEFORE THE HON. JUSTICE ANTHONY M. KENNEDY

CLINT BOLICK *Counsel for Plaintiffs*
NICHOLAS C. DRANIAS* ** Counsel of Record*
GUSTAVO E. SCHNEIDER
GOLDWATER INSTITUTE
Scharf-Norton Ctr. for Const. Lit.
500 East Coronado Road, Phoenix, AZ 85004
(602) 462-5000; facsimile: (602) 256-7045

1. I am over the age of twenty-one, of sound mind, and willing to testify to the matters set forth herein under oath and in a court of law. I have personal knowledge of the facts set forth in this Declaration.

2. I am a partner in the political consulting firm of Coleman Dahm & Associates in Phoenix, Arizona. I have been a professional political and campaign consultant for over 10 years. In the course of my professional experience, I have represented both non-participating and participating candidate clients who have run for public office in Arizona under the Citizen Clean Elections Act (hereinafter "Clean Elections"). I am currently representing participating candidate clients running under Clean Elections as well as non-participating candidate clients running "traditional".

3. I estimate I have represented and provided professional advice on campaign fundraising, expenditures and related tactics and strategies to more than 10 participating and more than 10 non-participating candidate clients. In the course of my professional experience, in order to educate myself and others about viable campaign tactics and strategies in the

State of Arizona, I have spoken with numerous other professional political campaign consultants regarding the matters discussed in this declaration. The statements contained in this declaration are based on my personal knowledge arising from my professional political consulting experience. And I also believe that all competent professional political and campaign consultants in Arizona would agree with the statements contained in this Declaration. In short, the statements contained herein represent commonly-held concerns, considerations, customs, practices and beliefs in the professional political consultancy community in the State of Arizona and the predictions and conclusions set forth are made are to a reasonable degree of certainty.

4. As a result of my professional political consulting experience, I have acquired direct knowledge with respect to the practical effects that the Clean Election matching fund provisions have on the campaign decisions of candidates for public office and the standard customs and practices of political campaign consultants arising from the competitive environment generated by Citizens Clean Elections Act, the administrative rules implementing the Act, and the general campaign finance regulations applicable to all candidates.

5. Citizens Clean Elections Commission Administrative Rule R2-20-104(D)(6), is commonly interpreted by political consultants in Arizona, including myself, as authorizing qualified participating candidates to incur obligations in excess of cash on hand,

up to the applicable spending limit, as modified, upon notification by Clean Elections that matching funds are to be available to a participating candidate.

Consequently, it is widespread custom and practice of political consulting professionals in Arizona to incur strategic expenditure obligations on behalf of participating candidates above the original Clean Elections primary and general election spending limits (hereinafter "caps") upon notification of the pending receipt of matching funds under A.R.S. § 16-952. Contingent obligations for radio and print advertising costs are often incurred by candidate clients upon notification by Clean Elections of the future issuance of matching funds. In my experience as a professional political consultant working with many participating candidates, the making of campaign expenditures by participating candidates based on incurred obligations very often precedes the actual issuance of matching funds pursuant to Clean Elections.

6. On or about February 2, 2010, Governor Brewer submitted nomination papers and prima facie evidence of sufficient $5 contributions to qualify for early public financing. See http://www.arizonaguardian.com/azg/index.php?option=com_content&view=article&id=1646:brewer-first-to-qualify-for-2010-ballot-public-cash&catid=54:campaigns-a-elections&Itemid=75 (last visited February 7, 2010). The random sample signature verification process of her submissions is likely to be concluded within 10 days of such submission, by February 12, 2010. Consequently, Governor Brewer

will soon be qualified as a participating candidate to receive public financing. Accordingly, her political consultants will advise her that she is allowed to incur expenditure obligations in excess of cash on hand up to the applicable spending limit, upon notification by Clean Elections of her status as a qualified participating candidate. *See* Ariz. Rev. Stat. §§ 16-950, 16-951, 16-952, R2-20-104(3)(6).

7. Buz Mills, who is a non-participating candidate running for governor in competition with Governor Brewer, has reported personal contributions to his campaign in the amount of $2,000,000. *See* http://www.azsos.gov/cfs/PublicReports/2010/50460184-D24F-476B-AE47-4FF3DC6FE077.pdf (last visited February 8, 2010). Given his relatively low name recognition, there is a high likelihood that Buz Mills will make campaign expenditures in excess of the matching funds trigger threshold for gubernatorial candidates (which is $707,447) long before June 22, 2010.

8. Therefore, as soon as February 12, 2010 and almost certainly before June 22, 2010, Governor Brewer's candidate committee can be expected to incur expenditure obligations in excess of her base amount of public financing, based upon notification by Clean Elections of her eligibility to receive matching funds triggered by Buz Mills' campaign expenditures. Such incurred obligations would cause the negative consequences of matching funds to be felt by traditional candidates, such as John Munger as soon as February 12, 2010. For example, and without

limitation, by incurring preprimary obligations for scarce media airtime, Governor Brewer may be able to displace competing promotions by the gubernatorial campaigns of John Munger and Buz Mills (and other traditional candidates not directly competing with Governor Brewer).

9. In short, although the State will not issue matching funds to participating candidates until June 22, 2010, which is the beginning of the primary election period, participating candidates are expected by political consultants, such as myself, to incur expenditure obligations in the preprimary period as a result of the anticipated notifications of eligibility of matching funds.

10. Consequently, it is widespread custom and practice of political consulting professionals in Arizona, such as myself, to advise nonparticipating candidate clients (especially those who lack the financial resources of Mr. Mills), to refrain from making various campaign expenditures on behalf of their campaigns during the pre-primary period so as to avoid the triggering mechanism of matching funds during the primary period.

11. In fact, I have routinely advised non-participating candidate clients to refrain or delay from making any expenditure during the pre-primary period above the statutory threshold level that would result in the triggering of matching funds when the primary election period begins. My clients generally take my advice, which means the Clean Elections

matching fund provisions have an immediate and ongoing chilling effect on a non-participating candidate's decision to make or not to make various campaign expenditures during the pre-primary period which is underway and ends June 22, 2010.

I, Herbert Coleman, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the United States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 8th day of February, 2010.

/s/ Herbert Coleman

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,

Plaintiffs-Appellees,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, LOUIS HOFFMAN and LORI DANIELS, in their official capacity as members of the ARIZONA CLEAN ELECTIONS COMMISSION,

Defendants-Appellants,

and

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant Intervenor-Appellant.

On Emergency Application from the United States Court of Appeals for the Ninth Circuit

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DECLARATION OF TOM HORNE IN SUPPORT OF PLAINTIFFS' RENEWED EMERGENCY APPLICATION TO VACATE STAY BEFORE THE HON. JUSTICE ANTHONY M. KENNEDY

CLINT BOLICK *Counsel for Plaintiffs*
NICHOLAS C. DRANIAS* ** Counsel of Record*
GUSTAVO E. SCHNEIDER
GOLDWATER INSTITUTE
Scharf-Norton Ctr. for Const. Lit.
500 East Coronado Road, Phoenix, AZ 85004
(602) 462-5000; facsimile: (602) 256-7045

1. I am over the age of twenty-one, of sound mind, and willing to testify to the matters set forth herein under oath and in a court of law. I have personal knowledge of the facts set forth in this Declaration.

2. I am a candidate for the Office of Attorney General in the State of Arizona. I am currently serving as Arizona's Superintendent of Public Instruction.

3. My candidate committee currently maintains approximately $285,000 in its segregated campaign account for use in promoting my candidacy. I personally loaned approximately $100,000 of this to my campaign.

4. The primary election spending limit for attorney general candidates in the 2010 primary election cycle is $183,311. *See* Citizens Clean Elections Commission 2009-2010 Participating Candidate Guide 26, 28, http://www.azcleanelections.gov/forms-pubs/2009-2010/candidates/participating.aspx (stating primary election spending limit).

4. I will be competing against at least one opposing participating candidate during the 2010

primary election cycle, namely Andrew Thomas. On June 22, 2010, the beginning of the primary election period, he could receive matching funds approximately equal to any amount I spend above $183,311 either by myself or in combination with the funds spent by independent expenditure committees who support by my candidacy. In essence, every dollar I spend over $183,311 could finance my opponent's candidacy by roughly one dollar and enable them to disseminate hostile speech against my campaign.

5. Any campaign expenditures I make after June 22, 2010 above the primary spending limit will result in the government giving my campaign's opponent(s) disproportionate fundraising advantages and the ability to disseminate hostile speech against my campaign that they would not otherwise have, merely because I exercised my First Amendment rights.

6. The renewed threat of matching funds being paid by the government to my opponents because of the Ninth Circuit's recent merits decision is already causing me and my supporters to become more hesitant to contribute to the campaign and also to hesitate to spend money that has already been contributed to the campaign, and thus is chilling the freedom to communicate our ideas and political message to the public.

7. If the permanent injunction on matching funds entered by the District Court is not in effect on June 22, 2010, I may refrain from spending money

during the 2010 primary election cycle above $183,311, in order to avoid financing the hostile speech of my participating opponent(s).

I, Tom Horne, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the United States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 21st day of May, 2010.

/s/ Tom Horne

Case Nos. 10-15165 & 10-15166

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MCCOMISH; et al. and DEAN MARTIN; et al.,

Plaintiffs and Plaintiff-Intervenors Appellees,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, et al. and CLEAN ELECTIONS INSTITUTE, INC.,

Defendants and Defendant-Intervenor Appellants.

On Appeal from the United States District Court
for the District of Arizona
Judge Roslyn Silver
Case No. CV-08-1550-PHX-ROS

DECLARATION OF DUSTI LEEANN MORRIS IN SUPPORT OF PLAINTIFFS/APPELLEES' MOTION FOR STAY OF MANDATE PENDING PETITION FOR CERTIORARI

Clint Bolick
Nicholas C. Dranias*
Gustavo E. Schneider
Scharf-Norton Center for
Constitutional Litigation
GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, AZ 85004
T (602) 462-5000 F (602) 256-7045
ndranias@goldwaterinstitute.org
gschneider@goldwaterinstitute.org

Counsel for Plaintiffs
**Lead Counsel*

1. I am over the age of twenty-one, of sound mind, and willing to testify to the matters set forth herein under oath and in a court of law. I have personal knowledge of the facts set forth in this Declaration.

2. I am a traditional candidate for the Arizona state House of Representatives, Legislative District 11.

3. I am competing against two other traditional candidates and two participating candidates in the 2010 primary election cycle.

4. I am within a couple thousand dollars of spending over the approximately $14,000 spending limit that triggers the availability of matching funds to my participating opponents. At least ten percent of the money I have spent in support of my campaign is self-financed.

5. I intend to spend at least $7,000 more in support of my campaign, at least ten percent of which

will be self-financed. However, because I face two participating candidates, I am faced with the threat that for every dollar I spend over the spending limit, self-financed or not, nearly two dollars will be paid to my opposing participating candidates in matching funds. Moreover, because there are two other traditional candidates running, who are likely to spend above the spending limit, I also face the threat that my two opposing participating candidates will receive nearly another two dollars for every dollar each of my opposing traditional candidates spend. As a result, if my traditional opponents spend as much as I intend to spend, at least approximately $5,000 above the spending limit for a total of $15,000 as a class, it appears likely that each participating opponent of mine will receive nearly $15,000 in matching funds and that my participating opponents as a class will receive $30,000 in matching funds. The speech financed by matching funds threatens to swamp the privately-financed speech of all traditional candidates.

6. This threat of vast resources being triggered to my participating opponents will force me to change the timing of the funding and spending of money in support of my campaign to minimize the adverse impact of matching funds. Most likely this will involve delaying the funding and spending of money in support of my campaign, which will detract from the effectiveness of my communications and deny Arizonans from hearing my message in a timely way.

7. The continued threat of matching funds has thus deprived me of the unfettered freedom to spend my own money communicating my unique message and policy prescriptions to the people of the State of Arizona.

8. I support the effort to stay the issuance of the mandate from the May 21, 2010 merits decision in this case because I do not want Arizona's matching funds trigger to chill the speech of any other traditional candidate and deprive the public of yet another voice.

I, Dusti Leeann Morris, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the United States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 3rd day of June, 2010

/s/ Dusti Leeann Morris

Case Nos. 10-15165 & 10-15166

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MCCOMISH; et al. and
DEAN MARTIN; et al.,

Plaintiffs and Plaintiff-Intervenors-Appellees,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; et al. and
CLEAN ELECTIONS INSTITUTE, INC.,

Defendants and Defendant-Intervenor-Appellants.

On Appeal from the United States District Court
for the District of Arizona
Judge Roslyn Silver
Case No. CV-08-1550-PHX-ROS

DECLARATION OF ERIC ULIS IN SUPPORT OF PLAINTIFFS/APPELLEES' MOTION FOR STAY OF MANDATE PENDING PETITION FOR CERTIORARI

Clint Bolick — *Counsel For Plaintiffs*
Nicholas C. Dranias* — **Lead Counsel*
Gustavo E. Schneider
Scharf-Norton Center for Constitutional Litigation
GOLDWATER INSTITUTE
500 East Coronado Road,
Phoenix, AZ 85004
T (602) 462-5000 / F (602) 256-7045
ndranias@goldwaterinstitute.org
gschneider@goldwaterinstitute.org

1. I am over the age of twenty one, of sound mind, and willing to testify to the matters set forth herein under oath and in a court of law. I have personal knowledge of the facts set forth in this Declaration.

2. I am a traditional candidate for the Arizona state House of Representatives, Legislative District 8.

3. I am competing against two other traditional candidates and three participating candidates in the 2010 primary election cycle.

4. Within the next ten days I will have spent enough money to come within four thousand dollars of approximately $14,000 spending limit that triggers the availability of matching funds to my participating opponents.

5. I intend to spend at least $10,000 above the spending limit in support of my campaign. However, because I face three participating candidates, I am faced with the threat that for every dollar I spend

above the spending limit, self-financed or not, nearly three dollars will be paid to my opposing participating candidates in matching funds to spend against me. Moreover, because there are two other traditional candidates running, who are likely to spend above the spending limit, I also face the threat that my three opposing participating candidates will receive nearly another three dollars for every dollar each of my opposing traditional candidates spend. As a result, if my traditional opponents spend as much as I intend to spend, namely at least $10,000 above the spending limit for a total of at least $30,000 as a class, it appears likely that each participating opponent of mine will receive at least nearly $30,000 in matching funds and that my participating opponents as a class will receive $90,000 in matching funds. The speech financed by matching funds threatens to swamp the privately-financed speech of all traditional candidates.

6. Additionally, I am uncomfortable and disturbed with the uncertainty of independent expenditures being made in support of my campaign because every dollar an independent expenditure committee spends supporting me above the spending limit will trigger nearly one dollar to each participating candidate opposing me, for a total of nearly three dollars to be spent against me for every dollar in independent expenditures spent to support me. This uncertainty is making me fear contributing and spending money in support of my campaign.

7. This threat of vast resources being triggered to my participating opponents is forcing me to change the timing of the funding and spending of money in support of my campaign to minimize the adverse impact of matching funds. Most likely this will involve delaying the funding and spending of money in support of my campaign, which will detract from the effectiveness of my communications and deny Arizonans from hearing my message in a timely way.

8. I would have contributed and spent at least $25,000 of my own money in support of my campaign through the primary election cycle if the district court's permanent injunction on matching funds were currently in effect. However, because of the threat of matching funds being issued to my participating opponents when I spend over approximately $14,000, I have not contributed or spent more than $300 in support of my campaign.

9. The continued threat of matching funds has thus deprived me of the unfettered freedom to spend my own money communicating my unique message and policy prescriptions to the people of the State of Arizona.

10. I support the effort to stay the issuance of the mandate from the May 21, 2010 merits decision in this case because I do not want Arizona's matching funds trigger to chill the speech of any other traditional candidate and deprive the public of yet another voice.

I, Eric Ulis, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the United States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 3rd day of June, 2010

/s/ Eric Ulis

Case Nos. 10-15165 & 10-15166

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MCCOMISH; et al. and
DEAN MARTIN; et al.,

Plaintiffs and Plaintiff-Intervenors-Appellees,

v.

KEN BENNETT, in his official capacity as
Secretary of State of the State of Arizona; et al. and
CLEAN ELECTIONS INSTITUTE, INC.,

Defendants and Defendant-Intervenor-Appellants.

On Appeal from the United States District Court
for the District of Arizona
Judge Roslyn Silver
Case No. CV-08-1550-PHX-ROS

DECLARATION OF JOHN MUNGER IN SUPPORT OF PLAINTIFFS/APPELLEES' MOTION FOR STAY OF MANDATE PENDING PETITION FOR CERTIORARI

Clint Bolick — *Counsel For Plaintiffs*
Nicholas C. Dranias* — **Lead Counsel*
Gustavo E. Schneider
Scharf-Norton Center for Constitutional Litigation
GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, AZ 85004
T (602) 462-5000 / F (602) 256-7045
ndranias@goldwaterinstitute.org
gschneider@goldwaterinstitute.org

1. I am over the age of twenty-one, of sound mind, and willing to testify to the matters set forth herein under oath and in a court of law. I have personal knowledge of the facts set forth in this Declaration.

2. I had been a candidate for the office of Governor of the State of Arizona for the 2010 election cycle.

3. On June 1, 2010, I had approximately $175,000 of my own personally contributed funds in my segregated gubernatorial campaign account.

4. If the stay on the district court's permanent injunction on Arizona's matching funds trigger had been lifted, I would have spent at least $25,000 of the $175,000 of my own personally contributed funds, and possibly more, in support of my gubernatorial campaign by June 15, 2010.

5. Shortly before June 1, 2010, I became aware of reports that participating gubernatorial candidates

Jan Brewer and Dean Martin could qualify for in excess of one million dollars each in matching funds because gubernatorial candidate Buz Mills reportedly spent well over a million dollars in support of his campaign above the spending limit that triggers matching funds.

6. Because the stay on the district court's permanent injunction on the matching funds trigger was found to remain in effect on June 1, 2010, and with the June 22, 2010 distribution date for matching funds approaching rapidly, I could not in good faith or conscience spend the $25,000 of my own personally contributed funds to project my ideas to the public knowing that matching funds continued to threaten to provide millions of dollars to finance hostile opposing speech by participating gubernatorial candidates Jan Brewer and Dean Martin. Likewise, I could not request from my supporters further contributions to my campaign because it was obvious that my campaign message would be swamped and unsuccessful due to the vastly superior funding of the participating gubernatorial candidates. Furthermore, I felt forced to withdraw my candidacy and did, in fact, withdraw my candidacy because I knew the availability of matching funds would prevent me from overcoming the message-swamping effect of the millions of dollars in matching funds that could be given to my participating opponents.

7. The continued threat of matching funds has thus deprived me of the unfettered freedom to spend my own money communicating my unique message

and policy prescriptions to the people of the State of Arizona. In these ways, the availability of matching funds has chilled my ability to speak freely.

8. I support effort to stay the issuance of the mandate from the May 21, 2010 merits decision in this case because I do not want Arizona's matching funds trigger to chill the speech of any other traditional candidate and deprive the public of yet another voice.

I, John Munger, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the United States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 3rd day of June, 2010

/s/ John Munger

Case Nos. 10-15165 & 10-15166

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MCCOMISH; et al. and DEAN MARTIN; et al.,

Plaintiffs and Plaintiff-Intervenors-Appellees,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, et al. and CLEAN ELECTIONS INSTITUTE, INC.,

Defendants and Defendant-Intervenor-Appellants.

On Appeal from the United States District Court
for the District of Arizona
Judge Roslyn Silver
Case No. CV-08-1550-PHX-ROS

DECLARATION OF MICHAEL BLAIRE IN SUPPORT OF PLAINTIFFS/APPELLEES' MOTION FOR STAY OF MANDATE PENDING PETITION FOR CERTIORARI

Clint Bolick
Nicholas C. Dranias*
Gustavo E. Schneider
Scharf-Norton Center for
Constitutional Litigation
GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, AZ 85004
T (602) 462-5000 F (602) 256-7045
ndranias@goldwaterinstitute.org
gschneider@goldwaterinstitute.org

Counsel for Plaintiffs
**Lead Counsel*

1. I am over the age of twenty-one, of sound mind, and willing to testify to the matters set forth herein under oath and in a court of law. I have personal knowledge of the facts set forth in this Declaration.

2. I am a traditional candidate for the Arizona state House of Representatives, Legislative District 8.

3. I am competing against two other traditional candidates and three participating candidates in the 2010 primary election cycle.

4. I have spent slightly over the approximately $14,000 spending limit that triggers the availability of matching funds to my participating opponents. The majority of the money I have spent in support of my campaign is self-financed.

5. I intend to spend at least $10,000 above the spending limit in support of my campaign. However, because I face three participating candidates, I am faced with the threat that for every dollar I spend

above the spending limit, self-financed or not, nearly three dollars will be paid to my opposing participating candidates in matching funds to spend against me. Moreover, because there are two other traditional candidates running, who are likely to spend above the spending limit, I also face the threat that my three opposing participating candidates will receive nearly another three dollars for every dollar each of my opposing traditional candidates spend. As a result, if my traditional opponents spend as much as I intend to spend, namely at least $10,000 above the spending limit for a total of at least $30,000 as a class, it appears likely that each participating opponent of mine will receive at least nearly $30,000 in matching funds and that my participating opponents as a class will receive $90,000 in matching funds. The speech financed by matching funds threatens to swamp the privately-financed speech of all traditional candidates.

6. Additionally, I am uncomfortable and disturbed with the uncertainty of independent expenditures being made in support of my campaign because every dollar an independent expenditure committee spends supporting me above the spending limit will trigger nearly one dollar to each participating candidate opposing me, for a total of nearly three dollars to be spent against me for every dollar in independent expenditures spent to support me. This uncertainty is making me fear contributing and spending money in support of my campaign.

7. This threat of vast resources being triggered to my participating opponents is forcing me to change the timing of the funding and spending of money in support of my campaign to minimize the adverse impact of matching funds. Most likely this will involve delaying the funding and spending of money in support of my campaign, which will detract from the effectiveness of my communications and deny Arizonans from hearing my message in a timely way.

8. The continued threat of matching funds has thus deprived me of the unfettered freedom to spend my own money communicating my unique message and policy prescriptions to the people of the State of Arizona.

9. I support the effort to stay the issuance of the mandate from the May 21, 2010 merits decision in this case because I do not want Arizona's matching funds trigger to chill the speech of any other traditional candidate and deprive the public of yet another voice.

I, Michael Blaire, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the United States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 3rd day of June, 2010

/s/ Michael Blaire

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
JAN 12 2011
OFFICE OF THE CLERK

Nos. 10-238 and 10-239

In The
Supreme Court of the United States

JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,

Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY I. FAIRMAN, LOUIS HOFFMAN and LORI DANIELS, in their official capacities as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

CLINT BOLICK
NICHOLAS C. DRANIAS*
GOLDWATER INSTITUTE
SCHARF-NORTON CENTER
FOR CONSTITUTIONAL LITIGATION
500 East Coronado Road
Phoenix, AZ 85004
telephone: (602) 462-5000
facsimile: (602) 256-7045
ndranias@goldwaterinstitute.org

Counsel for Petitioners
**Counsel of Record*

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QUESTIONS PRESENTED FOR REVIEW

At issue in this case is the matching funds provision of Arizona's Citizens Clean Elections Act, A.R.S. § 16-952, which authorizes the payment of campaign subsidies to "participating" candidates for state elective office when competing "traditional" candidates or opposing independent expenditure committees raise or spend campaign money above a "spending limit." The questions presented for review are:

1. Whether *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010), and *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008), require the Court to strike down Arizona's matching funds system under the First and Fourteenth Amendments because it penalizes and deters free speech by forcing privately-financed candidates and their supporters to finance the dissemination of hostile political speech whenever they raise or spend private money, or when independent expenditures are made, above a "spending limit."

2. Whether *Citizens United* and *Davis* require the Court to strike down Arizona's matching funds system under the First and Fourteenth Amendments because it regulates campaign financing in order to equalize "influence" and financial resources among competing candidates and interest groups, rather than to advance directly a compelling state interest in the least restrictive manner.

PARTY LISTING

A list of all parties to the proceeding in the court whose judgment is the subject of the petition is as follows:

Plaintiffs-Appellees and Petitioners: John McComish; Nancy McLain; and Tony Boone.

Plaintiff-Intervenors-Appellees and Respondents in Support: Dean Martin; Robert Burns; Rick Murphy; Arizona Free Enterprise Club's Freedom Club PAC; and Arizona Taxpayers Action Committee, as agent of Taxpayers Action Committee.

Defendants-Appellants and Respondents in Opposition: Ken Bennett, in his official capacity as Secretary of State of the State of Arizona; Gary Scaramazzo, in his official capacity as a member (Commissioner) of the Arizona Citizens Clean Elections Commission (hereinafter "CCEC"); Royann J. Parker, in her official capacity as a member (Commissioner) of the CCEC; Jeffrey L. Fairman, in his official capacity as a member (Commissioner) of the CCEC; Louis Hoffman, in his official capacity as a member (Commissioner) of the CCEC; and Lori S. Daniels, in her official capacity as a member (Commissioner) of the CCEC.

Defendant-Intervenor-Appellant and Respondent in Opposition: Clean Elections Institute, Inc.

The term "Respondents" used hereinafter refers solely to Respondents in Opposition.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of the Court, this merits brief has not been filed by or on behalf of a nongovernmental corporation. The Goldwater Institute, which is a nongovernmental corporation that is neither publicly traded nor owned in any percentage by a publicly traded company, furnishes legal representation but is not a party to this proceeding.

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OPINIONS BELOW

The merits decision of the court of appeals is reported at 605 F.3d 720 and an amendment to footnote 1 of the decision is reported at 611 F.3d 510. *See also* 10-239 McComish Cert. Pet. Appendix ("10-239 PA") at 2-45. The decision of the district court is not officially reported, but is available at 2010 WL 2292213 and 2010 U.S. Dist. LEXIS 4932. *See also* 10-239 PA47-80.

JURISDICTION

Plaintiffs/Appellees' Petition for Writ of Certiorari was filed within 90 days of the court of appeals' judgment. 10-239 PA1. May 21, 2010. The Petition was granted on November 29, 2010 and consolidated with the parallel proceeding under case number 10-238 filed by Plaintiff-Intervenors/Appellees. This merits brief will be filed within 45 days of November 29, 2010. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, as well as A.R.S. §§ 16-940 through 961. Full statements of each of those constitutional and statutory provisions are reproduced at 10-239

PA134-81. The provisions of A.R.S. § 16-905 relating to contributions, together with a restatement of the matching funds provisions of A.R.S. § 16-952 and a full statement of the matching funds implementation provisions of CCEC Administrative Rules R2-20-109 and R2-20-113, are provided below:

A.R.S. § 16-905 provides in relevant part:

Contribution limitations; civil penalty; complaint

A. For an election other than for a statewide office, a contributor shall not give and an exploratory committee, a candidate or a candidate's campaign committee shall not accept contributions of more than:

1. For an election for a legislative office, four hundred eighty-eight dollars from an individual.

2. For an election other than for a legislative office, three hundred ninety dollars from an individual.

3. For an election for a legislative office, four hundred eighty-eight dollars from a single political committee, excluding a political party, not certified under subsection G of this section to make contributions at the higher limits prescribed by paragraph 5 of this subsection and subsection B, paragraph 3 of this section.

4. For an election other than for a legislative office, three hundred ninety dollars from a single political committee, excluding a political party, not certified under subsection G of this section to make

contributions at the higher limits prescribed by subsection B, paragraph 3 of this section.

5. Two thousand dollars from a single political committee, excluding a political party, certified pursuant to subsection G of this section.

B. For an election for a statewide office, a contributor shall not give and an exploratory committee, a candidate or a candidate's committee shall not accept contributions of more than:

1. One thousand ten dollars from an individual.

2. One thousand ten dollars from a single political committee, excluding a political party, not certified under subsection G of this section to make contributions at the higher limits prescribed by subsection A, paragraph 5 of this section and paragraph 3 of this subsection.

3. Five thousand ten dollars from a single political committee excluding political parties certified pursuant to subsection G of this section.

C. A candidate shall not accept contributions from all political committees, excluding political parties, combined totaling more than:

1. For an election for a legislative office, sixteen thousand one hundred fifty dollars.

2. For an office other than a legislative office or a statewide office, ten thousand twenty dollars.

3. For a statewide office, one hundred thousand one hundred ten dollars.

D. A nominee of a political party shall not accept contributions from all political parties or political organizations combined totaling more than ten thousand twenty dollars for an election for an office other than a statewide office, and one hundred thousand one hundred ten dollars for an election for a statewide office.

E. An individual shall not make contributions totaling more than five thousand six hundred ten dollars in a calendar year to state and local candidates and political committees contributing to state or local candidates. Contributions to political parties and contributions to independent expenditure committees are exempt from the limitations of this subsection.

F. A candidate's campaign committee or an individual's exploratory committee shall not make a loan and shall not transfer or contribute money to any other campaign or exploratory committee that is designated pursuant to this chapter or 2 United States Code section 431 except as follows:

1. An exploratory committee may transfer monies to a subsequent candidate's campaign committee of the individual designating the exploratory committee, subject to the limits of subsection B of this section.

2. A candidate's campaign committee may transfer or contribute monies to another campaign committee designated by the same candidate as follows:

(a) Subject to the contribution limits of this section, transfer or contribute monies from one committee to another if both committees have been designated for an election in the same year.

(b) Without application of the contribution limits of this section, transfer or contribute monies from one committee to another designated for an election in a subsequent year.

G. Only political committees that received monies from five hundred or more individuals in amounts of ten dollars or more in the one year period immediately before application to the secretary of state for qualification as a political committee pursuant to this section may make contributions to candidates under subsection A, paragraph 5 of this section and subsection B, paragraph 3 of this section . . .

H. The secretary of state biennially shall adjust to the nearest ten dollars the amounts in subsections A through E of this section by the percentage change in the consumer price index and publish the new amounts for distribution to election officials, candidates and campaign committees. . . .

A.R.S. § 16-952(A)-(C) provides:

Equal funding of candidates

A. Whenever during a primary election period a report is filed, or other information comes to the attention of the commission, indicating that a nonparticipating candidate who is not unopposed in that primary has made expenditures during the election cycle to date exceeding the original primary election spending limit, including any previous adjustments, the commission shall immediately pay from the fund to the campaign account of any participating candidate in the same party primary as the nonparticipating candidate an amount equal to any excess of the reported amount over the primary election spending limit as previously adjusted, less six per cent for a nonparticipating candidate's fund-raising expenses and less the amount of early contributions raised for that participating candidate for that office as prescribed by section 16-945. The primary election spending limit for all such participating candidates shall be adjusted by increasing it by the amount that the commission is obligated to pay to a participating candidate.

B. Whenever during a general election period a report has been filed, or other information comes to the attention of the commission, indicating that the amount a nonparticipating candidate who is not unopposed has received in contributions during the election cycle to date less the amount of expenditures the nonparticipating candidate made through the end

of the primary election period exceeds the original general election spending limit, including any previous adjustments, the commission shall immediately pay from the fund to the campaign account of any participating candidate qualified for the ballot and seeking the same office as the nonparticipating candidate an amount equal to any excess of the reported difference over the general election spending limit, as previously adjusted, less six per cent for a nonparticipating candidate's fund-raising expenses. The general election spending limit for all such participating candidates shall be adjusted by increasing it by the amount that the commission is obligated to pay to a participating candidate.

C. For the purposes of subsections A and B of this section, the following expenditures reported pursuant to this article shall be treated as follows:

1. Independent expenditures against a participating candidate shall be treated as expenditures of each opposing candidate, for the purpose of subsection A of this section, or contributions to each opposing candidate, for the purpose of subsection B of this section.

2. Independent expenditures in favor of one or more nonparticipating opponents of a participating candidate shall be treated as expenditures of those nonparticipating candidates, for the purpose of subsection A of this section, or contributions to those nonparticipating candidates, for the purpose of subsection B of this section.

3. Independent expenditures in favor of a participating candidate shall be treated, for every opposing participating candidate, as though the independent expenditures were an expenditure of a nonparticipating opponent, for the purpose of subsection A of this section, or a contribution to a nonparticipating opponent, for the purpose of subsection B of this section.

4. Expenditures made during the primary election period by or on behalf of an independent candidate or a nonparticipating candidate who is unopposed in a party primary shall be deducted from the total amount of monies raised for purposes of determining the amount of equalizing funds, up to the amount of primary funds received by the participating candidate. Equalizing funds pursuant to subsection B of this section shall then be calculated and paid at the start of the general election period.

5. Expenditures made before the general election period that consist of a contract, promise or agreement to make an expenditure during the general election period resulting in an extension of credit shall be treated as though made during the general election period, and equalizing funds pursuant to subsection B of this section shall be paid at the start of the general election period.

6. Expenditures for or against a participating candidate promoting or opposing more than one candidate who is not running for the same office shall be allocated by the commission among candidates for different offices based on the relative size or length

and relative prominence of the reference to candidates for different offices.

R2-20-109. Reporting Requirements

A. Reporting of transactions; software provided or approved by the Secretary of State. All campaign finance reports shall be filed in electronic format in accordance with A.R.S. § 16-958(E). The Commission shall coordinate with the Secretary of State to make electronic-filing computer software available to candidates. Campaign finance reports shall be available on the Secretary of State's web site. All candidates shall file campaign finance reports that include all receipts and disbursements for their current campaign account using the campaign finance computer software provided or approved by the Secretary of State as follows:

1. Expenditures for consulting, advising, or other such services to a candidate shall include a detailed description of what is included in the service, including an allocation of services to a particular election. The Commission may treat such expenditures as though made during the general election period, and equalizing funds pursuant to A.R.S. § 16-952 shall be paid at the start of the general election period.

2. Original and supplemental campaign finance reports filed pursuant to A.R.S. §§ 16-941 and 16-958 shall include the same information regarding receipts and disbursements as required by A.R.S. § 16-915.

3. A candidate may authorize an agent to purchase goods or services on behalf of such candidate, provided that:

a. The candidate shall report an expenditure as of the date that the agent promises, agrees, contracts or otherwise incurs an obligation to pay for the goods or services;

b. The candidate shall have sufficient funds in the candidate's campaign account to pay for the amount of such expenditure and all other outstanding obligations of the candidate's campaign committee; and

c. Within seven calendar days of the date upon which the amount of the expenditure is known, the candidate shall pay such amount from the candidate's campaign account to the agent who purchases the goods or services.

d. A joint expenditure is made when two or more candidates agree to share the cost of goods or services. Candidates may make a joint expenditure on behalf of one or more other campaigns, but must be authorized in advance by the other candidates involved in the expenditure, and must be reimbursed within seven days.

4. In the event that a candidate purchases goods or services from a subcontractor or other vendor through an agent pursuant to subsection (A)(3), the candidate's campaign finance report shall include the same detail as required in A.R.S. § 16-948(C) for

each such subcontractor or other vendor. Such detail is also required when petty cash funds are used for such expenditures.

5. For the purposes of the Act and Commission rules, a candidate or campaign shall be deemed to have made an expenditure as of the date upon which the candidate or campaign promises, agrees, contracts or otherwise incurs an obligation to pay for goods or services.

B. Participating candidate reporting requirements. In addition to the campaign finance reports filed pursuant to A.R.S. § 16-913, participating candidates shall file the following campaign finance reports and dispose of excess monies as follows:

1. Prior to filing the application for funding pursuant to A.R.S. § 16-950, participating candidates shall file a campaign finance report with the names of persons who have made qualifying contributions to the candidate.

2. End of qualifying period. At the end of the qualifying period, a participating candidate shall file a recap campaign finance report consisting of a recap of all early contributions received, including personal monies and the expenditures of such monies.

a. The recap campaign finance report for the qualifying period shall be filed with the Secretary of State no later than five days after the last day of the qualifying period and shall include all campaign activity through the last day of the qualifying period.

b. If the recap campaign finance report shows any amount unspent by a participating candidate, the candidate, within five days after filing the recap campaign finance report, shall send the Commission a check from the candidate's campaign account that will remit all unspent early contributions to the fund, pursuant to A.R.S. § 16-945(B). Any unspent personal monies shall be returned to the candidate or the candidate's family member within five days.

3. Primary election and general election recap campaign finance reports. Each participating candidate shall file a campaign finance report consisting of a recap of all expenditures made in connection with an election, all contributions received in the election cycle in which such election occurs, and all payments made from such candidate's campaign fund to the Clean Elections Fund. If the recap campaign finance report shows any amount unspent by a participating candidate, the candidate, within five days after filing the recap campaign finance report, shall send the Commission a check from the candidate's campaign account that will return all unspent monies to the Fund.

a. The recap campaign finance report for the primary election shall be filed within five days after the primary election day and shall reflect all activity through the primary election day.

b. The recap campaign finance report for the general election shall be considered filed upon the

filing of the post-general campaign finance report filed in accordance with A.R.S. § 16-913(B)(3).

C. Amending Reports. If a candidate determines that a previously filed campaign finance report contains inaccurate information, then the candidate shall amend the campaign finance report to provide accurate information.

1. Except when a new election period has started, a participating candidate who received Clean Elections funding based upon an inaccurate campaign finance report shall remit to the Commission the excess funds as determined by the amended campaign finance report within five days after filing the amended campaign finance report.

2. If the participating candidate does not have sufficient funds in his or her account to return the required monies, the balance owed shall be withheld from future equalizing funds due to the participating candidate in the election period during which the excess funds were awarded.

D. Independent expenditures.

1. Any individual, group of individuals, corporation, political party or membership organization that makes independent expenditures cumulatively exceeding the amount prescribed in A.R.S. § 16-941(D) in an election cycle that expressly advocate the election or defeat of a specific candidate, as defined in R2-20-101(11), shall file campaign finance reports with

the Secretary of State in accordance with A.R.S. § 16-958.

2. Any individual, group of individuals, corporation, political party or membership organization that makes independent expenditures for literature or an advertisement relating to any one candidate or office within 10 days before the day of any election to which the expenditures relate shall send to the Commission, (a) by overnight delivery; and (b) by facsimile or e-mail, no later than one day after it is mailed, broadcast or published, as applicable, a copy of the campaign literature or advertisement together with a statement declaring the cost of producing and distributing such campaign literature or advertisement. The copy of the literature or advertisement sent to the Commission pursuant to this Section shall be a reproduction that is clearly readable, viewable or audible, as applicable.

3. Any individual, group of individuals, corporation, political party or membership organization that fails to file a campaign finance report pursuant to this subsection (D) shall be subject to a civil penalty as described in A.R.S. § 16-942(B), as applicable.

E. The following will be considered to be a "contribution during the election cycle to date" or "expenditures . . . made through the end of the primary

election period" for purposes of reporting under A.R.S. §§ 16-941(B)(2) and 16-958(A):

1. A contribution to a candidate to retire debt from a prior election cycle if deposited into the current campaign account;

2. Any contributions received and placed in a future, current, or prior, campaign account during the current election cycle;

3. Surplus funds transferred into the current campaign account;

4. Contributions received or expenditures made beginning 21 days after the date of the prior general election.

F. Timing of reporting expenditures.

1. Except as set forth in subsection (F)(2) below, a candidate shall report a contract, promise or agreement to make an expenditure resulting in an extension of credit as an expenditure, in an amount equal to the full future payment obligation, as of the date the contract, promise or agreement is made.

2. In the alternative to reporting in accordance with subsection (F)(1) above, a candidate may report a contract, promise or agreement to make an expenditure resulting in an extension of credit as follows:

a. For a month-to-month or other such periodic contract or agreement that is terminable by a candidate at will and without any termination penalty or payment, the candidate may report an expenditure,

in an amount equal to each future periodic payment, as of the date upon which the candidate's right to terminate the contract or agreement and avoid such future periodic payment elapses.

b. For a contract, promise or agreement to provide goods or services during the general election period that is contingent upon a candidate advancing to the general election period, the candidate may report an expenditure, in an amount equal to the general election period payment obligation, as of the date upon which such contingency is satisfied.

c. For a contract, promise or agreement to pay rent, utility charges or salaries payable to individuals employed by a candidate's campaign committee as staff, the candidate may report an expenditure, in an amount equal to each periodic payment, as of the date that is the sooner of (i) the date upon which payment is made; or (ii) the date upon which payment is due.

G. Transportation expenses.

1. Except as otherwise provided in this subsection (G), the costs of transportation relating to the election of a statewide or legislative office candidate shall not be considered a direct campaign expense and shall not be reported by the candidate as expenditures or as in-kind contributions.

2. If a candidate travels for campaign purposes in a privately owned automobile, the candidate may use campaign funds to reimburse the owner of the automobile at a rate not to exceed the state mileage

reimbursement rate (which is 44.5¢ per mile in 2007), in which event the reimbursement shall be considered a direct campaign expense and shall be reported as an expenditure. If a candidate chooses to use campaign funds to reimburse, the candidate shall keep an itinerary of the trip, including name and type of events(s) attended, miles traveled and the rate at which the reimbursement was made.

3. Use of airplanes.

a. If a candidate travels for campaign purposes in a privately owned airplane, the candidate shall use campaign funds to reimburse the owner of the airplane at a rate of $150 per hour of flying time, in which event the reimbursement shall be considered a direct campaign expense and shall be reported as an expenditure. If the owner of the airplane is unwilling or unable to accept reimbursement, the candidate shall remit to the fund an amount equal to $150 per hour of flying time.

b. If a candidate travels for campaign purposes in a state-owned airplane, the candidate shall use campaign funds to reimburse the state for the portion allocable to the campaign in accordance with subsection 3a, above. The portion of the trip attributable to state business shall not be reimbursed. If payment to the State is not possible, the payment shall be remitted to the Clean Elections Fund.

4. If a candidate rents a vehicle or purchases a ticket or fare on a commercial carrier for campaign purposes, the actual costs of such rental (including

fuel costs), ticket or fare shall be considered a direct campaign expense and shall be reported as an expenditure.

R2-20-113. Calculation of Equalizing Funds

A. During the primary election period, the Commission shall pay any participating candidate in the same party primary of a nonparticipating candidate, the amount of the nonparticipating candidate's expenditures in excess of the amount over the primary election spending limit, not to exceed three times the original primary election spending limit, as follows:

1. The nonparticipating candidates' expenditures, made before any coordinated or joint expenditure between the participating candidate and the nonparticipating candidate, which are defined as:

a. Any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value made by a person for the purpose of influencing an election in this state;

b. A promise or agreement to make an expenditure resulting in an extension of credit; and

c. The value of any in-kind contribution received.

2. If an independent expenditure is made against one or more participating candidates for a single office, each participating candidate will be eligible to receive equalizing funds, if applicable, for the amount of the independent expenditure. The

participating candidates who were the subject of the expenditure will be the only candidates eligible to receive the equalizing funds, if applicable, for the cost of that independent expenditure. If so required by this subsection, the Commission may issue equalizing funds based on an independent expenditure in an amount greater than the amount of such independent expenditure.

3. If an independent expenditure is made in favor of one or more nonparticipating candidates, all participating candidates in the party primary of the candidate favored by the independent expenditure will be eligible to receive equalizing funds, if applicable, for the amount of the independent expenditure. If so required by this subsection, the Commission may issue equalizing funds based on an independent expenditure in an amount greater than the amount of such independent expenditure.

4. If an independent expenditure is made in favor of a single participating candidate, all of the other participating candidates in that party primary will be eligible to receive equalizing funds, if applicable, for the cost of that independent expenditure. If so required by this subsection, the Commission may issue equalizing funds based on an independent expenditure in an amount greater than the amount of such independent expenditure.

B. During the general election period, a participating candidate who has not engaged in a joint or coordinated expenditure with the opposing nonparticipating candidate during the general election period, will receive equalizing funds when the opposing nonparticipating candidate has received in contributions to date, less the amount of expenditures the nonparticipating candidate made through the end of the primary election period, an amount that exceeds the general election spending limit. The Commission shall pay any participating candidate seeking the same office an amount equal to any excess over the general election spending limit, not to exceed three times the original general election spending limit, as follows:

1. The nonparticipating candidate's contributions include:

a. Surplus funds transferred from previous campaign accounts and deposited into the current campaign account;

b. Individual contributions;

c. $25 or less contributions;

d. In-kind contributions;

e. Political committee contributions;

f. Personal monies;

g. Candidate or family loans;

h. Other loans; and

1. Contributions to retire campaign debt, irrespective of whether placed in a prior, current or future campaign account. Contributions to retire debt from the immediately preceding election cycle and received within 51 days following the general election shall be disregarded for purposes of calculating equalizing funds in the subsequent election cycle.

2. In accordance with A.R.S. § 16-952, the nonparticipating candidate's contributions shall not include offsets to contributions, including a refund of a contribution to an individual contributor or to a political committee contributor.

3. In accordance with A.R.S. § 16-952(C)(4), when a participating candidate is opposed in the general election by an independent candidate or nonparticipating candidate who was not opposed in the party primary, expenditures made during the primary election period by the nonparticipating candidate or independent candidate will not be included in the calculation of equalizing funds.

4. If an independent expenditure is made against one or more participating candidates for a single office, each participating candidate will be eligible to receive equalizing funds, if applicable, for the amount of the independent expenditure. The participating candidates who were the subject of the expenditure will be the only candidates eligible to receive the equalizing funds, if applicable, for the cost of that independent expenditure. If so required by this subsection, the Commission may issue equalizing

funds based on an independent expenditure in an amount greater than the amount of such independent expenditure.

5. If an independent expenditure is made in favor of one or more nonparticipating candidates, all participating candidates in the election(s) for the same office(s) will be eligible to receive equalizing funds, if applicable, for the amount of the independent expenditure. If so required by this subsection, the Commission may issue equalizing funds based on an independent expenditure in an amount greater than the amount of such independent expenditure.

6. If an independent expenditure is made in favor of a single participating candidate, all of the other participating candidates in the election for that office will be eligible to receive the equalizing funds, if applicable, for the cost of that independent expenditure. If so required by this subsection, the Commission may issue equalizing funds based on an independent expenditure in an amount greater than the amount of such independent expenditure.

C. Independent expenditures made against a nonparticipating candidate during the primary or general election periods will not be considered in the calculation of equalizing funds for a participating candidate.

D. In accordance with A.R.S. § 16-952(C)(6), during the primary and general election periods, expenditures promoting or opposing candidates for more than one office shall be allocated by the Commission among candidates for different offices based on the

relative size or length and relative prominence of the reference to candidates for different offices. Equalizing funds shall be issued to each participating candidate, if applicable, in an amount equal to the proportion of the expenditure that is targeted at the office sought by such participating candidate. If so required by this rule, the Commission may issue equalizing funds based on an expenditure in an amount greater than the amount of such expenditure.

E. The Commission shall cease to disburse equalizing funds for an election period after the Wednesday following the primary or general election day.

F. The Commission may decline to issue equalizing funds on the basis of expenditures that the Commission determines to be of de minimis value, and shall decline to issue equalizing funds during the primary or general election period after the participating candidate and the nonparticipating candidate triggering the match made a joint campaign expenditure during that primary or general election period, on account of expenditures by or contributions to the non-participating candidate with whom the participating candidate made the joint expenditure during the period.

INTRODUCTION

Public financing in Arizona's matching funds system forces a yoke around the neck of traditionally funded candidates. The system conscripts their labor and campaign resources to trigger subsidies for participating candidates. When traditional candidates raise or spend campaign money above a "spending limit," the financial reporting requirements of Arizona's system literally force them to press a button on their computer that will trigger the payment of subsidies to the very participating candidates they oppose. The State of Arizona thereby compels individuals to help disseminate private political speech, which they abhor, as a consequence and condition of speaking freely about politics. Such compulsion strikes at the heart of the First and Fourteenth Amendments.

STATEMENT OF THE CASE

I. PRIOR PROCEEDINGS.

A. The district court applied strict scrutiny and ruled three times that Arizona's matching funds provision, A.R.S. § 16-952, violates the First and Fourteenth Amendments under *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008), which struck down 2 U.S.C. § 441a-1(a) (commonly referenced as the "Millionaire's Amendment"). 10-239 PA67-72, 101-13, 124-29. In its first ruling, the district court observed:

> [T]he Supreme Court has held (in a passage quoted approvingly in *Davis*) that, while one

> does not "have the right to be free from vigorous debate, one does have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents" . . . Though the Arizona [Clean Elections] Act's mechanism for funding differs [from that of the Millionaire's Amendment], the effect, which forces a candidate to choose to "abide by a limit on personal expenditures" or else endure a burden placed on that right, is substantially the same.

10-239 PA128-29 (citations omitted). The district court's second ruling echoed and elucidated the same point. 10-239 PA106-07 (citations omitted). And based on this reasoning, the district court ultimately granted summary judgment to Petitioners and permanently enjoined enforcement of A.R.S. § 16-952. 10-239 PA80.

B. The Ninth Circuit's motions panel stayed enforcement of the district court's permanent injunction. 10-239 PA84-85. Circuit Judge Bea dissented, emphasizing that Arizona's matching funds system clearly violated the principles enforced in *Davis* and *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010). 10-239 PA85-89. As explained by Circuit Judge Carlos Bea:

> In *Davis*, if Davis spent more than $350,000 of his own money in his campaign, the contribution limitations placed on how much others could contribute to his opponents were lifted, but not for contributions made by

> others to Davis. Quite naturally, this was found to be a disincentive to Davis spending money on his own campaign, lest the expenditure serve to give his opponents an advantage not open to him. Such a disincentive was found to impose a "substantial burden" on Davis' campaign speech which had to be justified under the "strict scrutiny" test. . . . Similarly [to *Davis*], here any expenditures by Plaintiffs in the primary are matched by funds from the State of Arizona given to the Plaintiffs' opponents. Plaintiffs know that if they buy a television advertisement, at a bargain rate now for June broadcasting, or hire a consultant who might go to the other side, that expenditure will result in "matching funds" going to the candidates they are trying to beat in the July primaries. Strategically, it makes no more sense for Plaintiffs to spend money now than for a poker player to make a bet if he knows the house is going to match his bet for his opponent.

10-239 PA85-87 (citations omitted). As further observed by Judge Bea, contrary to the principles applied in *Citizens United*, "participating candidates are 'preferred' by the State of Arizona," just as the Millionaire's Amendment preferred opponents of self-financed candidates. 10-239 PA89.

C. Despite Circuit Judge Bea's dissent, the Ninth Circuit ultimately reversed the district court's permanent injunction on Arizona's matching funds trigger provision. 10-239 PA39. The Ninth Circuit

equated the speech burden of Arizona's matching funds system to that of a financial disclosure requirement, and applied intermediate scrutiny. *Compare* 10-239 PA34-35 *with* 10-239 PA105-06, 128-29. *Davis*' analogy between the Millionaire's Amendment and the matching funds system struck down in *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), was relegated by the Ninth Circuit to a footnote, where it was dismissed. *Compare Davis*, 554 U.S. at 739, *with* 10-239 PA28 n.9.

D. On June 8, 2010, the Court entered an order blocking the Ninth Circuit's decision from taking effect. 10-239 PA81. The order stayed the mandate from the decision and lifted the appellate stay on the district court's permanent injunction on A.R.S. § 16-952. It thereby ensured that matching funds would not be distributed in Arizona during the pendency of this case.

II. THE MECHANICS OF MATCHING FUNDS.

A. The CCEC ordinarily pays matching funds to participating candidates based on "trigger reports," which are filed online by traditional candidates and independent expenditure committees both periodically and after reaching inflation-adjusted fundraising and spending thresholds. 10-239 PA312-13; JA272-73; A.R.S. §§ 16-941(B)(2), (D), 952(A), (B), 958(A), (B), (D), (E), 959, 961(G), (H); *CCEC Admin. Rules*, R2-20-109(A), (D). Violations of trigger reporting requirements can result in civil penalties, Class 1 misdemeanor

charges, and *removal from elected office*. A.R.S. §§ 16-941, 942(B), (C), 943.

B. When traditional and participating candidates compete during a primary election, matching funds to participating candidates are triggered by traditional candidate expenditures and independent expenditures (i.e., uncoordinated campaign spending by groups not affiliated with the candidate's campaign) in support of traditional candidates (or in opposition to participating candidates) once the sum of traditional candidate expenditures and independent expenditures exceeds the "primary election spending limit." A.R.S. § 16-952(A), (C); *CCEC Admin. Rules*, R2-20-113. For example, if the primary election spending limit is $10,000, then no matching funds will be triggered until the sum of expenditures by traditional candidates and by allied independent expenditure committees exceeds $10,000. However, once the sum exceeds $10,000, then matching funds are triggered to each participating candidate on a dollar-for-dollar basis less a statutory deduction of 6% and an amount equal to the private "early contributions" participating candidates are allowed to collect under A.R.S. §§ 16-945, 946, 950.

C. During the general election, matching funds are similarly triggered by traditional candidate contributions and independent expenditures once the sum of traditional candidate contributions, independent expenditures and the unspent amount of traditional candidate primary election contributions exceeds the "general election spending limit." A.R.S. § 16-952(B), (C); *CCEC Admin. Rules*, R2-20-113. For

example, if "general election spending limit" is $10,000, then no matching funds will be triggered until the sum of contributions to traditional candidates (including contributions unspent during the primary election) and expenditures by independent expenditure committees in support of traditional candidates (or in opposition to participating candidates) exceeds $10,000. And once the sum exceeds $10,000, then matching funds are, again, triggered to each participating candidate on a dollar-for-dollar basis less a statutory deduction of 6%.

D. The statutory 6% deduction from the amount of the triggering campaign financing is substantially less than the typical out-of-pocket cost of fundraising by traditional candidates. 10-239 PA311-14; JA295, 639-41; District Court Record[1] ("Record") 332(7:12-25, 8:1-24, 9:1-24, 10:1-23). The 6% deduction in the amount matched also does not incorporate any measure of the opportunity cost of fundraising by traditional candidates. *Id.* By failing to adjust matching funds to reflect actual fundraising costs incurred by traditional candidates, Arizona's system ensures that participating opponents will almost always have more financial and personal resources than traditional candidates to conduct their campaign. *Id.*

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[1] Numerous district court filings originally included in the Excerpts of Record before the court of appeals have since been assigned different ECF docket numbers. To avoid any possible confusion, reference to the "Record" is made to the current ECF docket.

E. Independent expenditures in favor of traditional candidates or against participating candidates trigger matching funds to participating candidates, but independent expenditures in favor of participating candidates or against traditional candidates trigger nothing to traditional candidates. A.R.S. § 16-952(A)-(C). Because participating candidates have control over the matching funds they receive and traditional candidates do not have control over independent expenditures, the one-sided triggering of matching funds from independent expenditures typically gives participating candidates a greater competitive benefit from those expenditures than traditional candidates received in the first place. 10-239 PA193-94, 248, 313-15, 327-28; JA287-89, 1024-25; Record 317(5:6-21).

III. THE SPEECH BURDEN OF MATCHING FUNDS

A. It is undisputed Petitioners and allied independent expenditure committees, through raising or spending campaign money, collectively triggered tens of thousands of dollars in matching funds to opposing participating candidates. JA925-27(¶¶36, 44, 45, 49, 64), 932-35(¶¶5, 19, 21, 27, 31).

B. The most significant speech burden imposed by matching funds arises from its "multiplier effect." Petitioner McComish, for example, faced three participating opponents in the 2008 Arizona primary. Consequently, every dollar he spent above his "spending limit" triggered nearly three dollars to be spent

against his candidacy. 10-239 PA247-49, 327-28. In fact, Petitioner McComish watched his three participating opponents collectively receive $140,227.98 in public financing, which included at least $82,081.98 in matching funds triggered by campaign spending made by McComish and independent expenditure committees above the applicable $19,382.00 "spending limit." 10-239 PA328. Reeling from the deluge of hostile speech triggered by his campaign spending, McComish decided not to spend money on an "auto-dialer" campaign marketing program for fear of triggering matching funds to his opponents. 10-239 PA247-49, 325-26, 328-29. Spending $2,500 on the auto-dialer program would have triggered matching funds in the aggregate amount of nearly $7,500 to McComish's participating opponents. 10-239 PA248.

Additionally, when multiple traditional candidates compete against one or more participating candidates, the speech swamping effect of matching funds against traditional candidates and their supporters is even greater. Legislative candidate Eric Ulis described the threat he faced in the 2010 primary election cycle as follows:

> [B]ecause I face three participating candidates, I am faced with the threat that for every dollar I spend above the spending limit, self-financed or not, nearly three dollars will be paid to my opposing participating candidates in matching funds to spend against me. Moreover, because there are two other traditional candidates running, who

> are likely to spend above the spending limit, I also face the threat that my three opposing participating candidates will receive nearly another three dollars for every dollar each of my opposing traditional candidates spend. As a result, if my traditional opponents spend as much as I intend to spend, namely at least $10,000 above the spending limit for a total of at least $30,000 as a class, it appears likely that each participating opponent of mine will receive at least nearly $30,000 in matching funds and that my participating opponents as a class will receive $90,000 in matching funds. The speech financed by matching funds threatens to swamp the privately-financed speech of all traditional candidates.

JA1014-15. Candidate Ulis' testimony was echoed by candidates Michael Blaire and Dusti Morris, who faced the same or similar dynamics in their districts during the 2010 election cycle. JA1010-12, 1023-25.

A similar multiplier effect swamps the speech of independent expenditure committees that support traditional candidates or oppose participating candidates. For example, the Arizona Realtors Association made an independent expenditure in the amount of $6,500 ostensibly to support Petitioner McComish, which triggered $18,330 in the aggregate to his three competing participating opponents. 10-239 PA327-28.

C. Petitioners testified about a number of specific instances in which their exercise of First Amendment rights was burdened by the threat of

triggering matching funds. Petitioner Nancy McLain testified that she decided not to self-finance her campaign during Arizona's 2004 election cycle after she and her husband discussed how Arizona's matching funds trigger would give a like amount to opposing participating candidates. 10-239 PA191-92, 195. Petitioner McLain further testified that the threat of Arizona's matching funds trigger chilled her campaign spending and forced her to decide not to raise any more contributions. 10-239 PA195-97, 250; Record 317(4:14-28, 5-6:1-4, 7:14-28, 8:1-12).

Petitioner Tony Bouie testified that he "made a decision to minimize and delay campaign expenditures after seeing the full impact of" triggering matching funds to his opponents and "decided to wait until the last possible minute . . . to spend money" on his campaign. 10-239 PA243-47, 300-303, 311, 317-18. Bouie's fear of Arizona's matching funds was so profound that, for the 2010 election cycle, he chose to run for an office in which he would not face competition from a participating candidate. 10-239 PA296-97.

The threat of matching funds similarly burdened the campaign finance decisions of former gubernatorial candidate John Munger, legislative candidate Jack Harper, and attorney general candidate Tom Horne. JA984, 986-88, 990, 992-94, 1007-08; Record 430-4(2:20-28, 3-4, 5:1-9). Gubernatorial candidate John Munger was deterred from spending tens of thousands of dollars of his own money to finance his campaign by the threat of triggering potentially

hundreds of thousands of dollars of matching funds to his participating opponents. JA1019-21.

D. Petitioners' testimony has been corroborated by Respondent witnesses. During her deposition, Respondent Commissioner Daniels was asked, "For those individuals who are aware of the impact of matching funds and for those individuals who are engaged in decisions about fund-raising or expenditures in support of their campaign, wouldn't you agree that there would always be a chilling effect of some magnitude on their fund-raising and expenditure decisions?" Eventually, she replied, "The majority of the time, is it a chilling effect with matching funds, yes." 10-239 PA237-38; JA642-43; Record 332(12:10-17, 13:3-4). Daniels also admitted to being familiar with the strategies of ten candidates and that "at least 80 percent" would be chilled by matching funds. 10-239 PA237-38; JA644-45; Record 332(16:8-25, 17:1-8). She concluded that there is "nothing inherently incredible" about Plaintiffs' testimony that they had "been chilled by matching funds in the course of their candidacies." JA646-47; Record 332(18:9-14).

Respondent witness Representative David Lujan similarly corroborated Petitioners' testimony, testifying that before Clean Elections became law it was common to see $100,000 being spent in a legislative campaign, but now it is more common to see around $40,000 being spent because of the influence of matching funds. JA613, 616-19; Record 323(16:13-25, 17:1-25, 18:1-2, 16-25, 19:1-17, 20:20-25, 21:1-14). He also

explained that "under clean elections they [independent expenditure committees] are less likely to make an independent expenditure if they see that the value of that independent expenditure is going to be weakened because it's matched by the clean elections system." 10-239 PA239; JA621.

Respondents' expert witness Dr. Donald Green corroborated Petitioners' testimony by admitting that Arizona's matching funds system "dampens" the "arms race" of campaign spending. JA766-68.

E. Third party political action committees echoed the testimony of the parties. Victory 2008 and Arizonans for a Healthy Economy ("AFHE"), for example, brought a separate lawsuit to block the issuance of matching funds during Arizona's 2008 election cycle, claiming that the CCEC led them to believe that matching funds would not be available in their district and that they would not have made independent expenditures had they known matching funds were available. 10-239 PA240-43; JA548-62. When responding to the question, "In making the decision as to whether or not to make an expenditure, can you tell us generally . . . what role the matching funds provisions under Clean Elections plays?" AFHE's representative replied, "It played a huge role. And Arizonans for a Healthy Economy conducted efforts in numerous districts. And we actually had more districts that we would like to be in. But because of the matching funds issue, there were decisions made to not advocate in specific districts because – because of the matching-funds issue. That

was one step. The second step was other districts that we didn't want to go into – we didn't want to advocate in until very late because of the matching-funds issue." 10-239 PA242-43; JA560-61.

F. *Gaming Arizona: Public Money and Shifting Candidate Strategies*, an article in a peer-reviewed academic journal, also corroborated the parties' testimony. 10-239 PA235-37; JA357-81. Confirming how the threat of matching funds induces delay in expenditures, *Gaming Arizona* reported that between 2002 and 2006 the proportion of matching fund contribution distributions in the final week of the campaign cycle never dropped below one-third of the total expenditures. JA378. *Gaming Arizona* further reported, "The desire for cost efficiency is present in all campaigns, but the effects of matching funds shift the spending calculus well beyond simple husbandry." JA364. Finally, *Gaming Arizona* observed: "According to every informant interviewed, traditionally funded candidates try to maximize competitive effect of the money that they do spend by releasing funds at the last minute." JA366.

G. By prohibiting conspiracies to postpone campaign donations for the purpose of postponing related trigger reporting, A.R.S. § 16-958(C) anticipates efforts by traditional candidates to avoid triggering matching funds until just before the general election.

H. The parties' testimony is further corroborated by measurements of campaign spending in

Arizona since 1998, which show i) per capita growth of independent expenditure spending in Arizona lagged per capita growth of PAC spending nationally by at least 33% between 1998 and 2006, and ii) average per capita expenditures in Arizona by traditional legislative candidates of major parties declined 6% in real terms between 1998 and 2006. 10-239 PA285-86, 290.

I. Finally, the dampening effect of matching funds on campaign spending is corroborated by statements by proponents of Arizona's system that it is designed to limit campaign spending and reduce the cost of running for office. JA95, 106-07, 110, 213, 227.

IV. THE PURPOSE OF MATCHING FUNDS.

A. The Clean Elections Act explicitly describes its purpose as protecting the "voices" and "influence" of "Arizona citizens" from "a small number of wealthy special interests" and reducing the "influence" of "special interest money." A.R.S. § 16-940(A), (B)(4).

B. Arizona's matching funds provision is titled "Equal funding of candidates," the CCEC's administrative rules refer to triggered matching funds as "equalizing funds," and hundreds of related administrative records identify matching funds as "equalization" payments. A.R.S. § 16-952; *CCEC Admin. Rules*, R2-20-113; JA885.

C. Respondent CCEC has repeatedly stated that the purpose of the Clean Elections Act is to "level the playing field." JA308, 457, 840, 854-55; Record 145-4(19:23-25, 20:1-10, 25, 26), 326-3(1). For example, a legal brief filed by the CCEC repeatedly declares that "[i]t can not be disputed that the purpose of the Citizens Clean Elections Act is to equalize the playing field and give participating candidates equal opportunity to get their message out." JA236. The CCEC's insistence on this interpretation of the Act has led to at least one determination by an administrative law judge that the purpose of Arizona's matching funds system is to level the playing field and equalize spending. JA240.

D. After the Court blocked the issuance of matching funds for Arizona's 2010 election cycle, Respondent Commissioners discussed how the decision was "unfair" to candidates because it prevented the Clean Elections Act from "leveling the playing field," which it was "designed to do." 10-239 PA186-87.

E. According to Respondent Clean Elections Institute, the purpose of matching funds is "[t]o combat the inequalities that exist with disproportionate funding, when a non-participating candidate outspends his Clean Elections participating opponent." JA257. Proponents of Clean Elections have repeatedly emphasized the electoral opportunity, influence and resource leveling purpose and effect of Arizona's matching funds system. JA95, 106, 109, 228-29, 248, 263-64, 809-54.

V. THE DISCONNECT BETWEEN MATCHING FUNDS AND ANTICORRUPTION PURPOSES.

A. CCEC Executive Director Todd Lang admitted matching funds do not address an actual corruption problem in Arizona, stating: "I don't think we have any corrupt legislators right now, I hope. This [Arizona's matching funds system] is about appearances and encouraging participation and reinforcing good feelings about our – you know, our system of government." JA449.

B. Arizona was ranked in 2005 as having *the* most stringent contribution limits and the 5th most stringent overall campaign finance disclosure system in the nation. 10-239 PA264-66; Record 325-9(10). Arizona's campaign financing regulations remain among the most stringent in the nation. JA679-702; Record 325-10(2-13). Adjusted for inflation, the contribution limits for individual contributions to legislative and statewide candidates in the 2010 election cycle were $410 and $840, respectively. *See* A.R.S. §§ 16-905(A)(1), 941(B)(1); Arizona Office of the Secretary of State, 2009-10 Contribution Limits, http://www.azsos.gov/election/2010/Info/Campaign_Contribution_Limits_2010.htm.

C. According to expert witness Dr. Osborn, Arizona's contribution limits are sufficiently low and its disclosure requirements sufficiently extensive to prevent private campaign contributions from having any significant influence on candidates. 10-239 PA109, 255-75; JA462-64, 474; Record 143-6(6-7),

144-4(18-21), 144-5(1-3, 7), 145-1(36:13-25, 37:1-20). Public financing in general, and Arizona's matching funds trigger in particular, do nothing that could further prevent actual or apparent corruption from private campaign financing. *Id.*

D. Dr. Osborn further testified that matching funds do not prevent actual or apparent corruption because: a) the Clean Elections Act allows participating candidates to raise private contributions from individuals, lobbyists and bundlers; b) the matching funds system is gamed to generate the functional equivalent of unlimited and undisclosed contributions to participating candidates from private donors; c) the voting behavior of participating candidates is not materially different than traditional candidates; d) the CCEC lacks objective standards when awarding matching funds based on unreported campaign expenditures or contributions; and e) the CCEC actively lobbies the legislature it both funds and regulates through a highly paid contract lobbyist. 10-239 PA255-75.

SUMMARY OF ARGUMENT

1. The essence of Arizona's matching funds system is revealed by Secretary of Homeland Security Janet Napolitano's reminiscence about her successful Arizona gubernatorial race against Matt Salmon:

> At the next debate, I pulled Matt aside and thanked him, because under the Clean Elections match, his event raised $750,000 for my campaign. I am quite certain that I am the only Democratic Governor in the country for whom George Bush has held a fundraiser.

JA345; Record 327(10); *see also* JA244, 286-92. Matt Salmon probably did not laugh.

2. Political opponents of participating candidates, like Matt Salmon, are punished when their rightful campaign financing triggers hostile speech against them. Especially in the competitive context of electoral politics, the threat of such punishment constitutes a substantial deterrent to any rational person who would otherwise want to raise and spend private money in support of a traditional candidacy or to oppose a participating candidate. This deterrent imposes more than a severe burden on strategic decisions. Anyone who takes ideas seriously will be chilled by the prospect of being instrumental in funding the dissemination of ideas one opposes or abhors as a condition of raising or spending money to engage in campaign speech.

3. Arizona's "Clean Elections" system thus impales political opponents of participating candidates

on the horns of a dilemma by compelling their campaign fundraising and expenditures to trigger subsidies to the very candidates they oppose. Arizona's matching funds system severely burdens whether, how and when traditional candidates and independent expenditure committees raise or spend money on campaign speech; and it typically causes them to diminish and delay their campaign fundraising and expenditures.

a. Just like the Millionaire's Amendment, which was struck down in *Davis*, 554 U.S. 724, Arizona's matching funds system imposes substantial negative consequences on individuals and groups for choosing to exercise their First Amendment rights, which necessarily creates a substantial "drag" on free speech. Even when political opponents of participating candidates disregard the drag imposed on their free speech by Arizona's system, its punitive effect is downright devastating. Even more so than the Millionaire's Amendment, Arizona's system is the functional equivalent of the compelled speech regime struck down in *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986).

b. Like the regulatory regime in *Pacific Gas & Elec. Co.*, which forced a public utility to help disseminate consumer advocacy messages, Arizona's system forces traditional candidates to help disseminate hostile speech by their political opponents. The only way traditional candidates can avoid the punishment of matching funds is either to avoid competing against participating candidates or to run as a participating candidate. And independent

expenditure committees are always burdened by matching funds when they spend money on messages that support traditional candidates, who are in competition with participating candidates, or when they oppose participating candidates. This couples content-based regulation with systemic discrimination against traditional candidates in violation of the principles applied in *Citizens United*, 130 S. Ct. 876, which prohibit the government from favoring some speakers over others. The First and Fourteenth Amendments thus require Respondents to prove that Arizona's matching funds trigger can withstand strict scrutiny.

c. Arizona's matching funds provision is not closely drawn, much less narrowly tailored, to anticorruption purposes. The burden it imposes on both self-financed candidates and independent expenditure committees proves that the provision does not directly serve anticorruption purposes. Instead, the chief interest of matching funds is to level electoral opportunities, resources and influence. *Davis* and *Citizens United*, however, make it abundantly clear that such egalitarian goals do not justify burdening the exercise of core First Amendment rights under any level of heightened scrutiny.

d. Of course, advocates of Arizona's system argue matching funds indirectly serve anticorruption purposes by promoting participation in public financing. But Arizona's stringent campaign finance regulations are already adequate to prevent private campaign financing from causing actual or apparent corruption. Matching funds, even if they encourage participation in public financing, do nothing to further

prevent actual or apparent *quid pro quo* corruption from private campaign financing. In fact, Arizona's matching funds system is so poorly tailored that it enables the evasion of contribution limits and disclosure requirements by supporters of participating candidates. Moreover, by lobbying the same candidates it funds and regulates, the CCEC itself risks creating the very appearance of *quid pro quo* corruption that contribution limits seek to prevent. Thus, to the very extent existing contribution limits and disclosure requirements are posited to prevent actual or apparent *quid pro quo* corruption, Arizona's matching funds system is counterproductive. Therefore, the speech burden imposed by matching funds is "disproportionate" to advancing anticorruption interests. *Randall v. Sorrell*, 548 U.S. 230 (2006).

c. Participation in public financing is not, itself, a compelling state interest; it is only a prophylactic means of advancing anticorruption purposes. If matching funds can be said to serve a compelling state interest because they promote participation in public financing, then so could outright censorship of traditional candidates. There would be no limit to the abridgement of free speech that could be justified as serving a compelling state interest with such an argument. *Federal Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449 (2007), thus prohibits Arizona's matching funds system from piling "prophylaxis upon prophylaxis." Because Arizona's matching funds system does not directly serve anticorruption purposes, it cannot survive strict scrutiny.

f. Replacing matching funds with lump sum public financing would achieve any anticorruption purpose ascribed to public financing in a far less burdensome manner.

4. Taken together, Arizona's matching funds system imposes a substantial burden on the exercise of First Amendment rights; it is chiefly interested in equalizing resources, influence and electoral opportunities; and is neither closely drawn nor narrowly tailored to furthering anticorruption interests. The system, therefore, cannot possibly withstand intermediate scrutiny, much less strict scrutiny. Accordingly, the Ninth Circuit committed reversible error when it vacated the district court's permanent injunction on A.R.S. § 16-952. The Ninth Circuit's decision should be reversed, and the district court's permanent injunction should be affirmed because the Constitution obliges the Court to strike down unconstitutional laws. *Marbury v. Madison*, 5 U.S. 137, 179-80 (1803).

STANDARD OF REVIEW

On appeal from summary judgment, the Court conducts its review *de novo* and may affirm the district court on any basis afforded by the record. *See generally Eastern Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 466 (1992); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987).

ARGUMENT

I. STRICT SCRUTINY APPLIES TO ARIZONA'S MATCHING FUNDS SYSTEM BECAUSE IT DETERS AND PENALIZES THE EXERCISE OF FIRST AMENDMENT RIGHTS.

The Ninth Circuit's analogy between Arizona's matching funds system and the disclaimer and disclosure requirements upheld in *Citizens United* is profoundly mistaken. Reasonable disclaimer and disclosure requirements ordinarily affect all candidates and political groups equally; and they are meant to provide objective financial information and to prevent identity fraud by political actors. *Citizens United*, 130 S. Ct. at 914-16. In contrast, Arizona's matching funds system imposes a special burden on traditional candidates and their supporters, which is designed to help disseminate hostile speech – just like the Millionaire's Amendment in *Davis*. If anything, by causing the exercise of First Amendment rights to subsidize hostile speech, Arizona's matching funds provision is more akin to a disclosure requirement of the sort that prompts "threats, harassment or reprisals from either Government officials or private parties," which *Citizens United* certainly did not approve. *Id.*, 130 S. Ct. at 914 (citations and internal quotations removed). Moreover, unlike reasonable disclaimer and disclosure requirements, which are viewpoint neutral, Arizona's matching funds trigger is a content-based speech regulation that disfavors certain speakers. As discussed below, these differences are material and necessitate applying strict

scrutiny to Arizona's matching funds system under the First and Fourteenth Amendments.

A. Strict scrutiny applies to Arizona's matching funds provision under the doctrine of *stare decisis* because, like the Millionaire's Amendment, it imposes a special and potentially significant burden on the exercise of core free speech rights.

Under the doctrine of *stare decisis*, the rationale underpinning an opinion of the Court binds analogous cases unless a "special justification" warrants departing from that rationale. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). In the present case, *stare decisis* compels the conclusion that Arizona's matching funds system is subject to strict scrutiny because, like the Millionaire's Amendment struck down in *Davis*, it imposes a special and potentially significant burden on the exercise of core free speech rights.

In *Davis*, the Court applied strict scrutiny and struck down a federal campaign finance regulation that triggered elevated contribution limits for one candidate when an opposing self-financed candidate contributed or spent his own money above a certain threshold. The Court applied strict scrutiny because the regulation imposed an "unprecedented penalty on any candidate who robustly exercises that First Amendment right." 554 U.S. at 739. Specifically, *Davis* ruled that the Millionaire's Amendment substantially burdened free speech rights by forcing a candidate to choose "between the First Amendment

right to engage in unfettered political speech" and shouldering "a special and potentially significant burden." *Id.* In so ruling, *Davis* underscored that the Millionaire's Amendment caused "the vigorous exercise of the right to use personal funds to finance campaign speech" to produce "fundraising advantages for opponents in the competitive context of electoral politics," which the Court analogized to laws that infringe on free speech rights by forcing speakers "to help disseminate hostile views." *Id.* (citing *Pacific Gas & Elec. Co.*, 475 U.S. at 14).

Although *Davis* applied strict scrutiny under the First Amendment to a "discriminatory" contribution limit trigger, the rationale for its holding applies equally to Arizona's matching funds trigger. *Davis* reached its holding in direct reliance upon *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), which struck down Minnesota's matching funds system. 554 U.S. at 739. The Court used the signal "See" to introduce *Day* as "clearly" supporting the proposition for which it was cited. *Id.*; *see* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 46 (18th ed. 2006). And in citing *Day*, the Court specifically pinpointed the Eighth Circuit's holding at 34 F.3d at 1359-60, which states:

> The knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech.

> This "self-censorship" that has occurred even before the state implements the statute's mandates is no less a burden on speech that is susceptible to constitutional challenge than is direct government censorship.

Davis even reiterated *Day*'s holding on matching funds parenthetically, noting "a Minnesota law that increased a candidate's expenditure limits and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures." *Id.*, 554 U.S. at 739.

Davis' reference to *Day* was not gratuitous. *Davis* plainly and naturally regarded the contribution limit and matching funds provisions at issue as imposing analogous speech burdens, which require the same level of scrutiny – as did every court of appeals that reached the issue prior to the Ninth Circuit's ruling below. *See* 10-239 Cert. Pet. pp. 32-34. If anything, matching funds impose a far more certain and substantial burden on the exercise of First Amendment rights than did the Millionaire's Amendment. Of necessity, not mere possibility, Arizona's system threatens to bestow "fundraising advantages" for participating candidates consisting of matching taxpayer subsidies when traditional candidates and independent expenditure committees vigorously exercise their First Amendment rights to spend their own money to finance campaign speech. *See* A.R.S. § 16-952(A)-(C). Moreover, neither the Millionaire's Amendment nor matching funds provisions symmetrically relax

government-imposed restrictions on free speech for all candidates competing in the same race. Instead, like the Millionaire's Amendment, matching funds force self-financed traditional candidates and independent expenditure committees to shoulder a special, potentially significant burden if they choose to engage in unfettered campaign fundraising and expenditures. Arizona's matching funds system must therefore be regarded as imposing a substantial burden on free speech that triggers strict scrutiny for the same reasons as did the Millionaire's Amendment. *Green Party of Conn. v. Garfield*, 616 F.3d 213, 243-44 (2nd Cir. 2010) (enjoining Conn. Gen. Stat. §§ 9-713, 9-714 (2009)); *Scott v. Roberts*, 612 F.3d 1279, 1290-91, 1293-94 (11th Cir. 2010) (preliminarily enjoining Fla. Stat. § 106.355 (2009)). No "special justification" exists to depart from the rationale in *Davis* because, as discussed below, *Davis* logically applied settled First Amendment jurisprudence.

B. Strict scrutiny applies to Arizona's matching funds system because it links the exercise of First Amendment rights to the dissemination of hostile speech, thereby deterring and punishing rightful conduct.

In refusing to apply strict scrutiny to Arizona's matching funds system, the Ninth Circuit completely ignored *Davis*' reliance upon *Pacific Gas & Elec. Co.*, 475 U.S. at 14, which held that the First Amendment

is violated by regulations that force citizens "to help disseminate hostile views" when they speak. *Pacific Gas & Elec. Co.* applied strict scrutiny to an effort to require a public utility to include consumer advocacy material in its mailings. The Court held that linking the dissemination of hostile viewpoints to the exercise of First Amendment rights deterred and penalized free speech because the speaker "might well feel compelled to reply or limit its own speech." *Pacific Gas & Elec. Co.*, 475 U.S. at 10-12, 11 n.7, 14 (citing *Miami Herald Publishing v. Tornillo*, 418 U.S. 241, 256-57, 257 n.22, 258 (1974)). The Court further emphasized that such laws should be struck down under the First Amendment based purely on this punitive and deterrent effect, independently from any other consideration, such as the cost or scarcity of publication space. *Id.* Finally, *Pacific Gas & Elec. Co.* held that requiring a speaker "to assist in disseminating" opposing views "necessarily burdens the expression of the disfavored speaker." *Id.* at 15.

Under *Pacific Gas & Elec. Co.*, citizens do not have a right to speak free from rebuttal, but they certainly do have the right to speak freely without being required to assist in the rebuttal of their own speech. This principle of speaker autonomy has its roots in the Court's recognition that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ.*

v. Barnette, 319 U.S. 624, 642 (1943). As further explained by the Court in *Wooley v. Maynard*, "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" 430 U.S. 705, 714 (1977) (quoting *Board of Education v. Barnette*, 319 U.S. 624, 637 (1943)). The principle of speaker autonomy thus preserves the dignity to which a free citizen is entitled in our system of ordered liberty. It also recognizes that "mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed. of the Blind of North Carolina*, 487 U.S. 781, 795 (1988).

Of course, the government does not always require "citizens to confess by word or act their faith" in what they do not believe. Instead, as evidenced by the regime in *Pacific Gas & Elec. Co.*, governments often use more indirect methods to achieve the same outcome. Such efforts are properly rebuffed by the recognition that "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77-78 (1990). In response to the creativity of regulatory efforts, the Court has properly applied the principle of speaker autonomy to a variety of contexts in which citizens have been directly or indirectly compelled to help disseminate hostile speech. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 410-11 (2001) (striking down a federal law that used mandatory fees paid by mushroom growers to

subsidize private speech to which they were opposed, where speech was the central purpose of the regulatory regime).

By forcing citizens to choose between silence or promoting people and ideas they oppose, a regulatory regime that links the exercise of First Amendment rights to the dissemination of hostile ideas "inescapably 'dampens the vigor and limits the variety of public debate.'" *Tornillo*, 418 U.S. at 257 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)). Such regimes strike at the heart of free speech because, by imposing negative consequences on the exercise of First Amendment rights, they clearly create the "potential" for "self-censorship" that is "abhorrent to the First Amendment." *Cf. Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 318 (1979). Forcing candidates and their supporters to choose between silence and assisting in the dissemination of hostile speech also runs afoul of the doctrine of unconstitutional conditions. *See generally Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674-75 (1996) (holding under the modern doctrine of unconstitutional conditions "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights") (citing *Laird v. Tatum*, 408 U.S. 1, 11 (1972)). The Court quite properly applies strict scrutiny to regulatory regimes that violate these principles based on the longstanding recognition:

> The evils to be prevented [by the First Amendment] were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.

Grosjean v. American Press Co., 297 U.S. 233, 249-50 (1936) (citation omitted).

Strict scrutiny applies to Arizona's matching funds system because it burdens the exercise of First Amendment rights in essentially the same way as the regulatory scheme struck down in *Pacific Gas & Elec. Co.* Like the regulatory regime in *Pacific Gas & Elec. Co.*, Arizona's matching funds system compels traditional candidates and their supporters to help disseminate hostile speech through their exercise of First Amendment rights. Traditional candidates and their supporters are required to assist in the dissemination of the hostile views because it is their very own campaign financing activities that cause the distribution of matching funds to their political opponents. In fact, when traditional candidates and allied independent expenditure committees raise or spend campaign money close to or above a certain threshold, Arizona's law literally requires them to file trigger reports that lead directly to the disbursement of checks to their political opponents. 10-239 PA312-13; JA272-73; A.R.S. §§ 16-941(B)(2), (D), 952(A), (B), 958(A), (B), (D), (E), 959, 961(G), (H).

Although Arizona's matching funds system conscripts labor, and the regulatory system in *Pacific Gas & Elec. Co.* commandeered property, both systems presume to force citizens to help disseminate hostile views as a consequence and condition of exercising their First Amendment rights. Just as the law in *Pacific Gas & Elec. Co.* forced a public utility to give consumer advocates a free ride in its mailings, Arizona's matching funds regime throws a yoke around the necks of traditional candidates and their supporters, requiring them to advance the campaigns of their political opponents alongside their own. Arizona's matching funds system thus deters and penalizes the exercise of First Amendment rights just like the regulation at issue in *Pacific Gas & Elec. Co.* *See* Jason Bradley Kay and Jack McDaniel Sawyer, *The Constitutionality of "Rescue Fund Triggers" in North Carolina's Judicial Campaign Reform Act*, 2 First Amend. L. Rev. 267, 283-85 (Spring 2004).

It is an understatement to say that traditional candidates and independent expenditure committees "might well feel compelled" to limit their fundraising and expenditures to avoid triggering matching funds. *Cf. Pacific Gas & Elec. Co.*, 475 U.S. at 11 n.7. An interview of a traditional candidate, which was reported in *Gaming Arizona*, provides a better account of the feeling provoked by matching funds: "Every dollar I spend over the threshold starts feeding the alligator trying to eat me." JA364. Expert witness Dr. Marcus Osborn reviewed all of the evidence in the record and similarly found:

> First time candidates, veteran candidates, sophisticated independent expenditure committees and even a member of the CCEC all confirmed in their interviews or testimony that the matching funds component of the Clean Election[s] Act created a drag or "chilling effect" on their campaign fundraising and expenditures that tended to restrict and delay campaign fundraising and spending.

10-239 PA231. This chilling effect arises because the "matching funds component impose[s] a significant 'cost,' or competitive disadvantage, on traditional candidates with respect to raising and spending money that would not exist in a world without matching funds." 10-239 PA253. Not surprisingly, it is undisputed that campaign consultants ordinarily counsel their clients to minimize matching funds' competitive cost by delaying or refraining from campaign fundraising and spending. 10-239 PA252-54, 328-29; JA927-28(¶101), 1003-04. Correspondingly, CCEC enforcement proceedings are replete with allegations that traditional candidates deliberately delayed or avoided filing reports that could have triggered matching funds. JA880-82, 887. And measurements of campaign spending in Arizona since 1998 show: 1) per capita growth of independent expenditure spending in Arizona lagged per capita growth of PAC spending nationally by at least 33% between 1998 and 2006; and 2) average per capita expenditures in Arizona by traditional legislative candidates of major

parties declined 6% in real terms between 1998 and 2006. 10-239 PA285-86, 290.

Strict scrutiny must be applied to Arizona's matching funds system because applying a lower level of scrutiny is utterly inconsistent with core constitutional principles. The negative consequences visited on traditional candidates and their supporters by matching funds' "multiplier effect" are clearly more onerous than the burdens the government is generally prohibited from imposing on the choices of individuals and groups when they exercise their First Amendment rights. *Compare* 10-239 PA247-49, 311-14, 325-26, 328-29; JA295, 1010-12, 1014-15, 1023-25 *with Rutan*, 497 U.S. at 76 & 76 n.8 (observing, despite the choice to seek public employment, "the First Amendment . . . protects state employees not only from patronage dismissals but also from 'even an act of retaliation as trivial *as failing to hold a birthday party* for a public employee . . . when intended to punish her for exercising her free speech rights'") (citation omitted; emphasis added). In the context of competitive electoral politics, in which one candidate's gain is another's loss, the threat of matching funds is similar to the threat of a fine for raising or spending campaign money beyond a "spending limit." *Cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 335-36 (1995) (striking down a law that imposed a $100 fine for anonymously distributing campaign literature).

Indeed, the punitive linkage between the exercise of First Amendment rights and the issuance of public

financing to political opponents is what distinguishes Arizona's matching funds system from the public financing system upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976). By disregarding *Davis*' reliance on *Pacific Gas & Elec. Co.*, the Ninth Circuit thus mistakenly equated Arizona's punitive matching funds system with non-punitive public financing regimes. To vindicate free speech, that mistake must be corrected by applying strict scrutiny.

C. Strict scrutiny applies because Arizona's matching funds system imposes a content-based speech regulation that discriminates against disfavored speakers.

In *Citizens United*, 130 S. Ct. at 899, the Court firmly declared that the First Amendment stands against campaign finance regulations that discriminate against disfavored speakers. *Id.* (observing "speech restrictions based on the identity of the speaker are all too often simply a means to control content"). Moreover, laws that link the exercise of First Amendment rights by specific speakers to the dissemination of hostile speech imply there is something intrinsically suspect or unfair about the speaker's communication that requires the government to intercede and provide a platform to an opposing speaker or opposing point of view. *Pac. Gas & Elec. Co.*, 475 U.S. at 12-15 (citing *Tornillo*, 418 U.S. at 256); *cf. Tornillo*, 418 U.S. at 258 (holding government control over editorial process implies power to make determinations of fairness). This regulatory

judgment is not speaker or viewpoint neutral; it discriminates against disfavored speakers and engages in impermissible content-based speech regulation. *Id.* Accordingly, strict scrutiny must be applied to Arizona's matching funds system. *See generally Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 641-42 (1994) (observing "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous [strict] scrutiny [as content-based speech regulation]") (citations omitted).

The content-based nature of Arizona's discriminatory system is most clearly revealed by the one-sided triggering of matching funds from independent expenditures. Independent expenditure committees will *never* trigger matching funds when they spend money on a message that *opposes* any traditional candidate. A.R.S. § 16-952(c). Thus, in order to enforce Arizona's matching funds trigger provisions, the CCEC must assess whether the content of campaign speech by an independent expenditure committee opposes a traditional candidate. This overtly content-based assessment is obviously "concerned with the communicative impact of the regulated speech." *Turner Broadcasting Sys., Inc.*, 512 U.S. at 658.

The speaker discrimination entailed by Arizona's matching funds system is also manifest. Traditional candidates, and not participating candidates, face the

threat of matching funds. A.R.S. § 16-952(A), (B). This is despite the fact that a portion of the financing raised and spent by participating candidates can originate from private campaign financing and matching funds triggered by independent expenditures. A.R.S. §§ 16-945, 952(C)(1)(3). Even if traditional and participating candidates were somehow distinct classes for purposes of First Amendment analysis, it is important to underscore that, even within their respective class, campaign speech is not treated the same way. The system requires the campaign financing of traditional candidates to enable rebuttal speech by competing participating candidates. It does not, however, require the campaign financing of participating candidates to enable rebuttal speech by competing participating candidates. Because Arizona's system treats similar speech differently, both inside and outside of candidate classes, an inference is warranted that traditional candidates are being targeted and punished as disfavored speakers. *Cf. Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (holding selective treatment of similar speech underscores that the law's purpose in enacting the law was to target and punish a disfavored speaker); *id.* at 542 (Scalia, J., concurring).

The targeting of traditional candidates and independent expenditure committees for special speech burdens is not viewpoint neutral. Matching funds target expenditures that convey a viewpoint that

would tend to enhance a traditional candidate's electoral prospects relative to a competing participating candidate. This arises in the context of a regulatory system that decries the "influence of special interest money" and promises "Clean Elections" through "clean campaign funding." A.R.S. §§ 16-940(A), 951. The system's concern with the communicative impact of the speech it regulates is further evidenced by its prediction, "Campaigns will become more issue oriented and less negative." A.R.S. § 16-940(A). The CCEC has even surveyed the relative "credibility" of participating and traditional candidates as a performance measurement. JA315.

By virtue of its titling, purpose, administration and effect, Arizona's matching funds system "is value laden, content-based speech suppression." *Cf. Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 696 (1990) (Kennedy, J., dissenting). Like the "equal time" regulation in *Tornillo* and the consumer advocacy mandate in *Pacific Gas & Elec. Co.*, Arizona's system unavoidably conveys the message that the government will not allow speech benefitting traditional candidates to stand on its own because it is "dirty." Strict scrutiny applies to Arizona's matching funds system under the First and Fourteenth Amendments because it targets disfavored speakers for content-based speech regulation. *Day*, 34 F.3d at 1360 (citing *Burson v. Freeman*, 112 S.Ct. 1846, 1850 (1992)).

II. ARIZONA'S MATCHING FUNDS SYSTEM FAILS STRICT SCRUTINY BECAUSE IT CANNOT EVEN WITHSTAND INTERMEDIATE SCRUTINY.

Arizona's matching funds system cannot possibly withstand *Buckley*'s intermediate test of "exacting scrutiny," much less strict scrutiny, because it is needless, counterproductive and chiefly advances impermissible purposes. *Buckley*'s test is more rigorous than the heightened scrutiny triggered by content-neutral speech regulations and regulations affecting non-speech conduct that is closely related to speech. *Buckley*, after all, rejected applying the tests of *United States v. O'Brien*, 391 U.S. 367 (1968), and *Cox v. Louisiana*, 379 U.S. 559 (1965), to contribution limits as insufficiently rigorous. *Buckley*, 424 U.S. at 16-18. Thus, a speech regulation that would fail the test applied in *O'Brien* and *Cox*, or their progeny, should also fail *Buckley*'s intermediate scrutiny test. Therefore, Arizona's matching funds system should be struck down unless Respondents prove: 1) it furthers an important governmental interest, 2) the governmental interest it serves is unrelated to suppressing free expression, and 3) it does not burden substantially more speech than is essential to further the government's interests. *Turner Broadcasting Sys. Inc.*, 512 U.S. at 662, 665 (holding government bears the burden of proof under *O'Brien* scrutiny and the law will satisfy intermediate scrutiny only if "'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the

suppression of free expression; and . . . that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests'") (quoting *O'Brien*, 391 U.S. at 377; *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

Respondents cannot carry their burden of proof. Arizona's system is not "unrelated" to the suppression of free expression because it burdens campaign fundraising and spending chiefly to equalize electoral opportunities among candidates. For this reason alone, the system fails intermediate scrutiny. Arizona's matching funds system also fails intermediate scrutiny because it does not further any important government interest, is not "closely drawn" to meet its objectives, and, therefore, "disproportionately" burdens First Amendment rights. *Cf. Randall*, 548 U.S. at 253, 255, 261-62.

A. Arizona's matching funds system impermissibly burdens the exercise of First Amendment rights chiefly to equalize electoral opportunities, resources and influence.

The principal justification for matching funds offered by the Ninth Circuit is that it ensures participants in public financing will be "viable candidates in their elections" and that the State will be able to allocate "funding among races of varying levels of competitiveness without having to make qualitative

evaluations of which candidates are more 'deserving' of funding." 10-239 PA38. Saying that Arizona's matching funds system aims to ensure candidates will be "viable" in their elections and receive funding in proportion to "competitiveness" is just another way of saying that the regulation aims to equalize electoral opportunities, resources and influence. *Scott*, 612 F.3d at 1293 (observing "[a]t bottom, the Florida public campaign financing system appears primarily to advantage candidates with little money or who exercise restraint in fundraising . . . the system levels the electoral playing field, and that purpose is constitutionally problematic"). Whatever rhetoric is used – "leveling the playing field," ensuring participating candidates are "viable," reducing special interest "influence" – a campaign finance regulation that is chiefly interested in leveling electoral opportunities cannot withstand intermediate scrutiny, much less strict scrutiny, when it burdens core political speech. *Davis*, 554 U.S. at 740 n.7 ("the chief interest proffered in support of the asymmetrical contribution scheme – leveling electoral opportunities – cannot justify the infringement of First Amendment interests").

As observed in *Citizens United*, "*Buckley* rejected the premise that the government has an interest 'in equaling the relative ability of individuals and groups to influence the outcome of elections.'" 130 S. Ct. at 904 (quoting *Buckley*, 424 U.S. at 48-49). Empowering the government to intervene in the marketplace of ideas in this way is irreconcilable with the First

Amendment's fundamental "mistrust of governmental power." *Id.* at 898. For this reason, a state's effort to control some voices in order to "enhance the relative voices" of less influential speakers "contradicts basic tenets of First Amendment jurisprudence." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.30 (1978) (internal quotations and citations omitted). The purpose of equalizing electoral opportunities, resources or influence is simply "antithetical" to the goals of the First Amendment. *Davis*, 554 U.S. at 742 (quoting *Austin*, 494 U.S. at 705 (Kennedy, J., dissenting)); *see also Citizens United*, 130 S. Ct. at 904-05. Consequently, a regulation that burdens free speech chiefly for the purpose of equalizing electoral opportunities cannot withstand any level of heightened scrutiny. *Davis*, for example, struck down reporting and disclosure requirements for self-financed candidates because they chiefly served the electoral equalizing purposes of the Millionaire's Amendment, even though they only triggered intermediate scrutiny. 554 U.S. at 744. These principles compel the conclusion that Arizona's matching funds system cannot possibly survive intermediate scrutiny.

The Clean Elections Act declares on its face that it seeks to protect "the voices and influence of the vast majority of Arizona citizens" and to encourage qualified candidates to run for office "who lack personal wealth or access to special-interest funding." A.R.S. § 16-940(A). It describes matching funds as "equalizing funds" and "[e]qual funding of candidates." A.R.S. § 16-952; *CCEC Admin. Rules*, R2-20-113.

Matching funds, in turn, correspondingly target independent expenditure committees and self-financed candidates, whose campaign spending poses no threat of *quid pro quo* corruption under *Citizens United*, 130 S. Ct. at 913, and *Davis*, 554 U.S. at 740-41. A.R.S. § 16-952(A)-(C). And Arizona's matching funds provision does not go dormant if the State runs out of money with which to subsidize political campaigns. Instead, A.R.S. § 16-954(F) ensures that the provisions serve to lift contribution and spending limits in order to allow participating candidates to accept and spend *private* campaign donations. The goal of equalizing electoral opportunities thereby overrides the goal of eliminating private campaign financing when the two conflict. This feature alone compels the conclusion that the *chief* interest of Arizona's matching funds system is to equalize electoral opportunities, resources and influence. That conclusion is confirmed by the voluminous admissions of Respondents and proponents of the Clean Elections Act. 10-239 PA186-87; JA95, 106, 107, 109, 110, 213, 228-29, 236, 240, 248, 257, 263-64, 308, 457, 809-54, 885.

As declared emphatically by a leading proponent of Clean Elections: "Clean Elections is NOT about public funding. It's about spending limits, getting rid of special interests, and leveling the playing field." JA213 (emphasis in original). For that very reason, Arizona's matching funds system must be struck down under the First and Fourteenth Amendments, regardless of the level of heightened scrutiny applied.

B. Arizona's matching funds system imposes a disproportionate burden on speech.

Even if "leveling the playing field" were an important government objective for campaign finance regulations, Arizona's matching funds system goes well beyond merely enabling participating candidates to run competitive campaigns. The average amount spent by participating candidates grossly exceeds the average amount spent by competing traditional candidates – participating candidates spend, on average, as much as 136% more than traditional candidates. 10-239 PA290-92. Moreover, in contests between major party candidates, the one-sided award of matching funds for independent expenditures benefits participating candidates most *when they need it least* – major party participating candidates spend 50% more than modestly-financed major party traditional candidates. 10-239 PA292. The one-sided award of matching funds for independent expenditures gives participating candidates a huge advantage over traditional candidates, whose campaigns typically are not advanced as effectively by uncoordinated expenditures. 10-239 PA193-94, 248, 313-15, 327-28; JA287-89, 1024-25. Moreover, the fundraising cost savings and "multiplier effect" of matching funds ensure that participating candidates as a class will be able to swamp the campaign fundraising and expenditures of most traditional candidates, which strongly discourages traditional candidates from raising or spending campaign money. 10-239 PA247-49, 311-14,

325-26, 328-29; JA295, 639-42, 1010-12, 1014-15, 1023-25.

In short, Arizona's matching funds system gives a lopsided competitive advantage to participating candidates when they face all but the most extremely well-financed traditional candidates. 10-239 PA246-47, 249-50, 318. The associated speech burden is quite literally disproportionate to what is reasonably necessary to encourage participation in public financing, much less to compete successfully against traditional candidates. The disproportionality of matching funds is further underscored by the fact that encouraging participation in public financing does not advance anticorruption purposes in Arizona's highly regulated campaign finance system.

1. Matching funds do not further anticorruption purposes in Arizona's already highly regulated campaign finance system.

According to the Ninth Circuit, the prevention of actual or apparent *quid pro quo* corruption through encouraging participation in public financing is the government interest furthered by Arizona's matching funds system. 10-239 PA38. The court of appeals reasoned, "The more candidates that run with public funding, the smaller the appearance among Arizona elected officials of being susceptible to *quid pro quo* corruption." 10-239 PA37. But within a system that already prohibits large campaign contributions and

imposes extensive disclosure requirements, matching funds simply cannot further advance anticorruption purposes – not even by promoting participation in public financing.

As observed in *Randall*, 548 U.S. at 250-51, Arizona already has among the lowest contribution limits in the nation. In fact, Arizona was ranked in 2005 as having the most stringent contribution limits and the 5th most stringent overall campaign finance disclosure system in the nation. 10-239 PA264-66; Record 325-9(10). Adjusted for inflation, the contribution limits for individual contributions to legislative and statewide candidates in the 2010 election cycle were $410 and $840, respectively. *See* A.R.S. §§ 16-905(A)(1), 941(B)(1); Arizona Office of the Secretary of State, 2009-10 Contribution Limits, http://www.azsos.gov/election/2010/Info/Campaign_Contribution_Limits_2010.htm. Arizona's campaign financing regulations remain among the most stringent in the nation. JA679-702; Record 325-10(2-13). In this context, it is implausible to claim that anticorruption purposes are advanced by participation in public financing, much less by matching funds.

Bluntly stated, when low contribution limits are combined with disclosure requirements requiring the reporting of all campaign contributions and expenditures, it is a very high risk proposition for traditional candidates to spend illegally large contributions in support of their campaigns. Elected officials who are susceptible to *quid pro quo* corruption are not likely to accept bribes in order to spend those bribes on

their *campaign*. They may very well trade legislative favors for cash, but their motivation will be the all-cash purchase of a summer home on Lake Tahoe, not financing their next campaign. There is no reason to believe publicly-financed candidates are less susceptible than traditional candidates to the lure of a gym bag of cash. *Buckley* never held that public financing serves anticorruption purposes in a regulatory context in which large contributions are *already* prohibited by law and in which private campaign financing is *already* comprehensively disclosed and regulated.

Public financing, after all, is not a magic wand. It does not transform participating politicians into angels. Far from it.[5] Studies of Arizona's stringently regulated campaign finance environment have shown there is no significant difference in interest group influence or legislative voting patterns between traditional and participating candidates based on sources or amounts of campaign financing. 10-239 PA258-59; JA462-64; Record 143-6(6-7), 144-4(18-21), 144-5(1-3, 7), 145-1(11:3-25, 12-14), 325-8(2-21). Likewise, in 1991, a bipartisan task force rejected public financing as a remedy for the outright bribery that was involved in AzScam; instead, it recommended closing loopholes in Arizona's regulatory regime to

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[5] Participating candidates are routinely accused of, and occasionally prosecuted for, accepting illegal in-kind contributions, violating contribution limits, and committing perjury, among other shenanigans. JA298-99, 325-29, 883-94; Record 327(4-6, 19-20), 325-4(8-22), 329-6(7-8), 330-4(2-4).

ensure that all campaign contributions and expenditures were fully disclosed. JA116-21; Record 352(2-6). Since then, there have been no actual or apparent *quid pro quo* corruption scandals in Arizona arising from private campaign contributions.

According to expert witness Dr. Osborn, Arizona's contribution limits are sufficiently low and its disclosure requirements sufficiently extensive to prevent private contributions from having any significant influence on candidates. 10-239 PA109, 255-75; JA462-64, 474; Record 143-6(6-7), 144-4(18-21), 144-5(1-3, 7), 145-1(36:13-25, 37:1-20). Public financing in general, and Arizona's matching funds in particular, do nothing that could further prevent actual or apparent corruption in Arizona's electoral system. *Id.* There is no reason to believe Arizona's matching funds system furthers any anticorruption purpose, even assuming that it plays a role in increasing participation in public financing. If anything, Arizona's matching funds system is counterproductive to advancing anticorruption purposes to the very extent that low contribution limits and extensive campaign finance disclosure requirements serve anticorruption purposes.

2. Through rampant gaming, Arizona's matching funds provisions enable large, undisclosed campaign contributions.

In assessing whether campaign finance regulations advance government interests, the Court has

considered how gamesmanship could undermine or circumvent their effectiveness. *Buckley*, 424 U.S. at 45, 61, 62 & 62 n.71. Such considerations reveal that matching funds fail intermediate scrutiny because they are not closely drawn to furthering anticorruption purposes.

Arizona's matching funds system generally treats traditional and participating candidates as if they were competing even when they are not. This feature has led to significant gaming of the system. 10-239 PA270-75, 331-33; Record 145-1(25-29, 31-33, 38-43:1-22), 145-8(7:19-25, 8:1-23), 327(4-6, 18, 19); 329-5(7). Individuals, for example, can deliberately run as candidates in the same race as one or more preferred participating candidates in order to trigger matching funds to participating candidates. 10-239 PA210-22, 271-72, 314-15, 319. Self-financed traditional candidate, Sam George, for example, triggered nearly $1,000,000 in matching funds to Democratic participating candidates, Paul Newman and Sandra Kennedy, to support a coordinated "Solar Team" campaign for three seats on the Arizona Corporation Commission during the 2008 election. 10-239 PA199, 200, 202-05, 211-12, 214-15, 218-22, 272; JA928-29(¶133); Record 33-2(25-26), 145-3(11:24-25, 12-13:1-14), 145-6(11:22-25, 12, 13:1-4, 16:10-24); 145-8(14:17-24, 18-24).

Significantly, Solar Team-member Sam George was a consultant to the proponents of the Clean Elections ballot measure; and the Solar Team website stated that Sam George "helped write and pass" the Clean Elections Act. Record 145-3(18); 145-6(2:14-25,

3:1-25, 12:22-25, 13:1-4). A cynic might suspect Arizona's matching funds system was designed to be gamed. If so, the secret is out. Respondent Commissioner Daniels testified that she repeatedly heard plans for a similar conspiracy among Republican candidates running for Corporation Commission. Record 332(19:19-25, 20-30:1-2).

Additionally, even without running for office, individuals and special interests can contribute to traditional candidates deliberately to trigger matching funds to their favored participating candidate. 10-239 PA271-72. Corporation Commissioner Paul Newman testified that this is what the energy industry appeared to do during the 2008 election cycle when he heard that Republicans were running a "team" of traditional and participating candidates for Corporation Commission. 10-239 PA200-02, 205-08. This scam multiplies the value of moneys given or spent to support a traditional candidate.

Finally, individuals and special interests can engage in "reverse targeting" to trigger matching funds to preferred participating candidates. 10-239 PA274-75, 331-33, 336; JA652. "Reverse targeting" is a common campaign tactic that describes an advertisement that appears to support a candidate, but which is actually ineffective or deliberately designed to undermine that candidate because of the likely adverse reaction of the audience to the message it conveys. *Id.* Actual or apparent examples of "reverse targeting" during the 2008 election cycle included a blast email in which a gay rights organization

seemingly advocated the election of a socially conservative candidate, as well as signs that appeared to support various candidates with messages such as "they promised to raise taxes help them keep the promise," "help them to support illegals," and "support open borders." 10-239 PA274-75, 314-16, 331-33, 336; JA382-83, 547, 563, 649-52; Record 329-6(2), 329-7(10-13, 17-21, 27-28), 332(36:8-21, 51-57:1-9, 59:6-24, 60:6-13), 332-2(1-3), 332-3(2-6), 332-4(1-3). Arizona's matching funds system encourages "reverse targeting" because a participating candidate's supporters may wish to circumvent contribution limits and disclosure requirements by triggering matching funds to their preferred participating candidate through an ineffective or harmful advertisement made to appear as though it supported a competing candidate. 10-239 PA274-75; JA652.

Arizona's matching funds system thus enables political actors to leverage public campaign financing to generate the functional equivalent of unlimited and undisclosed private campaign contributions. 10-239 PA270-75; JA465-73; Record 321(12:13-17, 13:1). But unlike an honest effort to deregulate campaign financing, Arizona's system is premised on deceptively using the public's money to reach the same result. Whether Sam George-style gaming is intended or not, the Phoenix New Times' depiction of Clean Elections as Mr. Clean covered in grime is apt. *See* JA731. By incentivizing gaming tactics that undermine the integrity of the electoral system, matching funds throw sand in the gears of regulations that are more closely

connected to furthering anticorruption purposes. 10-239 PA109-12. Because it is counterproductive, Arizona's matching funds system cannot be regarded as "closely drawn" to serving anticorruption purposes. A closer look at Arizona's version of public financing also calls into question the assumption that encouraging participation in that system is "closely drawn" to furthering anticorruption purposes.

3. Encouraging participation in Arizona's version of public financing does not shield against actual or apparent *quid pro quo* corruption stemming from large campaign contributions.

The Ninth Circuit was mistaken in asserting that "[i]n exchange for public funding, participating candidates relinquish their right to raise campaign contributions from private donors." 10-239 PA36. In order to qualify for public financing, participating candidates are required to raise hundreds or even thousands of individual $5 campaign contributions. A.R.S. §§ 16-946, 950. Participating candidates are also allowed to raise thousands or even tens of thousands of dollars in private seed money, which are called "early contributions." A.R.S. § 16-945. Individual "volunteers" are permitted to bundle the entire number of qualifying contributions a candidate may need to access Clean Elections. Record 330(16:16-23), 330-1(5), 330-3(2:10-25). In fact, the private campaign contributions participating candidates are allowed to receive are routinely bundled by individuals and

organizations to make it easier to qualify for public financing – advertisements by the CCEC even encourage volunteers to collect $5 contributions for candidates. 10-239 PA267-69; JA86-87, 661, 883; Record 145-2(10:11-21), 145-4(26), 332(61:7-25, 62:1-25, 63:1-25). Participating candidates are fully aware that their access to tens of thousands or even millions of dollars of public financing is provided by private individuals, organizations and lobbyists who are able to bundle these private contributions; hence the real value of these private contributions, when bundled, far exceeds their face value. 10-239 PA268-69. At the same time, because their access to sources and amounts of private campaign financing is more restricted than traditional candidates, and the time in which they have to qualify for public financing is short, participating candidates are actually more beholden to bundlers than are traditional candidates. *Id.*

Additionally, through its highly paid contract lobbyist, the CCEC has lobbied to block legislative action that threatened its existence, including amendments to the Act that were feared would make it more likely that voters would repeal Clean Elections. 10-239 PA259-64, 270; JA929-31(¶¶190, 191, 195), 935-36(¶84); Record 329-3(1-34), 329-4(1-13). The CCEC lobbies lawmakers despite the fact that it has the regulatory power to oust elected officials from office and also wields broad discretion over the issuance and amount of matching funds. 10-239 PA260-63.

For example, when confronted with unreported expenditures or contributions, the CCEC awards matching funds without any guiding step-by-step written standards. 10-239 PA262-63; JA602-10, 626-33, 652-59; Record 329(19:15-23, 20:1-2), 330(11:4-11, 13:1-23, 18:4-16). To assess the cost of unreported expenditures or contributions, the CCEC relies upon statements given by interested candidates and vendors without any concern about or procedures for controlling bias. Record 329(12:4-9), 330(18:17-25, 19:1-4, 25:9-15). Moreover, in assessing whether an unreported expenditure constitutes express advocacy or "reverse targeting," the CCEC does not investigate or determine whether voters in the affected district would actually react favorably or unfavorably to the message conveyed. Record 330(23:2-11). Tens of thousands of dollars in matching funds have been awarded or denied based on essentially subjective judgment calls. *Compare* Record 330(20:21-24, 21:3-17) *with* JA300-01, 322-24.

Given such broad discretion, the CCEC is in a position where it could easily indulge favoritism and abuse its powers. In fact, there is a long history of accusations against the CCEC for bias and favoritism in its regulatory and funding decisions. JA303, 305-07, 352-53, 888, 890-91; Record 326-3(5-6, 9-10), 327(14-15, 19-21). The most significant scandal involved allegations that the CCEC deliberately targeted gubernatorial candidate Matt Salmon with frivolous enforcement proceedings. JA291-92, 330-31, 890-91; Record 327(18).

Against this backdrop, Dr. Osborn opined that the CCEC's lobbying of lawmakers it both funds and regulates risks creating an appearance of *quid pro quo* corruption, if that appearance is posited to arise from financial influence over candidates. 10-239 PA259-64. Dr. Osborn is not alone.[5] The fact that the CCEC hired a contract lobbyist caused the Phoenix New Times to remark:

> [T]hat means the very commission that was supposed to reduce the role of powerful lobbyists has now hired a powerful lobbyist of its own – to lobby the very lawmakers dependent on the commission for financing. They call this reform?

Record 325-4(22).

Arizona's very unusual version of public financing clearly does not share the prophylactic anticorruption characteristics of the system upheld in *Buckley*. Instead, it replicates and augments all of the purportedly corrupting aspects of unregulated private campaign financing. Given these dynamics, there is no reason to conclude that participation in Arizona's system of public financing shields against the influence of large contributions, or their functional equivalent, more effectively than the rigorous regulatory

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[5] The cold record cannot hide Executive Director Lang's obvious discomfort with the questions that are naturally raised by the CCEC's practice of lobbying the very legislators it funds and regulates. *See* JA450-56.

system Arizona already applies to private campaign financing. Respondent Commissioner Daniels agreed in her deposition testimony:

> Q. The bottom line is that the Clean Elections system and its method of qualifying candidates for access to public financing is not more likely to reduce corruption or the appearance of corruption than the traditional way of fund-raising?
>
> . . .
>
> A. I've publicly stated that, so that's not anything I wouldn't agree with. I have publicly stated that I don't think that Clean Elections or traditional elections takes the dirty politics out of it. It is what it is when it's dirty, and when it's not, then it's what it's supposed to be.
>
> Q. And so if one of the purposes of the Clean Elections Act is to reduce the degree of corruption or the appearance of corruption that exists under a traditional fund-raising system, it's not going to achieve that purpose?
>
> . . .
>
> A. I do agree.

JA661-62.

In short, Arizona's matching funds system cannot be regarded as "closely drawn" to serving anticorruption purposes by encouraging participation in Clean Elections. Of necessity, matching funds impose a

"disproportionate" burden on the exercise of First Amendment rights. Thus, Arizona's matching funds system fails intermediate scrutiny under the First and Fourteenth Amendments. *Randall*, 548 U.S. at 253, 255, 261-62. Therefore, it cannot possibly withstand strict scrutiny.[4]

III. ARIZONA'S MATCHING FUNDS SYSTEM CANNOT WITHSTAND STRICT SCRUTINY BECAUSE IT DOES NOT DIRECTLY SERVE ANTICORRUPTION PURPOSES IN THE LEAST RESTRICTIVE MANNER.

For a regulation to be regarded as narrowly tailored under strict scrutiny, the government must prove that it actually advances a threatened compelling state interest by directly remedying the underlying problem. *Wisconsin Right to Life, Inc.*, 551 U.S. at 465-66. The government must also prove the challenged regulation is the least restrictive means of remedying the targeted problem. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, 824 (2000). Respondents cannot possibly carry this burden of proof.

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[4] If, in response to the foregoing arguments, Respondents repeat their insistent claim in the lower courts that the Clean Elections system cannot function as it was intended without matching funds, then the Court should regard A R S § 16-952 as nonseverable and strike down the entire system under the First and Fourteenth Amendments *See Randall*, 548 U.S. at 262.

A. Arizona's matching funds system does not *directly* prevent actual or apparent *quid pro quo* corruption.

The same reasons that require striking down Arizona's matching funds system under intermediate scrutiny justify striking down the system under strict scrutiny. But even if one could conclude, as did the Ninth Circuit, that Arizona's matching funds system is somehow substantially, proportionately and efficaciously connected to advancing anticorruption purposes, it is clear that the connection is not *direct*. At most, the connection between Arizona's matching funds trigger and anticorruption purposes is an indirect one – it effectuates a scheme of public financing that is asserted to shield participating candidates from the need to accept private campaign contributions, which, in turn, is asserted to shield candidates from actual or apparent *quid pro quo* corruption associated with accepting "large contributions." *Buckley*, 424 U.S. at 26-27, 32, 56; 10-239 PA36-38. This asserted indirect connection between Arizona's matching funds trigger and anticorruption purposes parallels the indirect connection between issue advocacy regulation and anticorruption purposes, which did not withstand strict scrutiny in *Wisconsin Right to Life*.

Wisconsin Right to Life, 551 U.S. at 478, refused to countenance the argument that limitations on issue advocacy are justified to effectuate limitations on express advocacy, which are justified as a means of effectuating contribution limits. Declaring "enough is

enough," the Court rejected efforts to connect the regulation of protected speech to anticorruption purposes under strict scrutiny by way of such "prophylaxis upon prophylaxis" reasoning. *Id.* Instead, *Wisconsin Right to Life* requires "each application" of a regulatory regime that triggers strict scrutiny to be *directly* supported by a compelling state interest. *Id.* *Wisconsin Right to Life* recognized that the First Amendment prohibits the government from burdening core political speech in the name of reaching unprotected speech (or conduct) as a corollary of overbreadth doctrine. *Id.* at 479 (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) ("The Government may not suppress lawful speech as the means to suppress unlawful speech"); *Buckley*, 424 U.S. at 44 (expenditure limitations "cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations"). As underscored in the concurring opinion, "We have rejected the 'can't-make-an-omelet-without-breaking-eggs' approach to the First Amendment, even for the infinitely less important (and less protected) speech category of virtual child pornography." *Wisconsin Right to Life*, 551 U.S. at 494 (Scalia, J., concurring).

Wisconsin Right to Life's rationale applies equally here. Just as issue advocacy regulations impose a substantial speech burden that is distinct from express advocacy regulations, Arizona's matching funds imposes a substantial burden on fully protected free speech rights that is entirely distinct from any speech

burden that might be intrinsic to maintaining a system of public financing. Unlike lump sum public financing alone, matching funds pointedly cause traditional candidates and independent expenditure committees to disseminate hostile speech as a consequence and condition of exercising First Amendment rights. Therefore, any anticorruption rationale that may justify public financing cannot justify the speech burden imposed by Arizona's matching funds trigger, just as the anticorruption purpose of express advocacy regulations cannot justify the speech burden of issue advocacy regulations. Instead, to withstand strict scrutiny, the distinct speech burden imposed by Arizona's matching funds must be independently justified as directly serving anticorruption purposes. Because Arizona's matching funds system does not *directly* serve anticorruption purposes, it cannot withstand strict scrutiny under *Wisconsin Right to Life*.

B. Arizona's matching funds system is not the least restrictive means of remedying any asserted problem of actual or apparent *quid pro quo* corruption.

Even if Arizona's matching funds system were somehow shown to be the most effective means of directly preventing actual or apparent *quid pro quo* corruption, a law is the least restrictive means of remedying an asserted harm *only if* it is the least drastic remedy, not overbroad, and no more restrictive than necessary. *Ill. State Bd. of Elections v.*

Socialist Workers Party, 440 U.S. 173, 185 (1979). The government's chosen means of regulation is not the least restrictive when there are reasonably effective less restrictive alternatives to the government's chosen means of regulation, and the government has not shown them to be implausible. *Playboy Entertainment Group, Inc.*, 529 U.S. at 813, 824 ("[i]t is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act"); *Reno v. ACLU*, 521 U.S. 844, 876-79 (1997); *Florida Star v. B.J.F.*, 491 U.S. 524, 538-41 (1989). In the present case, Arizona's system fails to meet any of these requisites of narrow tailoring.

First of all, the Court should take judicial notice of the elephant in the room: matching funds are obviously more burdensome than lump sum public financing. Lump sum public financing does not cause the exercise of First Amendment rights by traditional candidates and their supporters to help disseminate hostile speech. It cannot possibly have the punitive and deterrent effect that matching funds do. And if existing amounts of lump sum public financing are inadequate to draw participation from candidates, it only takes a simple legislative act to increase those

amounts.[5] The CCEC has already helped draft model legislation to double the base amount of public financing. JA936(¶117); Record 331-1(19). There is no reason to incur the unintended (or intended) consequences of the complex regulatory apparatus entailed by matching funds.

In fact, given the grossly disproportionate funding received by participating candidates in Arizona's matching funds system, it is more likely that the existing system makes public financing more expensive than would lump sum public financing. Respondents have never explained why they could not promote reasonable husbandry of public funds by requiring participating candidates to repay what they cannot justify spending, perhaps secured by posting collateral or a bond. Another alternative is to establish a strong deterrent by prosecuting gross abuses –

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[5] In contrast to the Ninth Circuit's naked assertion that doing "away with matching funds altogether" would make public financing "prohibitively expensive and spell its doom," (10-239 PA38), the CCEC recently announced that it returned $20 million to the general fund and has returned a total of $64 million to the general fund since 2003. Press Release, *CCEC Gives $20 Million to Arizona's General Fund*, http://www.azcleanelections.gov/2009-2010-docs/Commission_Gives_to_General_Fund_2010.sflb.ashx. Moreover, despite being limited to their initial lump sum of public financing, which is about one third of the total amount they could have obtained with triggered matching funds, about half of the major party winners in the 2010 primary election were participating candidates. *See* 2010 Candidate Listing with Funding Amounts, http://www.azcleanelections.gov/2009-2010-docs/Candidate_Listing.sflb.ashx

as the CCEC did several years ago when self-described Libertarians spent $100,000 in clean campaign funds to party at local nightclubs. JA327-28, 293, 889-91; Record 325-4(8).

Secondly, all by themselves, Arizona's existing contribution limits and extensive disclosure requirements are adequate to prevent actual and apparent *quid pro quo* corruption stemming from private campaign financing. 10-239 PA255-59, 264-70; JA462-64, 474; Record 143-6(6-7), 144-4(20-21), 144-5(1-3, 7), 145-1(36:13-25, 37:1-20). Simply maintaining or tweaking those regulations by providing for additional disclosure requirements is a plausible, less restrictive alternative to Arizona's matching funds system. 10-239 PA264-70. In this context, the speech burden imposed by matching funds is overkill, especially in view of the feasible alternative of lump sum public financing. Arizona's system thus fails the test of narrow tailoring required by strict scrutiny under the First and Fourteenth Amendments, and must be struck down.[6]

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[6] The Court may also affirm the district court's judgment based on the determination that the evidence offered by Respondents, to which Petitioners objected and moved to strike, was implicitly stricken from the record. *Compare* JA968-70; Record 348(1:23-28, 2-37), 357(6-31) *with* 290(1-9); JA732-54, 856-77, 939-65). This is because Petitioners' motion to strike Respondents' evidence was merged by local rule and actual practice into their summary judgment filings. *Compare* D. Ariz. L.R.Civ. 7.2(m)(2) *with* Record 348(1:23-28, 2:1-16). The district court's decision to grant the entirety of Petitioners' motions for summary

(Continued on following page)

CONCLUSION

In both *Pacific Gas & Elec. Co.* and *Davis*, the Court struck down regulatory schemes that punished and deterred the exercise of First Amendment rights by imposing the risk of disseminating hostile speech on those who would engage in free speech. In *Citizens United*, the Court integrated disapproval of influence equalization with the longstanding principle that government may not devise regulatory schemes that prohibit or burden free speech by disfavored groups to balance electoral opportunities.

Contrary to *Citizens United* and *Davis*, Arizona's matching funds system is expressly premised on the goal of equalizing electoral opportunities, resources and disproportionate influence among competing candidates and interest groups. Arizona's matching

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judgment and to deny the entirety of Respondents' motions should, therefore, be construed as implicitly reaching evidentiary rulings in favor of Petitioners and against Respondents. *Cf. Shah v. United States*, 878 F.2d 1156, 1162 (9th Cir.), *cert. denied*, 493 U.S. 869 (1989). The case relied upon by the Ninth Circuit for the determination that explicit evidentiary rulings were required to exclude any evidence from the record, namely *Vinson v. Thomas*, 288 F.3d 1145, 1152 & n.8 (9th Cir. 2002), is inapposite because there is no indication that the parties in *Vinson* were required to merge their evidentiary motions with their summary judgment filings, and the case did not grapple with the doctrine of implicit rulings. The Ninth Circuit erred because it should have applied an abuse of discretion standard and sustained the district court's implicit evidentiary rulings based on the reasoning contained in Petitioners' motion to strike. *Cf. G.E. v. Joiner*, 522 U.S. 136, 142-43 (1997).

funds system is designed to level and swamp the resources of traditional candidates and their supporters, including self-financed candidates, third party contributors and independent expenditure committees. Contrary to *Davis*, Arizona's system ensures the robust exercise of First Amendment rights by traditional candidates and allied independent expenditure committees will trigger lopsided fundraising advantages for participating candidates. And contrary to both *Davis* and *Pacific Gas & Elec. Co.*, matching funds force the exercise of First Amendment rights by traditional candidates and their supporters to help disseminate hostile speech by opposing publicly-financed candidates. No anticorruption purpose is served by the substantial burdens placed by Arizona's matching funds trigger on the exercise of First Amendment rights. Respondents simply cannot carry their burden of proving that the mechanism is closely drawn or narrowly tailored to preventing actual or apparent *quid pro quo* corruption.

If the Ninth Circuit's grievous error upholding Arizona's system were not corrected, the foundational principle that government must not be trusted when it meddles in the open marketplace of political ideas will be undone. State and federal governments will be free to shape that marketplace to produce whatever outcome they desire through a combination of triggered campaign subsidies, low contribution limits and strict disclosure requirements. If millionaire candidates, corporations, unions or ordinary citizens are deemed to have disproportionate influence on the

political debate through their campaign contributions or expenditures, the government will be free to lavish millions of dollars on their political opponents, while maintaining low contribution limits and strict disclosure requirements, to neutralize that influence. Outright censorship will be replaced with high regulatory hurdles and punitive consequences for exercising First Amendment rights. In a few years' time, the political process will be jerry-rigged into a system that will produce the same curtailment of free speech that would have obtained had *Buckley*, *Pacific Gas & Elec. Co.*, *Randall*, *Wisconsin Right to Life*, *Davis*, and *Citizens United* never come down. And while courts puzzle over particular iterations of such regulatory schemes and statistical expositions on the magnitude of their burdens, political candidates and their supporters will no longer have uninhibited freedom to project their ideas to the public. Freedom of speech will be abridged.

Indeed, the regulatory push to force speakers to trigger rebuttal speech subsidies combined with the political pull to expand the scope of such regulation to avoid the appearance of disfavoring particular speakers or viewpoints naturally leads to the expansion of such regulatory regimes to encompass all speakers and all forms of speech. Allowing matching funds to burden core political speech thus lays the groundwork for the government to restructure the *entire* marketplace of ideas.

A fork in the road taken by our Republic thus approaches yet again. But this time, the choice is clear. Fiscally-engineered censorship must not stand.

The Court should reverse the Ninth Circuit's decision to uphold Arizona's matching funds system, affirm the district court's permanent injunction on A.R.S. § 16-952, and award reasonable fees and costs on appeal to Petitioners. To fully protect First Amendment rights, and to preserve judicial economy, the Court should also consider granting reasonable ancillary relief, such as enjoining reporting requirements that chiefly serve to effectuate triggered matching funds. *See, e.g.*, A.R.S. §§ 16-941(B)(2), (D), 958(A), (B), (D), (E), 959, 961(G), (H). And if Respondents contend that matching funds are integral to Arizona's Clean Elections system, the Court should refuse to sever A.R.S. § 16-952.

Respectfully submitted,

CLINT BOLICK
NICHOLAS C. DRANIAS*
GOLDWATER INSTITUTE
SCHARF-NORTON CENTER
FOR CONSTITUTIONAL LITIGATION
500 East Coronado Road
Phoenix, AZ 85004
telephone: (602) 462-5000
facsimile: (602) 256-7045
ndranias@goldwaterinstitute.org

Counsel for Petitioners
**Counsel of Record*

PETITIONER'S BRIEF

Nos. 10-238, 10-239

In The Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, et al.,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

JOHN MCCOMISH, et al.,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PETITIONERS ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ET AL.

INSTITUTE FOR JUSTICE
WILLIAM R. MAURER*
JEANETTE M. PETERSEN
101 Yesler Way, Suite 603
Seattle, WA 98104
Tel: (206) 341-9300
Fax: (206) 341-9311
wmaurer@ij.org
jpetersen@ij.org

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
STEVEN M. SIMPSON
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
wmellor@ij.org
ssimpson@ij.org

INSTITUTE FOR JUSTICE
TIMOTHY D. KELLER
PAUL V. AVELAR
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
Tel: (480) 557-8300
Fax: (480) 557-8305
tkeller@ij.org
pavelar@ij.org

Counsel for Petitioners
Arizona Free Enterprise Club's Freedom Club PAC, et al.

**Counsel of Record*

CUCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In *Davis v. FEC*, 554 U.S. 724 (2008), this Court held that the First Amendment forbids the government from attempting to level the playing field in elections by raising contribution limits for candidates who are outspent by self-financed candidates. Arizona's Citizens Clean Elections Act achieves a similar result by providing extra subsidies in the form of "matching funds" to publicly financed candidates who are outspent by independent expenditure groups and privately financed candidates. The questions presented are:

1. Whether the First Amendment forbids Arizona from providing additional government subsidies to publicly financed candidates that are triggered by independent expenditure groups' speech against such candidates?

2. Whether the First Amendment forbids Arizona from providing additional government subsidies to publicly financed candidates that are triggered by the fundraising or expenditures by such candidates' privately financed opponents?

PARTIES TO THE PROCEEDING

The Petitioners in No. 10-238 are the Arizona Free Enterprise Club's Freedom Club PAC, the Arizona Taxpayers Action Committee, Dean Martin, and Rick Murphy. The Petitioners in No. 10-239 are John McComish, Nancy McLain, and Tony Bouie.

Respondents in both cases are Ken Bennett, in his official capacity as Secretary of State of the State of Arizona; Gary Scaramazzo, Royann J. Parker, Jeffrey L. Fairman, Louis Hoffman, and Lori Daniels, in their official capacities as members of the Arizona Citizens Clean Elections Commission; and the Clean Elections Institute, Inc.

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OPINIONS BELOW

The original decision of the court of appeals is reported at 605 F.3d 720. The court's amended decision is reported at 611 F.3d 510 and appears in the appendix to Petitioners' petition for a writ of certiorari ("App.") at App. 1-44. The decision of the U.S. District Court for the District of Arizona is unreported and appears at App. 45-78.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 2010. The petition for a writ of certiorari was filed on August 17, 2010, and was granted on November 29, 2010. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. Relevant portions of the Arizona Citizens Clean Elections Act, Ariz. Rev. Stat. §§ 16-940 *et seq.*, are reproduced at App. 134-49.

STATEMENT OF THE CASE

A. The Provisions and Operation of the Act

The Arizona Citizens Clean Elections Act, Ariz. Rev. Stat. §§ 16-940 *et seq.* (2010) (the "Act"), is a system of public financing for campaigns for Arizona state offices. The Act applies to races for Governor, Secretary of State, Attorney General, Treasurer, Superintendent of Public Instruction, Corporation Commissioner, Mine Inspector, State Senator, and State Representative. The Act provides government funds to candidates who collect a sufficient number of $5 "qualifying contributions" from the public. The government provides a set amount of money—an "initial disbursement"—to qualifying candidates once they collect the qualifying contributions. Except for the qualifying contributions and other minor exceptions, candidates taking public money cannot accept any private contributions. Ariz. Rev. Stat. § 16-941(A)(1) (2010); App. 135. They also may not make expenditures above the initial disbursement. Ariz. Rev. Stat. § 16-941(A)(3-4) (2010); App. 135-36. In other words, the state conditions its disbursement of campaign funds on an agreement by the candidate to (i) not accept private contributions, and (ii) not spend above a government-set limit.

At issue in this case is a specific provision of the Act, Ariz. Rev. Stat. § 16-952(A-C) (2010) (the "Matching Funds Provision"), entitled "Equal Funding of Candidates." App. 138-41. This provision kicks in when (i) the spending of groups making independent expenditures, combined with (ii) the spending or

fundraising of privately financed candidates, is more than the amount a publicly financed candidate may spend under the Act's expenditure limits for participating candidates.[1] That is, the Matching Funds Provision comes into play when the spending of a publicly financed candidate's political opponents, added together, is more than the amount of the initial disbursement provided to the publicly financed candidate. We shall refer to the amount of the initial disbursement as the "trigger level" for independent expenditure groups and privately financed candidates. The government provides "matching funds"—or additional direct public subsidies—to the publicly financed candidate based on how much his or her political rival spends[2] above the trigger level. These matching funds can amount to up to two times the amount of the initial disbursement for each candidate who receives them. Ariz. Rev. Stat. § 16-952(E) (2010); App. 142-43.

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[1] As discussed further below, the Act adds the spending of independent expenditure groups and the contributions (in the general election) or spending (in the primary election) of a privately financed candidate to determine whether matching funds should be triggered.

[2] After the primary election is over, the Act switches from using the amount the privately financed candidate spends to using the amount the privately financed candidate receives in contributions to determine whether the trigger level has been reached. That is, the government does not issue matching funds based on the expenditures of a privately financed candidate in the general election, but rather does so based on how much that candidate receives in contributions during the entire election cycle.

The matching funds equal the amount spent by the independent expenditure group, plus the amount a privately financed candidate spent (in the primary election) or received (in the general election) over the trigger level, less 6% for fundraising expenses. Ariz. Rev. Stat. § 16-952(A) (2010); App. 138-39.

1. How Independent Groups Trigger Matching Funds

Independent expenditure groups trigger matching funds to each publicly financed candidate in a race when (i) they spend money in opposition to a publicly financed candidate or in favor of a privately financed candidate, and (ii) the total amount spent by an independent expenditure group plus the amount spent or received by the privately financed candidate exceeds the amount of the initial disbursement. Ariz. Rev. Stat. § 16-952(C)(1-3) (2010); App. 139-40. When an independent expenditure group's spending triggers matching funds, the government provides those funds directly to the publicly financed candidate or candidates in the race and not to independent expenditure groups supporting them. Independent expenditures on behalf of publicly financed candidates or against privately financed candidates do not trigger matching funds to privately financed candidates. *Cf. id.* An independent expenditure in support of a publicly financed candidate results in matching funds to other publicly financed candidates in the same race, however. Ariz. Rev. Stat. § 16-952(C)(3) (2010); App. 140.

For example, assume a race in which total spending by independent expenditure groups and privately financed candidates exceeds the trigger level. When an independent expenditure group spends an additional $10,000 in support of a privately financed candidate or against a publicly financed candidate, that spending results in an almost $10,000 governmental subsidy to each publicly financed candidate in the race. In contrast, a $10,000 independent expenditure on behalf of a publicly financed candidate results in no government money going to any privately financed candidates in that race, but would trigger matching funds to any other publicly financed candidates in the race.

The Act also treats independent expenditures that do not mention a privately financed candidate at all as spending in favor of the privately financed candidate. For instance, suppose a race with a publicly financed candidate (Candidate A) running against a privately financed candidate (Candidate B). When an independent expenditure group spends money on an advertisement against Candidate A, but does not endorse or even mention Candidate B in that advertisement, the Act provides matching funds directly to Candidate A (assuming the trigger level has been met). Thus, speech unrelated to the privately financed candidate can, and does, result in direct subsidies to her rival.

2. How Privately Financed Candidates Trigger Matching Funds

Privately financed candidates trigger matching funds to each publicly financed candidate in a race when they spend (in the primary election) or raise (in the general election) money in an amount above the government's initial disbursement, when combined with any independent spending in support of a privately financed candidate's election. Ariz. Rev. Stat. § 16-952(C) (2010); App. 139-41. While contributions can trigger matching funds only in the general election, the Act includes contributions received by the privately financed candidate throughout the entire election period, including the primary (less the amount of expenditures the privately financed candidate made in the primary exceeding the trigger level), to determine whether the trigger level has been reached. Ariz. Rev. Stat. § 16-952(B) (2010); App. 139. Thus, a privately financed candidate cannot create a "warchest" during the primary election for use in the general election without risking triggering matching funds to her publicly financed opponents in the general election.

In considering how spending by either independent expenditure groups or privately financed candidates can trigger matching funds, the Act is structured so that an independent expenditure group's spending alone can trigger matching funds, even if the privately financed candidate in the race does not spend any money at all or does not receive any contributions. Likewise, a privately financed candidate's

spending (in the primary election) or contributions (in the general election) alone can trigger matching funds, even if there are no independent expenditures made in support of the privately financed candidate or against the publicly financed candidate in the race, so long as that privately financed candidate's spending or contributions exceed the trigger level.

3. The Act's Multiplier Effect

Although commonly referred to as "matching funds," that term does not accurately describe how the Matching Funds Provision actually works. The money distributed by the government to publicly financed candidates often does not "match," but instead substantially exceeds, the expenditures or contributions that triggered the subsidy.

This is because the Act provides a grant of the total matching funds subsidy to every publicly financed candidate running against a privately financed candidate. Ariz. Rev. Stat. § 16-952(A-B) (2010); App. 138-39. For example, assume a race (i) with one privately financed candidate and three publicly financed candidates, and (ii) where the privately financed candidate has spent or raised over the trigger level. If an independent expenditure group makes an expenditure of $10,000 in support of the privately financed candidate in this race, then the government gives $10,000 (less 6%) directly to each publicly financed candidate. In other words, $10,000 worth of expenditures in support of a privately financed candidate

(who may not have wanted them) results in $28,200 worth of speech given to that candidate's opponents.

Moreover, if we assume a race in which the converse is true and there are three privately financed candidates and one publicly financed candidate, independent expenditures of $10,000 in favor of each privately financed candidate results in $28,200 in matching funds going to the sole publicly financed candidate in the race. The Matching Funds Provision can thereby make the publicly financed candidate into the best financed candidate in the race and one capable of outspending all his privately financed opponents combined.

B. The History of the Act

The Act was adopted by initiative in 1998 by a margin of 51% to 49%. App. 49. Its proponents primarily intended it to reduce political spending and negate the influence of groups with whom the proponents disagreed and whom they viewed as "special interests." The Act would achieve these goals by "leveling the playing field" among political actors in Arizona.

The proponents believed that the "field" was not "level" because of their disagreement with contemporary legislative outcomes and believed that if they were to reduce overall spending and equalize resources among political actors, this would allow them to achieve certain progressive policy goals. *See, e.g.*, Joint Appendix (JA) at 213. Jim Driscoll, who was one

of the earliest proponents of the Act, an initiative steering committee member, and an employee of the campaign to pass the Act, authored a series of reports critical of Arizona's public policies. ECF No. 288-4 at 22, 26, 38-50, 62-142. In these reports, he argued that until a system of public financing was in place, "no significant progress can be made to protect the environment, fund education, [or] provide adequate health care . . . ." ECF No. 288-4 at 132. To that end, Driscoll recruited a number of progressive groups to support the Act. ECF No. 288-4 at 27; 294-1 at 21, 123-30. The Act's primary author, and current member of the Clean Elections Commission, Respondent Louis Hoffman, testified that he and the Act's other proponents sought to reduce the influence and relative voice of certain business groups. JA 719-24.

Notably, the initiative's campaign manager, in a confidential memorandum to the initiative campaign's steering committee, made clear that "Clean Elections is NOT about public funding. Its [*sic*] about spending limits, getting rid of special interests, and leveling the playing field." JA 213. Documents authored by proponents of the Act repeatedly and consistently state that they intended the Matching Funds Provision to (i) limit spending by certain groups and privately financed candidates, and (ii) "level the playing field" among political actors in Arizona. *See* JA 809-55 (chart summarizing hundreds of statements discussing leveling the playing field and limiting spending). Indeed, on its website, the Citizens Clean Elections Commission continues to

state that the purpose of the Act is to "level the playing field."[5]

One internal document from Respondent Clean Elections Institute, Inc. (CEI), written after the Act was passed, describes how the Matching Funds Provision works in practice. Entitled "Justification for Clean Elections Matching Funds," the document identifies the two main reasons for the Act's Matching Funds Provision: "fairness" and "limit[ing] spending." JA 109-10. Matching funds would achieve these goals by creating "disincentives" for privately financed candidates' expenditures:

> A traditional candidate may think twice about raising additional funds in a race against a Clean Elections candidate. For every dollar raised above the base amount, the CE candidate is matched. There is no incentive for the traditional candidate to raise and spend more, unless that candidate intends to outspend the CE candidate by going beyond three times the initial grant.
>
> . . .
>
> With the Clean Elections matching funds system, it can be argued that millions of dollars in spending never takes place.

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[5] *See* http://www.azcleanelections.gov/about-us/get-involved.aspx (Respondents' website proclaims: "The Citizens Clean Elections Act was passed by the people of Arizona in 1998 to level the playing field when it comes to running for office.") (last visited Jan. 10, 2011).

JA 110. As one campaign piece by Arizonans for Clean Elections directed at the public phrased it: "Candidates who chose to raise money by continuing to use the old system—accepting contributions from wealthy special interests—would be faced with various disincentives to raise more money than a Clean Elections opponent." JA 96.

In contrast to the proponents' preoccupation with limiting spending and leveling the playing field, their concern with corruption was, at best, tertiary and, at worst, an afterthought. Indeed, the Ninth Circuit recognized that "[t]here is no evidence that the Act was intended solely to remedy Arizona's apparent susceptibility to political corruption." App. 8.[*]

[*] The Ninth Circuit did note that there was "ample evidence" that voters were aware of, and concerned about, "continuing and repeated political corruption in Arizona." App. 8. The Ninth Circuit considerably overstated the influence of state campaign contributions on the four examples of "corruption" it listed, while ignoring the fact that state campaign finance laws could have done almost nothing to stop or cure these instances. App. 6-7. First, the conviction of Governor Fife Symington was for making false statements to financial institutions in his business transactions before he was governor. His conviction was overturned on appeal, *see United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999), and he was then pardoned by President Clinton prior to any retrial. The Ninth Circuit's description of this episode below contained numerous errors and the court subsequently amended its decision to correct some of its errors. The court did not, however, change its discussion regarding the "concern" about corruption ostensibly generated by Governor Symington's experiences. *Compare* App. 7-8 n.1, *with McComish v. Bennett*, 606 F.3d 720, 724 n.1 (9th Cir. 2010). Second, Governor Evan Mecham was impeached for the misuse of government

(Continued on following page)

Moreover, the campaign to pass the Act equated "corruption" with the existence of private money in the campaign system in general, which proponents blamed for their failure to achieve their desired policy goals. Arguments for the Act in the ballot proposition guide stated that "important issues regarding health care, children and the environment are affected by political contributions," JA 226, and extolled the Act's ability to "end the money chase, halt corruption, limit campaign spending and reduce special interest influence." JA 227. Further, the public was promised that "limiting campaign spending and increasing disclosure requirements . . . will level the playing field so that the voices of Arizona's working families and seniors on fixed incomes are heard just as loudly as the big money donors who are corrupting our system." JA 228-29.

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funds, not campaign finance issues. Although he was indicted on charges relating to the failure to disclose a campaign loan, he was acquitted of all charges. *See Meckam, Acquitted of Concealing Loan*, N.Y. Times, June 17, 1988, at A14. The third scandal, involving Charles Keating and the U.S. Senators from Arizona, concerned federal elections and could not have been affected by an Arizona state campaign finance law. The fourth scandal discussed by the Ninth Circuit occurred twenty years ago and involved campaign contributions as a minor part of a much wider sting involving direct payments of bribes to legislators for their personal use in return for their votes. App. 7. Thus, to the extent that Arizona has, or has had, problems with political corruption, they have not arisen from campaign contributions for state elections.

C. How the Matching Funds Provision Has Burdened the Speech of Petitioners and Others

1. The Identity of the Petitioners

The independent expenditure group petitioners in No. 10-238 are two political action committees. The Arizona Free Enterprise Club's Freedom Club PAC (the "Freedom Club PAC") is an independent expenditure group that funds and makes independent expenditures in Arizona state campaigns. JA 777, 782. The Arizona Taxpayers Action Committee ("Arizona Taxpayers") is a small independent expenditure group that makes independent expenditures in Arizona state campaigns. App. 158-59.

The candidate petitioners in No. 10-238 are State Senator Rick Murphy and former State Treasurer Dean Martin. Senator Murphy was elected to the Arizona State Senate in 2010, having previously served as a State Representative. App. 166-67. He successfully ran for State Representative as a privately financed candidate against publicly financed candidates in 2006 and 2008 and as a publicly financed candidate in 2004. JA 401-02. Martin ran and was elected to the Arizona State Senate in 2000 as a privately financed candidate. JA 336. In 2006, he ran and was elected State Treasurer as a privately financed candidate against a publicly financed candidate. JA 337. In 2010, despite opposing the Act ideologically and politically, Martin ran as a publicly financed candidate in the Republican gubernatorial primary. ECF 432-1 at 2-4. He withdrew before the

primary election occurred.[5] He ran as a publicly financed candidate in 2010, even in light of his opposition to the Act, because he believed this was the only strategy that would preclude his opponents from receiving significant government subsidies based on his exercise of his free speech rights. App. 153; ECF 432-1 at 2-4.[6]

2. The Effect on Petitioners

The Matching Funds Provision has reduced the spending and altered the timing of the speech of independent expenditure groups and privately financed candidates. Specifically, Arizona Taxpayers chose not to speak in opposition to a publicly financed candidate to avoid triggering matching funds to that candidate. JA 582-83. Similarly, Murphy chose not to fundraise—and therefore had less money with which to speak—in his 2006 and 2008 general election campaigns to avoid triggering matching funds to his publicly financed opponent(s). JA 567-68. Martin also avoided fundraising to prevent triggering matching

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[5] Although Martin does not currently hold elective office, he has long been politically active in Arizona and expects to run for state office again in the future. App. 151-53. The year 2011 marks his seventh year of litigating against the Matching Funds Provision. His claims could not be resolved before any of his previous campaigns for office had concluded. His case is therefore "capable of repetition, yet evading review." *Davis v. FEC*, 554 U.S. 724, 735-36 (2008).

[6] Robert Burns, a plaintiff intervenor below, was an Arizona State Senator. Senator Burns retired in 2010.

funds during his 2006 campaign. JA 728-29. John McComish, Nancy McLain, and Tony Bouie, petitioners in No. 10-239, have similarly refrained from raising and spending money in support of their campaigns. *See* Petitioners McComish, *et al.*, petition for writ of certiorari at 9-10.

People who regularly contribute to campaigns in Arizona take the Matching Funds Provision into account and prefer to give to privately financed candidates and independent expenditure groups who will not trigger matching funds to publicly funded candidates the donors oppose. JA 395-96, 407; App. 160-61. And because matching funds are triggered by independent expenditures, candidates further restrict their own fundraising for fear that an unexpected independent expenditure may trigger additional matching funds to their participating opponents. In effect, privately financed candidates create a "cushion" in their own fundraising to avoid having an independent expenditure trigger matching funds to their opponent. JA 567. Martin has thus actively discouraged groups from making independent expenditures on his behalf in order to avoid triggering matching funds to his opponents. JA 577-78.

3. The Matching Funds Provision's Effect on Speech in Arizona

The Matching Funds Provision forces the following choice on every privately financed candidate and independent expenditure group opposed to a government funded candidate: speak and become the

mechanism of dissemination of speech the candidate or the group opposes, or remain silent. This choice alters a privately financed candidate's strategy from the outset of an election. As one Arizona political consultant explained, "every spending decision" is made with matching funds in view. JA 596. He explained that privately financed candidates are "always aware of the cost of spending that first incremental dollar" that triggers matching funds and results in, for example, mailing information to fewer voters and doing so less frequently. *Id.*

This forced choice also alters the timing of speech because candidates delay political activity until matching funds can be of little use to opponents—that is, they speak more towards the end of the campaign so that matching funds arrive too late to be used by the publicly financed candidate. Petitioners' expert witness, Dr. David Primo of the Political Science Department of the University of Rochester, confirmed the experience of participating candidates delaying speech, finding that the Matching Funds Provision alters the timing of speech especially in competitive races where matching funds matter most. JA 791-92, 922. Based on a regression analysis, Dr. Primo found that in races where matching funds are triggered, candidates change the timing of their fundraising activities and their expenditures. JA 791-92. In Arizona, fundraising and campaign spending on political speech by privately financed candidates tends to occur during the very end of the campaign and, in the general election, even after the campaign so that matching funds cannot affect the outcome. *Id.*

This pattern of delayed spending and delayed speech is consistent with the findings of researcher Michael Miller, who reported that "*every informant [he] interviewed*," which included both privately financed and publicly financed candidates, affirmed the delay in speaking by privately financed candidates in an effort to minimize the burdens of matching funds. JA 366. This pattern appears uniquely attributable to the Act, in that Respondent CEI's expert witness, Prof. Donald Green, had not seen it in any other election. JA 771-72.

Independent expenditure groups and candidates thus delay speech that may trigger the Matching Funds Provision until the end of election cycles in order to minimize the possibility that their political activity will result in fundraising advantages for their political opponents. Accordingly, the Freedom Club PAC and Arizona Taxpayers delay making independent expenditures until late in the election cycle to minimize the effect of Matching Funds. App. 159-60, 163-64. Martin, McComish, McLain, and Bouie also delayed their speech and fundraising until late in elections for the same reason. App. 153; *see* Petitioners John McComish, *et al.*, petition for a writ of certiorari.

Even when privately financed candidates stop speaking or modify their speech to avoid matching funds, the Matching Funds Provision still penalizes their decision to reject government financing by matching independent expenditures made to support their candidacy or to oppose their publicly financed

opponents. In his 2008 primary election for the House of Representatives, Murphy did not send out any mail pieces in order to conserve his resources for the general election—where he accurately anticipated being massively outspent by his three government-financed opponents. JA 567. Although Murphy did not fundraise during the 2008 general election—because doing so would have triggered almost $3 in matching funds for every $1 he raised—he could not prevent groups from spending money to support him. *Id.* Accordingly, when a group made an independent expenditure of $3,627 to support his candidacy, each of his publicly funded opponents received a check for nearly the same amount. As a result, the independent group's small expenditure triggered more than $10,000 used to oppose Murphy's election. JA 568-69.

The burdens inherent in the Matching Funds Provision have been clear since 2002, when Matt Salmon ran as a privately financed Republican candidate for governor. The Democratic Party spent $1 million on independent expenditures against Salmon. JA 287. Those expenditures did not count toward the publicly financed Democratic candidate's spending limit and did not trigger matching funds to Salmon. In contrast, when the Republican Party spent $330,000 in responsive independent expenditures, the government gave each of Salmon's publicly funded opponents $330,000 in matching funds. JA 287-88. Salmon also held a fundraiser with President Bush that raised $750,000. JA 289. After expenses, including meals and costs for Air Force One, his campaign

netted only $500,000. *Id.* Nonetheless, the Matching Funds Provision triggered $750,000 to each of his two opponents. *Id.* A spokesperson for the Democratic campaign stated, "I'm not sure the president realizes he's raising money for both candidates," and referred to the event as a "dual fund-raiser." JA 284. Consequently, Club for Growth director Steve Moore told Salmon during the campaign that because of matching funds, the Club would not spend any money supporting his candidacy. JA 290.

In the case of Salmon's fundraiser with President Bush, the Legislature had not yet added the 6% reduction for fundraising expenses, so each of Salmon's government-funded opponents received the full amount spent or raised above the trigger level. However, even if the 6% reduction was in place during Salmon's race, his fundraising costs for the fundraiser were *five-and-a-half times* the statutory reduction amount.

The Matching Funds Provision has chilled speech across the political spectrum. In 2004, Mainstream Arizona, a group that promotes moderate Republicans, sent out preprimary mailings praising certain legislators for their support of a bipartisan budget. JA 300-01; ECF 288-7 at 26. Although the mailings did not directly urge recipients to vote for or against candidates, and even though Mainstream Arizona tried to avoid triggering matching funds, the Commission found that the $40,000 mailings required the government to distribute $67,500 in total matching funds to fifteen candidates. JA 300-01; ECF 288-8 at 26. Not only did Mainstream Arizona inadvertently

trigger matching funds when it spoke about issues it was founded to advance, the issuance of matching funds chilled Mainstream Arizona's involvement in the campaign. JA 301.

On the Democratic side, when a Republican candidate, David Stevens, violated the Act's rules, he became ineligible for matching funds. JA 548-49, 557-58. Political committees affiliated with the Democratic Party, Victory 2008 and Arizonans for a Healthy Economy, decided to make independent expenditures against him. As both groups later affirmed, "[h]ad Mr. Stevens been eligible for matching funds," those groups "would not have made independent expenditures" in his district. JA 549, 558. Nevertheless, the Citizens Clean Elections Commission subsequently awarded matching funds to Stevens despite his violation of the rules. JA 555.

The numerous individual and independent choices to avoid or minimize matching funds have resulted in a reduced amount of political speech in the aggregate. This is exactly as the Act's proponents intended. Respondent CEI's expert witness, Donald Green, testified that while overall electoral spending has increased in Arizona, it has not increased as much as it would have had the Act not been in effect. JA 768. Prof. Green conceded that the Act violates the First Amendment by limiting speech, and that the only real question is "how bad[ly]" it violates the constitution. JA 773. Similarly, Dr. Primo testified that while many states have seen a surge in campaign spending since 1998, Arizona is not one such state. JA 922.

Indeed, as Dr. Primo testified, the actual increase in spending in absolute terms in Arizona has been modest. *Id.*

D. The Procedural History of the Case

On January 29, 2004, Martin, as a plaintiff in *Association of American Physicians & Surgeons v. Brewer*, No. 04-cv-0200-EHC, first challenged the constitutionality of the Act's Matching Funds Provision in the United States District Court for the District of Arizona. That action was dismissed for failure to state a claim by the district court at 363 F. Supp. 2d 1197 (D. Ariz. 2005). On appeal, the Ninth Circuit first dismissed the appeal as moot, 486 F.3d 586 (9th Cir. 2007), but upon reconsideration found that Martin's appeal was not moot and that he had stated a cause of action. It then remanded to the district court, 494 F.3d 1145, 1146, *amended by* 497 F.3d 1056 (9th Cir. 2007). Once back in the district court under the recaptioned *Martin v. Brewer*, Martin was joined in his challenge by Arizona Taxpayers and the Freedom Club PAC.

On August 21, 2008, privately financed candidates John McComish, Nancy McClain, and Tony Bouie, Petitioners in No. 10-239, filed a separate challenge to the constitutionality of the Matching Funds Provision in the United States District Court for the District of Arizona in *McComish v. Brewer*, No. 08-cv-1550-ROS. Upon motion of the State of Arizona, the district court in the *Martin* action refused to

consolidate the two actions. As a result, the plaintiffs in the *Martin* action, now joined by Murphy, intervened in the *McComish* action and voluntarily dismissed the *Martin* action.

On August 29, 2008, the district court found that the Matching Funds Provision likely violated the First Amendment, but refused to enter a temporary restraining order. App. 119-31. On October 17, 2008, the district court again found that the Matching Funds Provision likely violated the First Amendment, but refused to enter a preliminary injunction. App. 90-118. Finally, on January 20, 2010, the district court granted summary judgment to all challengers to the Matching Funds Provision and entered a permanent injunction against its enforcement. App. 45-78. The district court stayed the effect of the injunction for ten days to permit defendants and defendant-intervenors (Respondents in this proceeding) time to appeal, which they did. App. 77.

The *McComish* plaintiffs then moved the Ninth Circuit to vacate the stay. On January 29, 2010, the Ninth Circuit refused to vacate the stay of the injunction and consolidated both state defendants' and defendant-intervenor's appeals. App. 87-88. Judge Carlos Bea dissented from the court's refusal to vacate the stay. App. 89. On February 1, 2010, the Ninth Circuit extended the stay of the injunction and expedited the appeals. App. 80-81. Judge Bea again dissented. App. 81.

On May 21, 2010, the Ninth Circuit merits panel, consisting of Judges Tashima, Thomas, and Kleinfeld, reversed and remanded in a decision published at 605 F.3d 720 (9th Cir. 2010). On June 23, 2010, the Ninth Circuit amended its prior decision. 611 F.3d 510 (9th Cir. 2010). The amended decision was not published and appears at App. 1-44.

On June 8, 2010, this Court stayed the Ninth Circuit's decision and ordered the district court's permanent injunction to take effect. App. 79.

The petitions for certiorari in both *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, No. 10-238, and *McComish v. Bennett*, No. 10-239, were filed on August 17, 2010. This Court granted both petitions and consolidated the cases on November 29, 2010.

SUMMARY OF ARGUMENT

The central question in this case is whether the government may coerce Arizona state independent expenditure committees and privately financed candidates into limiting their speech during political campaigns. Its resolution will determine whether the government may, in order to promote a system of publicly financed campaigns, burden the speech of those who do not, or cannot, use public money to fund their political speech. It will decide whether the government may "level the playing field" among political actors by creating various disincentives for speakers

to fully and unreservedly exercise their First Amendment rights. In a deeply flawed decision, the Ninth Circuit determined that Arizona may do all these things and thereby create *de facto* limits on expenditures. This conclusion was contrary to this Court's First Amendment jurisprudence and should be reversed.

1. In *Davis v. FEC*, 554 U.S. 724 (2008), this Court struck down Section 319(a) of the Bipartisan Campaign Reform Act of 2002 (known as the "Millionaire's Amendment"). The Court held that the Millionaire's Amendment created a "special and potentially significant burden" on expenditures by a self-financed candidate because it granted that candidate's opponent fundraising advantages based on the self-financing candidate's decision to spend above a certain amount in promoting his campaign. It rejected the government's argument that these fundraising benefits were justified by the need to make the contest between self-financed and non-self-financed candidates more equitable and concluded that this justification was not a legitimate reason to regulate campaign finances.

The Matching Funds Provision does exactly what this Court said the government could not do in *Davis* and more. Instead of imposing different fundraising limits on candidates in the same race, the Matching Funds Provision provides direct subsidies to candidates who participate in Arizona's public financing system. These subsidies are triggered when non-participating candidates and independent

expenditure groups supporting them choose to speak above a certain amount. The Matching Funds Provision thus imposes the same choice on independent expenditure groups and privately financed candidates in Arizona as the Millionaire's Amendment imposed on the plaintiff in *Davis*: it requires a candidate or independent expenditure group "to choose between the First Amendment right to engage in unfettered political speech and subjection" to discriminatory funding mechanisms. *Davis*, 554 U.S. at 739. This choice constitutes a burden on the ability of independent expenditure groups and privately financed candidates to spend freely in support of their political goals. It violates their right to be free from government regulations that burden their speech in order to enhance the relative voice of their political opponents. It constitutes a *de facto* limit on political expenditures contrary to this Court's decisions in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Citizens United v. FEC*, 130 S.Ct. 876 (2010). The Act, through the Matching Funds Provision, does this in order to limit spending and "level the playing field" among political actors in Arizona. The Matching Funds Provision thereby replicates and amplifies the constitutional deficiencies of the Millionaire's Amendment and is similarly unconstitutional.

2. The Ninth Circuit nonetheless viewed the Act as a public financing system that furthers anti-corruption efforts by providing funding alternatives to candidates similar to the system for Presidential elections this Court upheld in *Buckley*. The Act is fundamentally different from the system upheld in

Buckley, however. Unlike the system at issue in *Buckley*, the Act is designed not to promote speech, but to restrict campaign spending by speakers who do not participate in the system. This Court's conclusion in *Buckley* that government financing of campaigns can be constitutional in principle has no application to the Act, which uses unconstitutional means in the Matching Funds Provision.

3. The Matching Funds Provision severely burdens speech both as a matter of law and as a matter of fact. Because it burdens fully protected speech, the Matching Funds Provision is subject to strict scrutiny and can survive only if it is narrowly tailored to support a compelling governmental interest. The Matching Funds Provision does not meet this standard. The Matching Funds Provision is not narrowly tailored because it burdens the speech of independent expenditure groups and self-financed candidates in order to achieve an ostensible anti-corruption purpose. Those two types of speakers do not cause corruption in the political process, however, and their speech cannot be burdened in order to fight corruption. The Matching Funds Provision is also not narrowly tailored because it is not itself directed at fighting corruption or its appearance. Instead, the Matching Funds Provision exists to "level" the speech of privately financed candidates and independent expenditure groups who speak against publicly financed candidates. It does so by creating disincentives for candidates and independent expenditure groups to

engage in political activity above the expenditure limit set by the Act. The Matching Funds Provision's effect on corruption is thus far too attenuated and indirect to survive strict scrutiny. And because the Matching Funds Provision's foremost purpose is to "level the playing field" by deterring speech by independent expenditure groups and privately financed candidates, and not prevent corruption, the Matching Funds Provision is not supported by a compelling governmental interest. Even if it were supported by a governmental interest in preventing corruption, moreover, that interest cannot justify restrictions on expenditures.

ARGUMENT

I. THE MATCHING FUNDS PROVISION BURDENS FREE SPEECH BY FORCING INDEPENDENT EXPENDITURE GROUPS AND PRIVATELY FINANCED CANDIDATES TO CHOOSE BETWEEN MAKING UNFETTERED POLITICAL EXPENDITURES AND PROVIDING FUNDRAISING ADVANTAGES TO THEIR POLITICAL OPPONENTS.

With one recently overturned exception, since *Buckley*, this Court has consistently held that the government may not limit expenditures by independent groups and privately financed candidates. But *Buckley* dealt with an explicit restriction on expenditures, while the Act contains no overt restriction on

the amount of speech in which independent expenditure groups and privately financed candidates may engage. For the Ninth Circuit, this distinction was determinative because it meant that the Act "does not actually prevent anyone from speaking." App. 33. For the First Amendment, though, this distinction is meaningless.

This Court has consistently held that laws that create disincentives to speak may violate the First Amendment as well as any direct command. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991). In other words, the First Amendment focuses on outcomes rather than forms. "[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, 130 S. Ct. at 898. The question here is not whether the government explicitly bans speech, but whether the Matching Funds Provision penalizes speech by forcing independent expenditure groups and privately financed candidates to choose between unfettered political expression and funding advantages for their political rivals. The answer to that question is "yes," and, under *Davis*, this penalty constitutes a substantial burden on free speech.

A. Under *Davis*, Laws That Provide Funding Advantages To a Speaker's Political Opponents in Competitive Elections Substantially Burden Protected Speech.

In *Davis*, the Court struck down the Millionaire's Amendment, which allowed opponents of self-financed candidates in federal elections to accept funds in the amount of three times the maximum contribution limit from individuals if their self-financed opponents spent more than a certain amount of their own funds. The Court concluded that this system "impermissibly burden[ed] [the self-financing candidate's] First Amendment right to spend his own money for campaign speech." *Davis*, 554 U.S. at 738. The law created an "unprecedented penalty" on any self-financing candidate who robustly exercised her First Amendment rights: if she engages in "unfettered political speech," she will be subject "to discriminatory fundraising limitations." *Id.* at 739. Self-financing candidates could still spend their own money, "but they must shoulder a special and potentially significant burden if they make that choice." *Id.*

This Court recognized that laws that force a speaker to be the unwilling vehicle by which his message is countered create "a special and potentially significant burden . . . ." *Id.* (citing *Day v. Holahan*, 34 F.3d 1356, 1359-60 (8th Cir. 1994)). It thus concluded that the Millionaire's Amendment burdened the "fundamental nature of the right to spend personal funds for campaign speech" because it "'impose[d]

some consequences'" on a candidate's choice to self-finance beyond certain amounts. *Davis*, 554 U.S. at 738-39 (quoting FEC brief).

The Matching Funds Provision imposes the same consequences as the Millionaire's Amendment and more. By forcing independent expenditure groups and privately financed candidates to choose between triggering enhanced funding to their opponents and spending money in support of their political cause, the Matching Funds Provision similarly penalizes the exercise of First Amendment rights. It gives independent expenditure groups and privately financed candidates two poor alternatives. Those who continue to speak shoulder the burden of enabling funding that promotes their political rivals in the zero-sum context of electoral politics. Those who remain silent are prevented from speaking. Under *Davis*, the Act severely burdens the right of independent expenditure groups and privately financed candidates to spend money for campaign speech.

It is no surprise, then, that the Second and Eleventh Circuits have held that systems similar to the Matching Funds Provision are unconstitutional under *Davis*. *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010); *Green Party of Conn. v. Garfield*, 616 F.3d 213 (2d Cir. 2010).[7] The Ninth Circuit alone has rejected

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[7] In his dissent from the panel decision extending the stay of the district court's injunction in this case, Judge Bea also concluded that "this case is determined by *Davis* . . . because state intervention in the funding of campaign contributions in a

(Continued on following page)

the argument that *Davis* determines the constitutionality of such systems. App. 24. The Ninth Circuit instead concluded that *Davis* did not apply because this Court had described the Millionaire's Amendment as asymmetrical and discriminatory and therefore "the law constituted a burden on Davis' speech *only* because it treated candidates running against each other under the same regulatory framework differently based on a candidate's decision to self-finance his or her campaign . . . ." App. 25 (emphasis added).

The Ninth Circuit badly misinterpreted *Davis*. What triggered strict scrutiny there was the grant of a competitive advantage that resulted from Davis's constitutionally-protected decision to spend his personal funds. Indeed, matching funds are actually more burdensome than the Millionaire's Amendment because they relieve participants from the burden of raising funds entirely. *See Green Party*, 616 F.3d at 245 ("The penalty imposed by the excess expenditure provision . . . is *harsher* than the penalty in *Davis*, as it leaves no doubt that . . . the opponent of the self-financed candidate [] will receive additional money."). Under the Millionaire's Amendment, the non-self-financing candidate still had to raise funds from private parties. In contrast, once a group or

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manner to benefit candidates when their opponents spend their own money on speech imposes a substantial burden on the exercise of the free speech of the candidate who spends his own money." App. 81.

candidate triggers the Matching Funds Provision, the government directly gives extra financing to all publicly financed candidates in a race.

Davis's core holding was that a law that forced a speaker to choose between spending unlimited private funds on speech and enabling fundraising advantages to her opponent was an unconstitutional burden on free speech. In *Davis*, those fundraising advantages came in the form of higher contribution limits. Here, they come in the form of direct government subsidies to participating candidates. Whatever the nature of the fundraising advantage, though, it was the government's imposition of a choice between two bad alternatives that this Court held was an unconstitutional burden on speech. The Ninth Circuit disregarded this holding when it concluded that *Davis* applies only to asymmetrical contribution limits. The Ninth Circuit's decision therefore conflicts with *Davis* and should be reversed.

B. The Matching Funds Provision Violates Petitioners' Right To Be Free From Government Restrictions That Abridge Their Political Speech in Order To Enhance the Relative Voice of Their Political Opponents.

The First Amendment protects Petitioners' "right to be free from government restrictions that abridge [their] own rights in order to 'enhance the relative voice' of [their] opponents." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 14 (1986) (quoting

Buckley, 424 U.S. at 49). This right is well-established and flows from the common-sense conclusion that the government chills speech when it creates a system under which the act of speaking gives the speaker's opponent the means to counter that speech.

This Court has long recognized this principle. For example, in *Pacific Gas & Electric Co.*, California ordered a utility to make its billing envelope available to a consumer group. In rejecting this order, a plurality of this Court reasoned: "Compelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *Pac. Gas & Elec. Co.*, 475 U.S. at 9. The plurality stated that "whenever [the utility] speaks out on a given issue, it may be forced . . . to help disseminate hostile views. Appellant might well conclude that, under these circumstances, the safe course is to avoid controversy, thereby reducing the free flow of information and ideas that the First Amendment seeks to promote." *Id.* at 14 (internal quotation marks and citation omitted).

Similarly, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), this Court struck down a Florida law that granted candidates equal space to reply to criticism by a newspaper. The government claimed this regulation was necessary to ensure a variety of viewpoints reached the public and maintained the law did not prevent the newspaper from publishing what it wished. *Id.* at 247-48, 256. The

Court nonetheless concluded that the statute chilled expression about candidates and thus diminished free and robust debate. *Id.* at 257.[8]

The Ninth Circuit overlooked the fact that the First Amendment protects the right of Americans to engage in unfettered, free, uninhibited, robust, and wide-open political activity. *Buckley*, 424 U.S. at 14. Laws that interfere with the speaker's discretion to determine when, under what circumstances, and how much to speak interfere with this right.

For instance, although the Ninth Circuit termed Petitioners' decision to delay speaking until late in the election cycle as merely a "strategic choice," App. 31, the choice of when to speak is the speaker's alone to make under the First Amendment. *See Mills v. Alabama*, 384 U.S. 214, 219 (1966) (rejecting a law that prohibited a newspaper from printing an editorial on election day urging voters to vote a certain way even though the newspapers could print whatever they wanted the day before or the day after the election). "The First Amendment protects [a group's] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

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[8] This Court has rejected the argument that *Pacific Gas & Electric Co.* and *Miami Herald* stand solely for the proposition that laws that require the speaker to devote her property to the dissemination of her opponent's message are unconstitutional. Rather, these were independent grounds for invalidating these restrictions. *See Pac. Gas & Elec. Co.*, 475 U.S. at 12 n.7.

It is not a "strategy" to delay speaking in order to avoid government subsidies to one's opponent; it is a restriction on the speaker's message caused by government policy and a violation of the First Amendment. The Matching Funds Provision thereby burdens speech as much as the statutes this Court struck down in *Pacific Gas & Electric Co.*, *Miami Herald*, and *Mills*. "In the free society ordained by our Constitution, it is not the government but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley*, 424 U.S. at 57. Under our Constitution, the First Amendment mandates that this Court presume that speakers, and not the government, know best both what to say and how to say it. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988). The Matching Funds Provision destroys the speaker's right to engage in unfettered and uninhibited political debate by burdening her speech in order to advance the relative voice of publicly financed candidates through matching funds.

II. BECAUSE IT WAS DESIGNED TO BURDEN SPEECH, THE MATCHING FUNDS PROVISION FUNDAMENTALLY DIFFERS FROM THE PUBLIC FINANCING SYSTEM UPHELD IN *BUCKLEY*.

Despite the obvious parallels between the Millionaire's Amendment and the Matching Funds

Provision, the Ninth Circuit instead relied on the portion of *Buckley* that upheld a public financing system for presidential elections. App. 35. In essence, the Ninth Circuit held that because *Buckley* concluded that public financing promotes legitimate goals in principle, a system that penalizes nonparticipation in order to promote a public financing system is constitutional in practice. App. 36-37. To reach this conclusion, the Ninth Circuit disregarded both the structure of the Act and the nature of the system at issue in *Buckley*.

The Matching Funds Provision bears no similarity to the public financing system upheld in *Buckley*. The Matching Funds Provision was expressly designed to limit overall campaign spending and to achieve equality among speakers by penalizing those who choose to exercise their right to spend unlimited private funds on speech. In contrast, the system in *Buckley* was designed to provide an alternative to candidates who wished to lessen their reliance on private funds and, in upholding that system, the Court did not conclude that the government could pursue public financing by any means necessary. *Buckley*'s approval of public financing therefore does not control in this case.

A. The Matching Funds Provision Was Designed To Limit and Equalize Spending in Political Campaigns.

The Act was conceived, structured, promoted, and passed principally to limit campaign spending and reduce the influence of political actors with whom the proponents of the system disagreed. The Act has consistently been promoted to Arizona voters as a means to "level the playing field" among political actors. *See* JA 226-30.[1] Indeed, the Matching Funds Provision itself is entitled "Equal Funding of Candidates."

The Act achieves these goals by creating a system in which the government disburses burdens—or "disincentives"—to privately financed candidates and the independent groups that support them in campaigns. JA 96, 110. These disincentives include:

- providing matching funds to publicly financed candidates based on the speech of their privately financed opponents;

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[1] When Arizona courts interpret statutes adopted by initiative, "'the' primary objective . . . is to give effect to the intent of the electorate." *Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 212 P.3d 805, 806 (Ariz. 2009) (quoting *State v. Gomez*, 127 P.3d 873, 875 (Ariz. 2006)). To discern voter intent, courts most often look to the publicity pamphlet. *See Gomez*, 127 P.3d at 877; *Jett v. City of Tucson*, 882 P.2d 426, 431 (Ariz. 1994); *Laos v. Arnold*, 685 P.2d 111, 113 (Ariz. 1984). Generally, courts have cited the "descriptive title" and "arguments for" in the publicity pamphlet. *Laos*, 685 P.2d at 113; *Jett*, 882 P.2d at 431. As described above, the publicity pamphlet is replete with references to "limiting spending" and "leveling the playing field." JA 226-30.

- providing matching funds to publicly funded candidates based on independent expenditures by groups that privately financed candidates do not control and with whom they cannot coordinate;
- providing matching funds to publicly financed candidates running against a privately financed candidate based on the independent expenditures of groups that do not promote, or even mention, the privately financed candidate at all, but merely oppose the publicly financed candidate;
- providing matching funds to every publicly financed candidate in a race, thereby multiplying the funding advantages of all publicly financed candidates in a race; and
- deducting only 6% for fundraising costs from the matching fund grant when actual fundraising costs can be substantially higher.

The burdens on independent expenditure groups supporting privately financed candidates are especially egregious and unfair. Assuming the trigger level has been met, in a race between one publicly financed candidate and a privately financed candidate, an independent expenditure group spending in support of the publicly financed candidate can spend as much as it likes with no government-imposed consequences. In contrast, if an independent expenditure group opposes the publicly financed candidate—

or, in the case of Mainstream Arizona, just promotes the issues the group was founded to advance—that spending will result in more funding to support a candidacy the group rejects. In other words, there is no way for an independent expenditure group opposing the publicly financed candidate to participate in the election without generating government subsidies that undermine its interests.

In sum, the Act's structure creates inherent disincentives for speech funded by private parties. By operation of the Matching Funds Provision, the Act does far more than simply provide funding resources to candidates who wish to minimize or eliminate their reliance on private funds, as did the public financing system at issue in *Buckley*. Instead, the Act inserts the government directly into Arizona elections and firmly places its thumb on the scale in favor of publicly financed candidates.

B. The Public Financing System in *Buckley* Was Not Designed To Limit Spending or "Level the Playing Field" Among Candidates and It Did Not Penalize Nonparticipating Candidates or Independent Expenditure Groups for Exercising Their First Amendment Rights.

These disincentives distinguish the Act from the public financing system at issue in *Buckley*. In that case, the Court considered Subtitle H of the Internal Revenue Code, which provided for the public financing of Presidential campaigns. Under Subtitle H,

taxpayers authorized the government to pay funds from their tax liability to candidates and parties for certain election-related expenses. The system provided funds to candidates who pledged not to spend above a certain amount and to restrict their private fundraising. In upholding this system against a First Amendment challenge, the Court held that "Subtitle H is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, Subtitle H furthers, not abridges, pertinent First Amendment values." *Buckley*, 424 U.S. at 92-93.

Buckley thus holds that a truly voluntary system of public financing can enhance First Amendment values as a general proposition. But the system approved in *Buckley* is distinguishable from the Act in that the Act creates disincentives to spend too much money outside of the system. In particular, in upholding the Presidential system, this Court stressed that Subtitle H was not intended to burden speech. *Id.* at 92-93. The opposite is true of the Act. The Matching Funds Provision was designed to limit spending in campaigns and neutralize certain speakers in Arizona politics. It uses public money not as a means to facilitate speech, but as a means to manipulate speech in contests between publicly financed candidates and their privately financed opponents and their supporters.

In that regard, the size of the government's grant to a participating candidate in Subtitle H was completely divorced from the political activities of his opponents or independent political groups. Under Subtitle H, it did not matter what a participating candidate's opponents or their political supporters did—the government-granted subsidies were the same size and were triggered without reference to anyone else's speech. In contrast, the Matching Funds Provision directly ties the government grant of fundraising advantages to the political activity of the participating candidate's opponents and their supporters. The Matching Funds Provision's harm to independent expenditure groups and privately financed candidates places it outside of the rule in *Buckley*.

The Ninth Circuit erred when it concluded that, because *Buckley* upheld public financing in general, Arizona could burden speech in order to promote public financing; this Court has never accepted the proposition that if some regulation is constitutional, more regulation must be better. "'[The] power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.'" *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981) (quoting *Cantwell v. Conn.*, 310 U.S. 296, 304 (1940)). Consider, for instance, this Court's treatment of contribution limits. In *Buckley* and *McConnell v. FEC*, 540 U.S. 93 (2003), this Court upheld federal contribution limits to candidates against constitutional challenge, reasoning that they were a legitimate means to battle

corruption or its appearance. *See Buckley*, 424 U.S. at 28; *McConnell*, 540 U.S. at 136-37. Subsequently, in *Randall v. Sorrell*, 548 U.S. 230 (2006), this Court examined Vermont's contribution limits. The challengers there argued that Vermont's limits were so low that they interfered with their ability to amass the resources necessary for effective campaigns. *Randall*, 548 U.S. at 248. Under the reasoning of the Ninth Circuit below, if contribution limits are a constitutional means to battle corruption, even the most severe steps to further that interest would also be constitutional. This Court rejected that premise, though, noting that "that rationale does not simply mean 'the lower the limit, the better.' That is because contribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Id.* at 248-49.

Similar concerns should guide the Court here. While this Court has concluded that public financing may further a significant governmental interest, that interest must be weighed against any harm to free speech and the electoral process created by the particular public financing system before it. In particular, the Court must use its "independent judicial judgment," *id.* at 249, to assess the proportionality of the restrictions with any purported benefits. Restrictions on expenditures by groups or individuals "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth

of their exploration, and the size of the audience reached," and thus "limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'" *Buckley*, 424 U.S. at 19, 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)). Thus, although this Court has recognized certain benefits from public financing, it does not follow that the government may create a public financing system that undermines speech and political activity integral to the operation of our system of government. The Ninth Circuit read *Buckley*'s holding with respect to public financing systems far more broadly than that decision warrants. App. 25-26.

III. THE MATCHING FUNDS PROVISION IS SUBJECT TO STRICT SCRUTINY BECAUSE IT SEVERELY BURDENS POLITICAL SPEECH AND IS CONTENT-BASED.

The Matching Funds Provision is designed to burden political speech and does so in fact. The Matching Funds Provision is therefore subject to strict scrutiny. *Citizens United*, 130 S. Ct. at 898; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).[10]

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[10] The Ninth Circuit concluded that because the Matching Funds Provision and disclosure provisions both do not explicitly restrict speech, the Matching Funds Provision should be subject to intermediate scrutiny just like disclosure provisions. This argument is easily dispensed with. As noted by *amicus curiae* Cato Institute in support of the petition for certiorari, "[t]his

(Continued on following page)

The Ninth Circuit upheld the Matching Funds Provision in large part because it concluded that Petitioners had shown no cognizable harm. App. 27. In fact, the record is filled with examples of harm. Martin and Murphy both intentionally delayed and limited their fundraising in order to minimize matching funds. Martin actively discouraged independent political groups from making expenditures that would trigger matching funds. Murphy did not fundraise in the 2008 general election because he faced three publicly funded opponents and would have triggered almost $3 in matching funds for every $1 he raised beyond the general election trigger amount. The independent expenditure committees have been harmed by triggering matching funds to the candidates they oppose based solely on the exercise of their free speech rights and have altered the timing of their speech, often delaying it until later in the election cycle to minimize the harmful effects of the Matching

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Court has never suggested that [limits on expenditures] are comparable to disclosure requirements and therefore subject only to intermediate scrutiny." Cato Br. at 8. Moreover, this Court had an opportunity in *Davis* to apply disclosure-style scrutiny to a law that did not explicitly burden expenditures but nonetheless applied strict scrutiny. *Davis*, 554 U.S. at 740. Finally, disclosure requirements create a chill on an organization's contributors, not on the organizational speaker itself. *See Citizens United*, 130 S.Ct. at 914. This Court has always distinguished between laws that burden contributors and those that burden speakers. *See Buckley*, 424 U.S. at 20-21. Burdens that fall on the speaker are given strict scrutiny. *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007).

Funds Provision. In the 2006 primary, Arizona Taxpayers declined to speak in opposition to a publicly financed Senate candidate because such speech would have triggered matching funds. Martin was coerced into running as a publicly financed candidate for governor in order to avoid the inequitable treatment of privately financed candidates under the Act. JA 153.

Despite this evidence, the Ninth Circuit determined that because Petitioners had refused to buckle under the Act's inequitable burdens in all instances, the government could continue to burden their speech. App. 27. Thus, under the Ninth Circuit's rationale, the amount of speech the government is allowed to suppress depends on how successful it has been in suppressing speech up to now.

But one need not actually stop speaking before the government violates the First Amendment. And whether a law has a chilling effect cannot depend on the fortitude of the individual plaintiffs who choose to challenge it. *Davis*, again, is instructive. In *Davis*, this Court recognized that the Millionaire's Amendment "impermissibly burden[ed]" First Amendment rights even though it did not outright prohibit speech. 554 U.S. at 738. The proof of this burden was not a question of fact to be established by a litigant; rather, the burdens were inherent in the statute. Indeed, even though Davis triggered the Millionaire's Amendment, his opponents never took advantage of the provision. Regardless, this Court still found the

Millionaire's Amendment unconstitutionally burdened Davis's speech. *Id.* at 734, 744.[11]

Moreover, under the Matching Funds Provision, the government only issues matching funds in response to speech with certain content. For instance, if an independent expenditure group produces a television advertisement against a privately financed candidate, the government does not issue matching funds. However, if that same group produces a television advertisement in support of the same privately financed candidate and the trigger level has been reached, the government issues matching funds to all publicly financed candidates in the race. Matching funds are thus activated by a particular message and are therefore "content-based." *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 655 (1994).

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[11] The Court regularly strikes down laws that do not command silence but nonetheless violate the First Amendment. For instance, in *Thomas v. Collins*, 323 U.S. 516, 540 (1945), this Court held that a requirement that one register with the government before giving a public speech was incompatible with the First Amendment. In *Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965), this Court found a government program that labeled certain mail "communist political propaganda," and asked its addressees to confirm their desire to receive it before it would be delivered, violated the First Amendment rights of the addressees. Notwithstanding the fact that no addressee was denied delivery of the "propaganda," this Court recognized "any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'" *Id.* at 307. And in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), a tax on paper and ink, which did not prohibit any speech but did specially burden it, was found unconstitutional.

Laws that permit the government to discriminate on the basis of the content of a message "cannot be tolerated under the First Amendment." *Simon & Schuster*, 502 U.S. at 116 (internal quotation marks omitted). These laws are subject to the "most exacting" and "rigorous" scrutiny. *Turner*, 512 U.S. at 642. Indeed, content-based laws are so incompatible with the First Amendment that this Court considers them to be presumptively invalid. *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010). The Matching Funds Provision cannot survive strict scrutiny, nor can the government rebut the presumption of the Matching Funds Provision's invalidity.

IV. THE MATCHING FUNDS PROVISION FAILS STRICT SCRUTINY BECAUSE IT IS NOT NARROWLY TAILORED AND DOES NOT SERVE A COMPELLING GOVERNMENTAL INTEREST.

Under strict scrutiny, the government must prove that the Matching Funds Provision furthers a compelling governmental interest and that it is narrowly tailored to achieve that interest. *Wis. Right to Life, Inc.*, 551 U.S. at 464. The Matching Funds Provision fails this test.

A. The Matching Funds Provision Is Not Narrowly Tailored To Serve An Anti-Corruption Interest.

The government may only regulate the content of constitutionally protected speech in order to promote a compelling governmental interest.[12] In doing so, it must choose the least restrictive means to achieve that interest and must not unnecessarily interfere with First Amendment freedoms. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). The Ninth Circuit found the government's interest here to be preventing corruption or the appearance of corruption caused by large private contributions. App. 33.

The Matching Funds Provision is not narrowly tailored to achieve this interest for at least four reasons: first, the provision burdens the speech of speakers who do not cause corruption; second, it discriminates against speakers who cannot choose to participate in the public financing system on the basis that they have chosen not to participate in the public financing system; third, its burdens do not directly further an anti-corruption interest; and, fourth, there are no large private contributions to cause corruption in Arizona elections.

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[12] In addressing narrow tailoring, Petitioners assume for the sake of argument that the government possesses a compelling governmental interest here.

1. The Matching Funds Provision Is Not Narrowly Tailored Because It Burdens Speech by Political Actors Whose Speech Does Not Give Rise To Corruption or the Appearance of Corruption.

The Ninth Circuit determined that the Matching Funds Provision could "level" the speech of independent expenditure groups and self-financed candidates because burdening their speech makes it more likely that candidates will take public money, thereby inoculating these candidates from the potentially corrupting influence of private contributions. App. 35. In other words, although the government cannot burden speech to "level the playing field" and it cannot directly burden independent expenditures or self-financed candidates, the Ninth Circuit held it can indirectly burden these speakers in order to level the playing field. This conclusion contradicts both *Citizens United* and *Davis*.

In *Davis*, this Court reaffirmed *Buckley*'s holding that the government may not cap a candidate's expenditure of personal funds to finance campaigns. *Davis*, 554 U.S. at 738-39. The Court specifically noted that a cap on personal expenditures imposes a substantial, clear, and direct restraint on the First Amendment right to engage in the discussion of public issues and vigorously advocate for one's own election. *Id.* at 738 (quoting *Buckley*, 424 U.S. at 52-53). The Court also noted that a restriction on a candidate's use of personal funds disserves any

anti-corruption purpose because it increases the candidate's dependence on outside contributors. *Davis*, 554 U.S. at 738.

As the district court found, the Matching Funds Provision imposes the same penalty on self-financed candidates in Arizona state elections as the Millionaire's Amendment did in federal elections. App. 68-69. Like the Millionaire's Amendment, the Matching Funds Provision actually undermines the government's anti-corruption purpose by burdening self-financing by candidates. The provision is not narrowly tailored for this reason alone.

But the Matching Funds Provision does not stop there. It imposes identical burdens on independent expenditure groups as well, which share many of the same attributes as self-financed candidates. As the Second Circuit recognized, "nothing in *Davis* suggests that the 'right to spend personal funds for campaign speech' is limited to *candidates only*." *Green Party*, 616 F.3d at 245 (quoting *Davis*, 554 U.S. at 738). Independent groups also have the "First Amendment right to engage in unfettered political speech" and, under the Matching Funds Provision, the vigorous exercise of the right to use their funds to finance campaign speech produces fundraising advantages for politicians they do not support. *Davis*, 554 U.S. at 739-40.

Like the speech of self-financed candidates, "independent expenditures . . . do not give rise to corruption or the appearance of corruption." *Citizens*

United, 130 S. Ct. at 909. The Ninth Circuit's opinion thus assumes that the government may suppress the speech of third parties who do not implicate corruption concerns so long as the government can claim that doing so will prevent corruption. This is not narrow tailoring. "Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986). By infringing on speech that does not pose the danger that prompted regulation, the Matching Funds Provision fails narrow tailoring.

2. The Matching Funds Provision Is Not Narrowly Tailored Because It Burdens the Speech of Independent Expenditure Groups That Cannot Participate In the Public Financing System.

The Ninth Circuit held that Arizona could treat candidates differently depending on whether they chose to take public funding. App. 25 ("[I]t is constitutional to subject candidates running against each other . . . to entirely different regulatory schemes when some candidates voluntarily choose to participate in a public financing system."). This conclusion demonstrates the lack of tailoring in the Act, however, because it ignores the effect of the Matching Funds Provision on independent expenditure groups.

Independent expenditure groups cannot qualify for public funding under the Act and cannot "voluntarily choose" to accept or reject public funds. Instead, independent expenditure groups have only two choices available to them: they can either remain silent or they can speak and have the government "level" their voices by directly providing funding advantages to candidates they oppose. Like the self-financed candidate in *Davis*, the Act does not provide any way an independent expenditure group can exercise the unfettered right to make unlimited expenditures without abridgment unless it foregoes advocacy on behalf of privately financed candidates. *Davis*, 554 U.S. at 740.

More significantly, however, this Court has already rejected the Ninth Circuit's "voluntary choice" argument in *Davis*. The Court there rejected the argument that *Buckley* permitted the government to create a drag on speech "as a consequence of a statutorily imposed choice" because the public financing system there imposed an expenditure limit on participating candidates. *Davis*, 554 U.S. at 739. The Court noted that "[i]n *Buckley*, a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures. Here, [the Millionaire's Amendment] does not provide any way in which a candidate can exercise that right without abridgment." *Id.* at 739-40.

The impact on independent expenditure groups is even worse, because they are unable to participate in the public financing system. Their "choice" is to stop

speaking at some point or have the government pay direct subsidies to their political opponents. As in *Davis*, there is no way for them to exercise their rights without abridgment. The Act's lumping together of independent expenditure groups and privately financed candidates demonstrates the lack of careful tailoring in the law.

3. The Matching Funds Provision Is Not Narrowly Tailored Because It Does Not Directly Address Corruption.

The Matching Funds Provision is not narrowly tailored for another reason: it regulates and burdens the speech of independent expenditure groups and privately financed candidates in order to provide incentives for participating candidates to avoid corruption. The Ninth Circuit concluded that such an indirect means of fighting corruption was appropriate. However, it is not narrow tailoring. Narrow tailoring requires that, in pursuing its goal, the government's means are the "least restrictive of freedom of [political] belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." *Elrod v. Burns*, 427 U.S. 347, 363 (1976).

In the arena of free speech, the government is required to use "precision" of regulation as its "touchstone." *Id.* (internal quotation marks and citations omitted). To that end, this Court consistently rejects

government regulations that suppress fully protected speech in order to more efficiently regulate speech that may be constitutionally restricted. In *Wisconsin Right to Life*, the FEC argued that it could regulate constitutionally protected issue advocacy ads because doing so facilitated its ability to regulate express advocacy ads. *Wis. Right to Life*, 551 U.S. at 473-74. The Supreme Court rejected the FEC's argument, holding that "Government may not suppress lawful speech as the means to suppress unlawful speech." *Id.* at 475 (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002)). The Court rejected a similar argument in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). There, the government justified its regulation of anonymous leafleting by asserting that the regulation "serve[d] as an aid to enforcement of" other, permissible provisions of the election code and as "a deterrent to the making of false statements by unscrupulous prevaricators." *McIntyre*, 514 U.S. at 350-51. The Court rejected the argument, holding that "[a]lthough these ancillary benefits are assuredly legitimate," they could not justify the leafleting regulation. *Id.* at 351. *See also Buckley*, 424 U.S. at 44 (rejecting the argument that the government could limit expenditures in order to maximize the effectiveness of less intrusive contribution limits).

There is no logical stopping point to the Ninth Circuit's holding. If the government may burden fully protected speech in order to more efficiently regulate speech that may constitutionally be restricted, then all speech is subject to regulation and no speech is

fully protected. However, "the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795. Put another way, narrow tailoring does not permit the government to force a political player to lean into a pitch and "take one for the team." Narrow tailoring demands, at least, that the burdens of the law actually fall on those who give rise to the problem. The Matching Funds Provision does not do that.

4. The Matching Funds Provision Is Not Narrowly Tailored To Limit Corruption Deriving From Large Private Contributions To Candidates Because Arizona Has Banned Large Private Contributions.

This Court has concluded that limits on "large direct contributions" are permissible because such contributions could be given "'to secure a political *quid pro quo*.'" *Citizens United*, 130 S.Ct. at 908 (quoting *Buckley*, 424 U.S. at 26). But the Matching Funds Provision cannot be a government effort to fight corruption caused by "large direct contributions" because there are no large contributions in Arizona state elections. Arizona has one of the lowest contribution limits for state races in the country. *See Randall*, 548 U.S. at 250-51. According to the National Conference of State Legislatures, as of 2010, Arizona limits statewide candidates to $840 per contributor

per election cycle and limits legislative candidates to $410 per contributor per election cycle.[11]

It is difficult to understand why the speech of independent expenditure groups and privately financed candidates must be burdened in order to prevent the corrupting influence of contributions the largest of which cannot cover the cost of a laptop computer or an airplane ticket. To the extent that the Act is designed to combat the corruption derived from "large direct contributions," it is boxing a ghost. In that sense, burdening speech to prevent negative consequences associated with speech the state already severely limits is not narrow tailoring.

[11] Comparing states' contribution limits over a two-year election cycle, Arizona's contribution limit for statewide candidates is, on a per capita basis, the second lowest in the nation, behind only Florida. *See* Nat'l Conference of State Legislatures, *State Limits on Contributions to Candidates* (Jan. 20, 2010), http://www.ncsl.org/Portals/1/documents/legismgt/limits_candidates.pdf (last visited Jan. 10, 2011); United States Census 2010, *Resident Population Data*, http://2010.census.gov/2010census/data/apportionment-pop-text.php (last visited Jan. 10, 2011). Using 2010 Census data, the ratio of Arizona's statewide contribution limit to the size of the constituency is .00013, far lower than the Vermont ratio of .00064 that this Court held unconstitutionally low in *Randall*. *See Randall*, 548 U.S. at 251-52.

B. The Matching Funds Provision's Overwhelming Purposes Were To Equalize Electoral Opportunities and Limit Spending In Campaigns and It Is Therefore Not Supported By a Compelling Governmental Interest.

If we begin, as this Court did in *Buckley*, by examining the Act's "primary purpose," the Matching Funds Provision falls. *Buckley*, 424 U.S. at 26. The Act's primary purposes were to (i) limit spending in campaigns, and (ii) level the playing field among political actors in Arizona. Neither interest is compelling. The method the Act uses to achieve these purposes is the Matching Funds Provision. That provision therefore fails.

In *Buckley*, this Court rejected the argument that the government may restrict campaign spending in order to reduce the costs of campaigns. Specifically, the Court held that "[t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Id.* at 57. Arizona's interest in limiting spending therefore cannot justify the Matching Funds Provision's burdens on speech.

Arizona has even less success with its interest in "leveling the playing field" in state campaigns. As this Court held in *Davis*, it is a "dangerous business" for the government to attempt to influence the voters' choices by leveling electoral opportunities. *Davis*, 554 U.S. at 742. This interest not only fails to support the Matching Funds Provision's burden on speech, it is

not even a legitimate government interest in the first instance. *Id.* at 742. Because the Matching Funds Provision was designed to achieve a goal "wholly foreign to the First Amendment," *Buckley*, 424 U.S. at 48-49, it cannot survive in our constitutional system.

Of course, preventing corruption or the appearance of corruption are the only compelling governmental interests for restricting campaign finances. *Davis*, 554 U.S. at 740. Respondents and the Ninth Circuit therefore attempted to fit the Matching Funds Provision within the anti-corruption box. These efforts fail because the Matching Funds Provision is designed to limit spending by independent expenditure groups and privately financed candidates. Anti-corruption concerns cannot justify a law limiting independent expenditures or other spending that poses no threat of corruption. *See Citizens United*, 130 S.Ct. at 909; *Buckley*, 424 U.S. at 46. And the anti-corruption rationale cannot support restrictions on the ability of candidates to promote their own candidacies. *Davis*, 554 U.S. at 740-41; *Buckley*, 424 U.S. at 53.

To the extent that the Act is supported by a governmental interest in preventing corruption or its appearance, that interest is insufficient to justify the Matching Fund Provision's burdens on expenditures. That provision is therefore not supported by a compelling governmental interest and, to the extent that it is, that interest is insufficient to justify the level of harm to free speech rights caused by the law.

V. THE MATCHING FUNDS PROVISION FAILS INTERMEDIATE SCRUTINY.

The Ninth Circuit applied intermediate scrutiny to the Matching Funds Provision based on this Court's decisions regarding disclaimer and disclosure requirements in *Buckley* and *Citizens United*. App. 21, 23, 31-33. Even under intermediate scrutiny, however, the Matching Funds Provision is still unconstitutional. Intermediate or "exacting" scrutiny "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 130 S. Ct. at 914 (citing *McConnell*, 540 U.S. at 231-32, and *Buckley*, 424 U.S. at 64, 66). To survive this scrutiny, "there must be a relevant correlation . . . between the governmental interest and the information required to be disclosed, and the governmental interest must survive exacting scrutiny. That is, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis*, 554 U.S. at 744 (internal quotation marks and citations omitted). Here, there is neither a sufficiently important governmental interest nor a substantial relation between the Matching Funds Provision and any legitimate government interest.

First, there is no governmental interest in preventing or even chilling independent expenditures. This Court has found that independent expenditures do not, as a matter of law, implicate corruption or the appearance of corruption. *Citizens United*, 130 S. Ct. at 908. "Limits on independent expenditures . . . have

a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption." *Id.* Thus, even if the Ninth Circuit were correct that the Matching Funds Provision causes "merely theoretical chilling," such chilling is not permissible as applied to independent expenditures.

Second, the Matching Funds Provision burdens the expenditures of candidates as well. Privately financed candidates face the burdens inherent in the Matching Funds Provision if they choose to spend more than a government-set expenditure limit. But, like independent expenditures, candidate expenditures—whether by self-funded candidates or supporter-funded candidates—do not, as a matter of law, implicate corruption or the appearance of corruption. *Buckley*, 424 U.S. at 52, 55. Moreover, in chilling expenditures by self-funded candidates, the Matching Funds Provision chills speech that actually "*reduces* the threat of corruption." *Davis*, 554 U.S. at 740-41.

Third, to the extent that Respondents seek to justify "leveling the playing field" as a "sufficiently important governmental interest," such an argument has been foreclosed since *Buckley*. *Buckley*, 424 U.S. at 54, 56-57. An attempt to "level the playing field" cannot support any governmental policy at all because it is illegitimate and brings with it "ominous implications." *Davis*, 554 U.S. at 742. Accordingly, "leveling the playing field" of political speech cannot be a legitimate government interest, much less an important one.

Finally, Matching Funds cannot be justified as a necessary inducement into a public funding scheme that itself "fights corruption." As set forth above, Matching Funds do not directly combat corruption or its appearance. Instead, as recognized by the Ninth Circuit, they can only be indirectly linked to the fighting of corruption. App. 34-35. Such an indirect relation to a legitimate government interest is not consistent with "exacting scrutiny" because it does not satisfy the "substantially related" test.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Ninth Circuit below and permit to take effect the district court's order permanently enjoining Respondents from enforcing the Matching Funds Provision.

Respectfully submitted.

INSTITUTE FOR JUSTICE
WILLIAM R. MAURER*
JEANETTE M. PETERSEN
101 Yesler Way, Suite 603
Seattle, WA 98104
Tel: (206) 341-9300
Fax: (206) 341-9311
wmaurer@ij.org
jpetersen@ij.org

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
STEVEN M. SIMPSON
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
wmellor@ij.org
ssimpson@ij.org

INSTITUTE FOR JUSTICE
TIMOTHY D. KELLER
PAUL V. AVELAR
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
Tel: (480) 557-8300
Fax: (480) 557-8305
tkeller@ij.org
pavelar@ij.org

Counsel for Petitioners
Arizona Free Enterprise Club's Freedom Club PAC, et al.

**Counsel of Record*

AMICUS CURIAE BRIEF

Nos. 10-238 and 10-239

IN THE

Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *ET AL.*,

Petitioners,

v.

KEN BENNETT, *ET AL.*,

Respondents.

JOHN MCCOMISH, *ET AL.*,

Petitioners,

v.

KEN BENNETT, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT CLEAN ELECTIONS INSTITUTE, INC.

BRADLEY S. PHILLIPS*
GRANT A. DAVIS-DENNY
ELISABETH J. NEUBAUER
MICHAEL J. MONGAN
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
brad.phillips@mto.com

MONICA YOUN
MARK LADOV
MIMI MARZIANI
ELIZABETH KENNEDY
THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas
New York, NY 10013
Telephone: (646) 292-8333
Facsimile: (212) 463-7308
monica.youn@nyu.edu

Counsel for Respondent Clean Elections Institute, Inc.

February 2011

*Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

64515
(73)

TIMOTHY M. HOGAN
ARIZONA CENTER FOR LAW
IN THE PUBLIC INTEREST
202 EAST MCDOWELL ROAD
SUITE 153
Phoenix, AZ 85004
Telephone: (602) 258-8850
Facsimile: (602)
thogan@aclpi.org

QUESTION PRESENTED

The triggered matching funds provision of Arizona's public financing law, Ariz. Rev. Stat. § 16-952, provides candidates who choose to accept public funding, abide by expenditure limits, and forgo private contributions with limited supplemental public funds based on campaign spending by their privately financed opponents and independent expenditure committees. Is this triggered matching funds provision, which serves to combat corruption and expand electoral speech and competition in a viewpoint neutral and fiscally responsible way, constitutional?

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INTRODUCTION

The triggered matching funds provision of Arizona's Citizens Clean Elections Act is carefully tailored to combat political corruption, enhance political speech, and increase electoral competition in a fiscally responsible way. By assuring publicly funded candidates that they can run viable campaigns even in competitive races, matching funds encourage participation in Arizona's public funding system. *See Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) (holding that voluntary public funding of elections "furthers, not abridges, pertinent First Amendment values" by "facilitat[ing] and enlarg[ing] public discussion and participation in the electoral process"). While candidates who accept public funding agree voluntarily to limit their spending, Arizona's law places no limit on the amount that any privately financed candidate or independent committee may spend. Since the law took effect in 1998, spending by both privately financed candidates and independent committees has risen, electoral competition has increased, and the state has remained free of the corruption scandals that spurred the voters to enact the Clean Elections Act.

Petitioners assert that the Arizona law is subject to strict scrutiny, the standard this Court has applied to laws that directly limit political speech, coerce or compel speech, or discriminate among similarly situated speakers. But a more deferential standard applies to laws, such as this one, that do not directly regulate speech and instead primarily promote First Amendment values, even if those laws may incidentally burden some persons' speech. Thus, for example, in upholding mandatory disclosure of political contributions and expenditures, the Court in

Buckley established that regulations that further First Amendment values but which may incidentally burden political speech are constitutional if they are substantially related to a sufficiently important government interest. *Id.* at 64-65. This Court reaffirmed that holding in *Citizens United v. Federal Election Comm'n*,, 130 S.Ct. 876, 914 (2010). Here, the evidence shows that triggered matching funds further the compelling purposes of public funding that this Court recognized in *Buckley*: combating real and apparent corruption and enhancing public discussion and participation in the electoral process, the very foundation of our democracy. *See* 424 U.S. at 92-93, 96. The judgment of the Court of Appeals, upholding Arizona's law, should therefore be affirmed.

In urging reversal, Petitioners rely principally on this Court's decision in *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008). But *Davis* involved an entirely different constitutional question from that presented by Arizona's triggered matching funds provision. Voluntary public funding was not involved, and the Court held the federal law at issue was subject to strict scrutiny because it imposed "discriminatory contribution limits" on two privately financed candidates in the same race. *Id.* at 739-40. No such discriminatory limits exist here. Because Arizona allows candidates to choose voluntarily between two different regulatory regimes—a choice this Court has repeatedly held is permissible under the First Amendment—privately financed and publicly financed candidates are not similarly situated. Moreover, the law at issue in *Davis* could not be justified by the government's interest in combating corruption, *id.* at 740-41, while Arizona's triggered matching funds are important to the state's

effort to remedy Arizona's history of actual and apparent *quid pro quo* corruption without wasting public funds.

If the triggered matching funds provision in Arizona's voluntary public financing law were invalidated, the result would be less (not more) political speech and electoral competition, and the state's compelling interests in combating corruption and enhancing political participation would be undermined.

STATEMENT OF THE CASE

I. THE CITIZENS CLEAN ELECTIONS ACT

Arizona's voters passed the Act in 1998 in response to one of the worst state-level corruption scandals in this nation's history. In the early 1990s, a significant number of Arizona's elected officials were caught on tape accepting campaign contributions and bribes in exchange for agreeing to support gambling legislation. (JA 122-43.)[1] "AzScam," as the scandal came to be known, received extensive media coverage and fostered a widespread perception of political corruption in Arizona's government. (JA 122-27, 136-43, 173-77.) Shortly after AzScam garnered headlines, the state's major newspaper reported that

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[1] "JA" refers to the "Joint Appendix" filed with this Court. "PA" refers to the McComish Petitioners' Appendix to their petition for certiorari. "ECF" refers to the electronic filing docket number in the district court. "McComish Pet." refers to the McComish Petitioners' brief on the merits and "AFEC Pet." refers to the Arizona Free Enterprise Club Petitioners' brief on the merits.

100 percent of journalists, 66 percent of legislative staffers, and 42 percent of legislators and lobbyists believed that major contributors received special advantages from legislators. (JA 176.)

AzScam occurred five years into Arizona's initial experiment to combat corruption with contribution limits alone. Ariz. Rev. Stat. § 16-905 (2010) (historical note). AzScam demonstrated that those contribution limits were insufficient, by themselves, to fully prevent actual incidences of *quid pro quo* corruption and the public appearance of corruption in Arizona. In the years following AzScam, the public received yet more evidence that contribution limits alone had not eliminated real and apparent corruption from Arizona politics, as newspaper reports documented further instances of corruption. (JA 214-15.)

Arizona voters passed the Act based on their finding that the purely private "election-financing system . . . [u]ndermine[d] public confidence in the integrity of public officials." Ariz. Rev. Stat. § 16-940(B)(5) (2010). They adopted the Act to "improve the integrity of Arizona state government . . ., encourage citizen participation in the political process, and . . . promote freedom of speech under the U.S. and Arizona Constitutions." Ariz. Rev. Stat. § 16-940(A).

Under the Act, in exchange for agreeing to abide by expenditure limits, forgo potentially corrupting private fundraising, and participate in public debates, qualifying candidates receive public funding for statewide and legislative campaigns. Ariz. Rev. Stat. §§ 16-941, 16-945, 16-946, 16-950, 16-956(A)(2). To qualify, candidates must collect a specified number of five-dollar contributions from in-district

constituents to demonstrate that they have a sufficient base of support among voters. Ariz. Rev. Stat. §§ 16-949, 16-950.

The Act is designed to both provide candidates with sufficient resources to run competitive campaigns and avoid wasting limited state funds on non-competitive races. (JA 714-16.) Thus, it provides eligible candidates with a base grant equal to only one-third of the maximum per-candidate funding allotment. If a publicly funded candidate's traditionally funded opponent spends more than the initial base grant on his or her campaign, if independent expenditures are made in opposition to the publicly funded candidate, or if independent expenditures are made in support of that candidate's opponent (regardless of whether the opponent is publicly or privately funded), the publicly-funded candidate receives additional funds up to twice the amount of the initial grant (hereinafter, "matching funds" or "triggered matching funds"). Ariz. Rev. Stat. § 16-952(A), (C)(1)-(2), (E) (2010).

The Act's drafters considered but rejected awarding participating candidates one large lump-sum grant rather than a modest initial grant with the possibility of supplemental funds. After examining the wide disparity of spending in electoral contests, they decided that a one-size-fits-all grant would be either too low to attract candidates facing potentially competitive campaigns or so high that the state's limited resources would be wasted. (JA 714-716.)

Arizona's model has successfully encouraged two-thirds of state candidates to participate in the Clean Elections program. Participants have been drawn from both major parties in roughly equal numbers, as well as several minor parties, and both challengers

and incumbents have participated. (JA 479-529, 755-64; ER 313.) Since the law's enactment, Arizona has experienced a 20 percent increase in the number of contested Senate races, and the percentage of incumbents facing competitive Senate races has increased by 300 percent. (JA 535-36.)

II. THE ACT DOES NOT IMPOSE ANY SUBSTANTIAL BURDEN ON SPEECH

A. Candidates' Speech Has Not Been Chilled

Although Petitioners conducted extensive discovery, including from officeholders and candidates, they failed to present any reliable evidence that Arizona's triggered matching funds deter their speech or that of other non-participating candidates. In fact, discovery revealed just the opposite: Petitioners and other traditionally funded candidates did not spend less money on their campaigns because of the availability of matching funds to participating candidates. Indeed, they regularly spent beyond the matching-funds threshold.

For instance, Senator Robert Burns testified that while running for office he paid no attention to his opponents' receipt or expenditure of matching funds. (JA 433-34.) In 2008, Senator Burns and independent groups supporting him spent freely above the matching funds threshold. (JA 704.) Petitioners McComish, Bouie, and McLain triggered matching funds by exceeding the threshold notwithstanding their knowledge of the Act. (JA 384-85, 545-46; ECF 369-2, 370-2.) Further demonstrating the negligible impact triggered matching funds have on non-participants' spending decisions, Petitioner Martin triggered matching funds for his publicly funded

opponents but testified that he could not recall ever having done so. (JA 574-75, 755.)

Petitioner Murphy conceded at deposition that matching funds never caused him to reject a contribution, and his campaign consultant confirmed that Murphy never stopped fundraising because of matching funds. (JA 410, 594-95.) Murphy could not name any high-propensity donor who would not donate to his campaign due to matching funds. (JA 412.) Petitioner McLain testified that she had never turned down a campaign donation due to matching funds. (JA 416.)

The statistical evidence confirmed that matching funds do not deter spending by privately financed candidates who face publicly funded opponents. Those candidates either spend much less than the matching funds threshold—showing that their decisions to stop spending were based on something other than matching funds—or spend significantly more—showing that they were not deterred by matching funds. (JA 876-77.)

B. Independent Expenditures Have Not Been Chilled

Petitioners also failed to present any evidence that the Act has chilled independent expenditures. To the contrary, Petitioners' own figures show that, since implementation of the Act, independent expenditures have increased by 253 percent. (JA 284-85.)

Petitioner Freedom Club PAC does not make independent expenditures. Instead, it contributes money to Arizonans for a Sound Economy ("ASE"), which in turn makes independent expenditures. (JA 666.) Matching funds have never prevented the PAC from donating to ASE. (JA 670.) ASE's representative

testified that he does not "recall making a decision not to spend money" because of matching funds. (*Id.*)

Likewise, Petitioner Arizona Taxpayers Action Committee's ("ATAC") representative testified that ATAC has never withheld money from a race because of matching funds. (JA 584.) In fact, the organization's treasurer explained that the reason it did not spend money on campaigns in 2006 and 2008 was that it was unable to raise enough funds to do so and admitted that matching funds did not cause ATAC's financial woes; instead, the group's members simply lacked the time and will to fundraise. (JA 418-25.)

III. THE LOWER COURT RULINGS

A. The District Court

On January 20, 2010, the district court entered an order finding that Petitioners' evidence concerning the alleged burden imposed by the Act was "somewhat scattered" and "vague" and did not "definitively establish a chilling effect." *McComish v. Brewer*, No. CV-08-1550-PHX-ROS, 2010 WL 2292213, at *3 (D. Ariz. Jan. 20, 2010). The court noted that "it seems illogical to conclude that [an] Act creating more speech is a constitutionally prohibited 'burden' on [Petitioners]." *Id.* at *7. The district court, mistakenly concluding that it was required to do so by this Court's decision in *Davis*, nonetheless granted summary judgment for Petitioners.

B. The Court Of Appeals

On May 21, 2010, a three-judge panel of the Court of Appeals unanimously held that Arizona's triggered matching funds provision does not violate the First Amendment. The court held that the Act is subject to

less than strict scrutiny because it "imposes only a minimal burden on First Amendment rights." *McComish v. Bennett*, 611 F.3d 510, 513, 525 (9th Cir. 2010). The court held that the "burden created by the Act is most analogous to the burden of disclosure and disclaimer requirements in *Buckley* and *Citizens United*," to which this Court has applied less than strict scrutiny. *Id.* at 525. The court held that the Act is constitutional "because it bears a substantial relation to the State's important interest in reducing *quid pro quo* political corruption [and its] appearance . . . ." *Id.* at 513, 525.

SUMMARY OF ARGUMENT

Triggered matching funds do not abridge the right of candidates and committees to spend unlimited amounts in Arizona elections. To the contrary, Arizona's carefully-calibrated system of disbursing limited public funds promotes First Amendment values by encouraging more candidates to run, enhancing communication with the electorate, and increasing the number of contested and competitive elections. At the same time, matching funds serve Arizona's compelling interest in reducing the potential for *quid pro quo* corruption by making public financing a realistic alternative to potentially corrupting private contributions.

1. Arizona's law places no cap on the amount Petitioners may spend. Moreover, the record reveals no substantial evidence that matching funds burden candidates' or independent committees' speech. To the contrary, as Petitioners themselves argue, "[i]t is undisputed Petitioners and allied independent expenditure committees, through raising or spending campaign money, collectively triggered tens of thousands of dollars in matching funds to opposing

participating candidates." (McComish Pet. 30.) Petitioners' real complaint thus is not that their speech is chilled, but that Arizona's matching funds system gives their opponents, who are barred from raising private contributions, the financial wherewithal to respond and engage in effective, robust campaign debate. The First Amendment was not designed to protect one-sided campaigns.

Even if there were evidence that matching funds caused some candidates or political committees to alter their spending decisions for strategic reasons, such an incidental effect would not warrant strict scrutiny. This Court has consistently treated direct regulations of political speech differently from regulations that further First Amendment values but which may also have an incidental effect on the amount of money that is spent on political speech. Thus, *Buckley* applied strict scrutiny to FECA's direct limits on spending, but less rigorous scrutiny to contribution limits and disclosure requirements. Similarly, *Citizens United* applied strict scrutiny to BCRA's "outright ban" on corporate spending, but less rigorous scrutiny to requirements that corporations disclose their spending, which "impose no ceiling on campaign-related activities [and] do not prevent anyone from speaking . . . ." 130 S.Ct. at 914 (internal quotation marks omitted). Here, Arizona's matching funds provision places no direct limit on anyone's spending, furthers compelling First Amendment interests, and could have at most an incidental effect on spending by a privately financed candidate or an independent committee.

Petitioners wrongly contend that *Davis* requires application of strict scrutiny. *Davis*, which struck down a discriminatory scheme that subjected

similarly situated, privately financed candidates to asymmetrical contribution limits, does not control the outcome here. Arizona's system does not discriminate between similarly situated candidates but instead affords all candidates a choice between a public and private financing option, each with its own particular set of benefits and burdens. Public funding offers candidates the potential to receive matching funds, but that is counterbalanced by the uncertainty of whether and when such funds will become available, the inability to raise additional private funds, and limits on the amount the participating candidate may spend. There is no question that offering candidates a choice between a public and private financing option is constitutional and not discriminatory. *See Buckley*, 424 U.S. at 57 n.65.

Petitioners also err in attempting to classify Arizona's matching funds as content-based. All candidates, regardless of the content of their speech or the viewpoints they choose to express, are free to choose the public financing option and receive matching funds. The disbursement of those funds does not depend upon the ideas or views expressed; Arizona could simultaneously distribute supplemental funds to candidates with diametrically opposed viewpoints competing in the same race. The forced access cases, *see, e.g., Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986) ("*PG&E*"), are equally inapplicable. Matching funds do not force Petitioners to express the views of their political opponents in their mailers or campaign ads, and there is no risk that voters would associate the viewpoints of Petitioners with those of their publicly funded opponents.

2. Triggered matching funds are constitutional because they bear a "substantial relation" to a "sufficiently important" government interest. *See Citizens United*, 130 S.Ct. at 914. Arizonans had a compelling interest in remedying the reality and appearance of *quid pro quo* corruption highlighted by the AzScam scandal. The Act, including its matching funds provision, furthers that interest in a direct, substantial, and fiscally responsible way by making public funding a viable alternative to potentially-corrupting private contributions. Moreover, matching funds further the state's anti-corruption interest without limiting anyone's spending and while encouraging more speech and competition in Arizona elections.

The compelling nature of the anti-corruption interest is settled. Arizonans had a particularly vital interest in addressing corruption after it was widely shown in media reports that Arizona legislators had been caught on tape exchanging votes for bribes and campaign contributions. Arizona's public funding system was designed to address this history of *quid pro quo* corruption. Following *Buckley's* recognition that public financing is "a means of eliminating the improper influence of large private contributions," 424 U.S. at 96, the Act's drafters designed a system that would provide sufficient funding to participating candidates without wasting scarce public funds. There is no dispute that, absent matching funds, participation in Arizona's public funding option would decline. By making public financing a viable choice, matching funds have allowed many Arizona candidates—nearly two-thirds of candidates in recent years—to run for office without being dependent on private contributions. In the years since its passage,

Arizona has seen no repeat of the AzScam corruption scandal.

Triggered matching funds do not impermissibly attempt to "level the playing field." This Court's prohibition on leveling prevents government from "restricting" the spending of some candidates in order to equalize the relative resources of others. But matching funds do not *restrict* Petitioners' spending; they only *enhance* the speech of participating candidates, by providing them with public funds to substitute for the private contributions they are barred from accepting, in order to enable them to compete in high-spending races. As under the Presidential public financing system upheld in *Buckley*, all candidates in Arizona are free to choose the system that they believe will maximize their speech.

ARGUMENT

I. ARIZONA'S TRIGGERED MATCHING FUNDS PROVISION IS SUBJECT TO LESS THAN STRICT SCRUTINY.

A. Triggered Matching Funds Do Not Create A Burden On Speech That Warrants Strict Scrutiny.

Arizona's triggered matching funds "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking." *See Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64 and *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 201 (2003)). Moreover, such funds enhance political speech and enable voters to make more informed choices, by providing additional resources for participating candidates to communicate with the

voters. This Court has consistently held that regulations that impose no direct limits on speech and further First Amendment values, but which may incidentally burden some persons' ability to speak, are subject to less than strict scrutiny. Such regulations need only bear a "substantial relation" to a "sufficiently important" governmental interest. *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66); *see McConnell*, 540 U.S. at 231-232. That is the standard the Court should apply to Arizona's triggered matching funds.

In *Buckley*, the Court considered the constitutionality of the disclosure provisions of the Federal Election Campaign Act ("FECA"), which, like Arizona's triggered matching funds, were triggered by expenditures and contributions above specified amounts. 424 U.S. at 60-64, 74-75, 82. The Court recognized that a speaker might make a strategic choice not to spend money in order to avoid exposure of his political views or activities—a consequence analogous to that alleged here. *Id.* at 64, 68. Accordingly, the Court assumed that disclosure provisions could have a "deterrent effect on the exercise of First Amendment rights [that] arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Id.* at 65. The disclosure requirements therefore had "the potential for substantially infringing the exercise of First Amendment rights," and "discourage[ing] participation by some citizens in the political process." *Id.* at 66, 83. The Court nevertheless held that, despite this presumed deterrent effect, the burdens of disclosure are less substantial than the burden of a direct expenditure limit because "disclosure requirements impose no ceiling on

campaign-related activities." *Id.* at 64. Requiring disclosure of independent expenditures, the Court held, "is no prior restraint, but a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Id.* at 82. Accordingly, the Court did not apply strict scrutiny to FECA's disclosure provisions but instead inquired whether those provisions exhibited a "substantial relation" between a "sufficiently important" governmental interest and "the information required to be disclosed." *Id.* at 64.

The Court recently reaffirmed this analysis in both *Citizens United* and *Davis*. In *Citizens United*, the Court applied strict scrutiny to the "outright ban" on corporate spending contained in the Bipartisan Campaign Reform Act ("BCRA"), 2 U.S.C. § 441b, 130 S. Ct. at 897-98, but applied less rigorous scrutiny to BCRA's requirements that corporations disclose their spending, 130 S. Ct. at 914. The Court emphasized that BCRA's disclosure requirements further First Amendment values by "enabl[ing] the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 916; *see also Davis*, 554 U.S. at 744 (scrutinizing disclosure provisions of BCRA § 319(b) to determine whether "there [was] 'a relevant correlation' or 'substantial relation' between the government interest and the information required to be disclosed") (quoting *Buckley*, 424 U.S. at 64). *Buckley*, *Citizens United*, and *Davis* squarely refute Petitioners' contention that

any burden on expenditures results in strict scrutiny.[2]

Like disclosure provisions, Arizona's matching funds place no limit on spending by either privately financed candidates or independent committees. Indeed, as the record demonstrates, Petitioners have repeatedly exceeded that threshold, as have other privately financed candidates and independent committees. (*See, e.g.*, JA 384-85, 545-56, 691, 704, 755; ECF 369-2, 370-2.)

The most Petitioners can claim is that candidates and committees might make a strategic choice not to spend money in order to avoid triggering matching funds for participating candidates. Similarly, the Court in *Buckley* recognized that a speaker strategically may decide not to spend money to avoid exposure of his political views or activities. 424 U.S. at 64, 68. Both *Buckley* and *Citizens United* make clear that such an incidental effect on speech is not

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[2] This Court has, in other contexts, made similar distinctions between laws that directly regulate speech and those that may only incidentally affect it. Thus, for example, the Court has distinguished between the government's direct regulation of private parties' protected speech, on the one hand, and the government's decision to subsidize some but not all private parties' protected speech. *See, e.g.*, *Maher v. Roe*, 432 U.S. 464, 475 (1977) (citing *Buckley* to explain that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.").

sufficient to warrant strict scrutiny. *Buckley*, 424 U.S. at 64; *Citizens United*, 130 S. Ct. at 914.

Triggered matching funds as part of a public financing system should be subject to less than strict scrutiny for the additional reason that, like disclosure provisions, they further First Amendment values. In *Buckley*, this Court made clear that public financing of elections furthers the government's compelling interest in enhancing the amount of speech in American elections. The Court emphasized that the First Amendment was intended to protect and enhance public discussion of issues and candidates:

> "There is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] discussion of candidates." This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[.]" In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.

Buckley, 424 U.S. at 14-15 (citations omitted). The Court held that public financing of elections thus "furthers, not abridges, pertinent First Amendment values," by "facilitat[ing] and enlarg[ing] public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93. Consistent with that principle, Arizona's voters enacted the Clean Elections Act, including matching funds, precisely to "promote freedom of speech under

the U.S. and Arizona Constitutions." Ariz. Rev. Stat. § 16-940(A).

The factual record below confirms both that any incidental effect of matching funds is non-existent or minimal and that matching funds enhance political speech and competition. Thus, the record evidence indisputably establishes that spending in Arizona by both non-participating candidates and independent committees has increased significantly since the adoption of matching funds. (JA 916-17; PA 284-85.) Petitioners' own figures establish that, between 1998 and 2006:

- Overall candidate expenditures increased between 29-67% (JA 916-17);
- Overall independent expenditures increased by 253% (PA 284-85);
- Average candidate expenditures increased by 12-40% (JA 916-17); and
- Spending by the top 10% of candidates in the general election increased by 16% (PA 290).

The undisputed evidence further demonstrates that individual candidates' spending is not chilled by matching funds. Statistical analysis by expert Donald Green, Director of the Institute for Social and Policy Studies at Yale University, shows that matching funds do not have an effect on the overall spending of individual privately financed candidates in Arizona. If matching funds actually chilled the spending of privately financed candidates, one would expect the data to show that spending by such candidates who have participating opponents clusters just below the matching funds threshold of $17,918. That is, non-participating candidates would be expected to spend

up to, but not beyond, the threshold. (JA 876-77; ECF 311 at 14.) Instead, Professor Green found that, of the 46 traditionally funded legislative candidates who faced at least one participating opponent in 2006, 39 candidates spent less than $15,000 (almost $3,000 short of the threshold), demonstrating that their expenditure levels were controlled by factors unrelated to matching funds. Six candidates spent well above the threshold, showing that they were not deterred by matching funds. (JA 876-77.)[3]

The anecdotal evidence from Petitioners is consistent with this statistical analysis. As noted above, some Petitioners could not even recall whether they had triggered matching funds in their campaigns, thus implicitly acknowledging the insignificance of such funds to their decisions. (JA 434, 574-75.) The one Petitioner who had run both before and after the Act was adopted could not show that he reduced his spending or communications with voters after matching funds were implemented. (JA 436-38.) Other testimony showed affirmatively that candidates and committees have *not* been deterred

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[3] Petitioners cite their expert, Dr. Primo, for the claim that matching funds cause candidates to alter the timing of spending. (AFEC Pet. at 16). But Primo admitted that, if non-participating candidates postponed their spending in order to delay matching funds, one would expect to see the gap in spending between those non-participating candidates who have participating opponents and those who do not grow as the election nears. (JA 953-54.) But *both* Green *and* Primo found there is no statistically significant evidence of that pattern. (JA 954.)

from spending by matching funds. (*E.g.*, JA 410, 416, 594-95, 670.) Consistent with this evidence, both the district court and the Court of Appeals found that there was not substantial evidence supporting the alleged chilling effect of matching funds.[4] 611 F.3d at 524 ("Plaintiffs have not demonstrated that any chilling effect exists."); 2010 WL 2292213, at *3 ("Plaintiffs' testimony is somewhat scattered and shows only a vague interpretation of the burden of the Act.").

This absence of any evidence of deterrence or chill is fully consistent with what one would expect. Campaign speakers typically believe that their message will be more persuasive to the voters than the messages of their opponents. Thus, they keep spending to disseminate their own messages, even if they realize that such spending will trigger funds for their participating opponents. Matching funds do not "chill" speech because, given a choice between more speech by all candidates or less speech by all candidates—that is, more voter exposure to the various candidates' messages—a rational candidate

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[4] Petitioners improperly rely on declarations that were not part of the summary judgment record but were first submitted in connection with Petitioners' appellate stay applications. (*See* McComish Pet. at 32-34.) *See generally FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 235 (1990) ("[W]e may not rely on the city's affidavit, because it is evidence first introduced to this Court and is not in the record of the proceedings below . . . .") (quotation marks omitted). Even if considered, those declarations do not prove any substantial chilling effect.

who believes in his message will invariably opt for more, not less, speech.

The record evidence demonstrates also that Arizona's public financing scheme has enhanced political speech and competition in Arizona. Since the Act was implemented, overall and average candidate expenditures have increased; overall independent expenditures have increased; and there has been a 20% increase in the number of contested state Senate races and a 300% increase in the percentage of incumbents facing competitive challengers in state Senate races. (JA 535-36.) Triggered matching funds, as part of Arizona's successful voluntary public financing scheme, have both given voters more choices and enabled them to make more informed decisions about the candidates. Where, as here, a regulation places no direct limits on speech and *enhances* participating candidates' speech, enabling

voters to make more and better informed choices, it does not warrant strict scrutiny.[5]

B. This Court's Decision in *Davis* Does Not Support Strict Scrutiny Of Triggered Matching Funds.

This Court's decision in *Davis* does not require that strict scrutiny be applied to Arizona's triggered matching funds. *Davis* addressed a law, divorced from any public financing program, that resulted in discriminatory contribution limits being applied to two privately financed candidates competing against each other in the same race. No similar issue exists here, where publicly financed and privately financed

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[5] It is, of course, possible that some matching fund program somewhere may operate to deter privately funded speech. But such an "as applied" challenge must await proof of actual deterrence. The possibility of a future as-applied challenge cannot justify Petitioners' broad facial attack against the very concept of triggered matching funds. *See, e.g., Doe v. Reed*, 130 S.Ct. 2811, 2821 (2010) (rejecting facial challenge to public records law where challengers provided only "scant evidence" that disclosure generally violates First Amendment rights); *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases."). The various hypothetical scenarios that Petitioners concoct, (*see e.g.*, AFEC Pet. at 8), do not come close to meeting this burden.

candidates, far from being similarly situated, voluntarily occupy separate campaign financing worlds in which different rules necessarily and constitutionally apply.

Davis did not involve the public financing of election campaigns. Instead, *Davis* concerned federal congressional elections, in which all candidates are privately financed and thus similarly situated from a regulatory perspective. As the Court noted, in such a system of purely private fundraising, "[u]nder the usual circumstances, the same restrictions apply to all the competitors for a seat." *Davis*, 554 U.S. at 728. In congressional campaigns, all candidates are subject to the same contribution limits, *see* 2 U.S.C. § 441a(a)(1), and the same disclosure requirements, *see* 2 U.S.C. § 434. There is no alternative to the system of private financing, so no congressional candidate is eligible for public funds.

That is not the case when voluntary public financing is available. Under public-funding systems, all candidates begin their campaigns by choosing between one of two financing options, each with its own particular set of benefits and burdens. Candidates who choose public funding receive certain benefits, including funds sufficient to run a reasonably competitive campaign. But publicly funded candidates also "suffer a countervailing denial [because] acceptance of public financing entails voluntary acceptance of an expenditure ceiling," *Buckley*, 424 U.S. at 95, and the inability to raise private contributions. That participating candidates in Arizona are entitled, under specified circumstances, to supplemental funds based on the campaign spending of others, as a partial substitute for the private funds they are prohibited from raising

to respond to their competitors, is merely one additional difference in the regulatory regimes between which all candidates may choose.

The constitutionality of candidates' voluntary choice between public and private financing is well settled. *See id.* at 57 n.65. In *Buckley*, the Court held that "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." *Id.* In short, under public financing, it is a constitutionally acceptable approach to offer all candidates the alternatives of public and private funding where, depending on the choices made by individual candidates in a particular race, "the same restrictions" may not "apply to all the competitors for a seat." *See Davis*, 554 U.S. at 728.

This critical difference between a system of purely private financing and a system that includes a public funding option is essential to understanding the reach of the *Davis* decision. *Davis* concerned the constitutionality of BCRA's Section 319(a), which replaced the normal rule in Congressional elections—that all candidates in privately funded Congressional elections are subject to the same contribution limits—with "a new, asymmetrical regulatory scheme." *Davis*, 554 U.S. at 729. Specifically, Section 319(a) provided that, once a privately funded candidate spent more than $350,000 of personal funds on his or her campaign, the initial contribution limits were tripled and the limits on coordinated party/candidate expenditures were eliminated entirely—*but only for that privately financed candidate's privately financed opponent(s)*. Because Section 319(a) thus subjected otherwise similarly situated candidates to

"asymmetrical" and "discriminatory" fundraising limitations just because one candidate chose to spend personal funds, the *Davis* Court concluded that the law resulted in an "unprecedented penalty" that was subject to strict scrutiny and unsupported by any compelling interest. *Id.* at 739; *see also id.* ("We have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other . . .")

Davis did not turn, as Petitioners suggest, on a First Amendment "chilling" effect. The Court's opinion neither uses that term nor cites any of this Court's precedents explaining the "chilling effect" doctrine. Instead, the *Davis* Court repeatedly emphasized that the First Amendment defect in § 319(a) was that it imposed "discriminatory" and "asymmetrical" regulations. *See* 554 U.S. at 729 ("asymmetrical regulatory scheme"; "asymmetrical limits"); 730 ("asymmetrical limits"); 739 ("discriminatory fundraising limitations"); 740 ("discriminatory contribution limits"); 740 n.7 ("asymmetrical contribution scheme"); 741 ("asymmetrical limits"); 744 ("asymmetrical contribution limits"). The Court held further that these discriminatory limits imposed an "unprecedented penalty" on the self-financed candidate for choosing to exercise his constitutional right to spend his own money on his campaign. *Id.* at 739.

That the Court's holding in *Davis* turned specifically on the discriminatory nature of the triggered contribution limits, not merely the fact that a self-financed candidate's spending triggered a benefit to his opponent, is underscored by the Court's repeated statements that, if personal spending by a

candidate above a threshold resulted in an increase in *every candidate's* contribution limits, the result would be constitutional—that is, it would neither be "discriminatory" nor impose an impermissible "penalty." *See id.* at 737 ("If § 319(a) simply raised the contribution limits for all candidates, Davis' argument would plainly fail."); *id.* ("[I]f § 319(a)'s elevated contribution limits applied across the board, Davis would not have any basis for challenging those limits."); 738 ("Section 319(a) . . . does not raise the contribution limits across the board. Rather, it raises the limits only for the non-self-financing candidate . . . ."). If spending above the threshold had triggered an across-the-board increase in contribution limits, such an increase would presumably create a strategic choice for the self-financed candidate similar to that presented by Arizona's triggered matching funds: Would it be better for him to spend more, allowing his opponent to raise money in larger increments, or to stop spending? But the Court explicitly stated that such an across-the-board increase, because it would not be discriminatory, would be constitutional. Thus, it was the *discriminatory* nature of the contribution limits that warranted strict scrutiny in *Davis*, not the mere fact that a candidate's personal spending might "trigger" some benefit to opponents that could, in turn, create a strategic choice for the self-financed candidate.[6]

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[6] Petitioners' argument for analogizing *Davis* to this case relies heavily on the *Davis* Court's "see" citation to *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), an Eighth Circuit decision striking down a Minnesota law that increased expenditure limits and public subsidies for candidates who were opposed by

Under Arizona's law, there are no "discriminatory" or "asymmetrical" limits comparable to those in

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independent expenditures. In stark contrast to the evidence in this case, however, the record evidence in *Day* showed that the intent and actual effect of Minnesota's provision was to suppress independent expenditures rather than to increase participation in a public funding system. *See Day*, 34 F.3d at 1360-61 & n.4. Indeed, the Eighth Circuit later explained that, in *Day*, the state's asserted interest in encouraging candidate participation appeared to be "contrived for the purposes of this litigation," since "candidate participation in the public financing scheme was approaching 100 percent when the challenged provision was enacted." *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1555 (8th Cir. 1996) (citing *Day*, 34 F.3d at 1361).

Moreover, *Davis* cited *Day* only for the proposition that Section 319(a) imposed a "potentially significant burden," *Davis*, 554 U.S. at 739, and did not adopt the entirety of the *Day* court's reasoning. Even if *Davis*'s "see" citation to *Day* means that this Court believed that Minnesota's law imposed a "potentially significant burden," that burden is certainly no more substantial than the burden that this Court assumed might accompany compelled disclosure: "the potential for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 66. Because this Court has repeatedly held that the potentially significant burden of compelled disclosure requires less than strict scrutiny, Petitioners' contention that *Davis*'s brief citation to *Day* calls for strict scrutiny of all trigger provisions, regardless of their actual effects, is meritless.

Davis. Unlike the two privately financed candidates in *Davis*, a privately financed candidate and a publicly financed candidate are not "similarly situated." Privately financed candidates may raise private contributions, spend their personal money, and spend unlimited amounts on their campaigns. Participating candidates may not raise private contributions, may not accept money from their political party, may not spend their personal money, and are subject to spending limits. The availability and timing of triggered matching funds are not within the participating candidate's control. Moreover, supplemental funds are capped at a maximum of 200 percent of the initial grant. Privately financed candidates, by contrast, retain full control over their fundraising and spending and have no spending limit. Thus, participating candidates always face the risk that their privately financed opponents will substantially outspend them. This Court has repeatedly held that such differential regulatory treatment of privately financed and publicly funded candidates is permissible, so long as the choice between the two regulatory regimes is voluntary. *See Buckley*, 424 U.S. at 97; *Republican National Committee v. Federal Election Comm'n*, 487 F.Supp. 280, 283-286 (S.D.N.Y. 1980), *affirmed*, 445 U.S. 955 (1980). Nothing in *Davis* casts doubt on this reasoning—indeed, the Court in *Davis* took pains to reaffirm *Buckley*'s holding that "a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures." *Davis*, 554 U.S. at 739-40.[7]

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[7] If a State established two regulatory regimes that were so different that candidates were effectively

The fact that in some instances, as in *Davis*, one privately financed candidate may have more personal wealth than another privately financed candidate, does not mean they are not similarly situated for purposes of assessing, from a constitutional perspective, whether differential regulation of them is "discriminatory" or "asymmetrical." Certainly, the government could not decide to provide public subsidies only to those candidates with a net worth of less than $1 million, any more than it could provide such subsidies to challengers but not incumbents (who are thought to have inherent electoral advantages). Neither pair of candidates is "similarly situated" in a purely practical sense, but they, like the candidates in *Davis*, must be considered similarly situated for purposes of constitutional analysis. *Cf. Davis*, 554 U.S. at 742 ("Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name."). Not so for a privately financed candidate and a publicly financed candidate, who may, under *Buckley* and *RNC*, be

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coerced into choosing the public financing option, that circumstance might create a constitutional issue separate from the one that is raised in these cases. *See Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993) ("[T]here is a point at which regulatory incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive."). No such claim is at issue here, and it would in any event be meritless, particularly given that more than one-third of candidates in Arizona choose not to elect public funding.

subjected to different regulatory regimes based on their different choices about how to fund their campaigns.

Petitioners suggest that Arizona's matching funds present privately financed candidates with a choice analogous to the one created by BCRA § 319(a). But the choice imposed by § 319(a) was qualitatively different. Under § 319(a), candidates were required by the government to choose between two restrictions on campaign-related activities: (1) a limit on their personal spending or (2) discriminatory contribution limits. 554 U.S. at 739-40. Neither of these options, standing alone, could constitutionally be imposed on the candidate. This is not, as Petitioners suggest, merely a choice between "two poor alternatives" (AFEC Pet. 30), but a choice between two *unconstitutional* alternatives.

In Arizona, by contrast, a candidate's initial choice is between receiving public funds and voluntarily abiding by a spending limit, or remaining free to spend unlimited amounts. *Buckley* confirms the constitutionality of that choice. 424 U.S. at 57 n.65. Because the provision of public funds to a candidate's opponent is not itself unconstitutional, unlike discriminatory contribution limits, the choice here is unlike the one presented in *Davis*.

Contrary to Petitioners' contention, no "unbalanced playing field" arises from Arizona's matching funds. Participating candidates are prohibited from raising private contributions and are subject to spending limits. Matching funds are provided to such candidates merely as a substitute for their ability to raise private contributions, *see Buckley*, 424 U.S. at 96 n.129 (public financing "substitutes public funding for what the parties could raise privately"), and only

if their privately financed opponents raise or spend beyond the original spending limit (or if independent committees spend above certain amounts). Even then, the maximum a participating candidate may receive is 200 percent of the original spending limit, while their privately financed opponents may raise and spend unlimited amounts. To be viable, publicly financed candidates must, like their privately financed opponents, have the ability to respond to escalating spending by their opponents or by outside groups, and matching funds enable Arizona to provide this ability in a manner sensitive to the demands of the public fisc.[8] Such responsive speech is part and parcel of the normal back-and-forth of healthy electoral competition, and no First Amendment injury results merely because such responses may be funded through public subsidies that permissibly substitute for private fundraising.

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[8] While Petitioners contend that average participating candidate spending "grossly exceeds" spending by privately funded candidates, McComish Pet. 67-68, their statistics are misleading because they conveniently both include hopeless privately financed candidates who raised and spent little or no money (JA 895-912) and, for at least part of their analysis, exclude privately funded candidates who spent more than $70,000. (PA 292).

C. Triggered Matching Funds Are Not Subject To Strict Scrutiny On The Basis That They Are Content-Based Or Disfavor Certain Speakers.

Petitioners' argument that Arizona's matching funds are subject to strict scrutiny because they are content-based or disfavor certain speakers is incorrect and is refuted by this Court's First Amendment precedents.

In *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994), this Court held that the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Id.* Thus, "[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Id.* at 643. "By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Id.*

The Court in *Turner* expressly rejected "the view that all regulations distinguishing between speakers warrant strict scrutiny." *Id.* at 657. Instead, "speaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Id.* at 658. Thus, "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Id.*

Turner demonstrates that Arizona's matching funds provision is not subject to strict scrutiny on the

ground that it is content- or speaker-based. The grant of matching funds does not turn on the ideas or views expressed in speech by a candidate or other speaker. Instead, it turns on whether a particular candidate has chosen to participate in Arizona's public financing program and whether that candidate needs supplemental public funding as a substitute for the private contributions she might otherwise raise. Matching funds are available to all participating candidates, entirely without regard to their political affiliations, their viewpoints, or the ideas they intend to express. *See id.* at 645 (holding that cable television "must-carry" rules were subject to only intermediate scrutiny because the burdens and privileges created by the rules were unrelated to the substance of the messages contained in any programming). In *Turner*, the cable television must-carry rules distinguished between speakers, but "based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry." *Id.* at 645; *see also id.* ("burden is unrelated to content, for it extends to all cable programmers irrespective of the programming they choose to offer viewers"); *id.* at 648 ("The provisions . . . benefit all full power broadcasters irrespective of the nature of their programming."). Here, similarly, Arizona's matching fund provision distinguishes between speakers based only upon the manner in which they choose to finance their campaigns, and not upon the messages they intend to convey. To the extent there is any burden, it extends to all privately financed candidates and independent committees regardless of the specific ideas or views they express,

and it benefits all publicly financed candidates regardless of the substance of their messages.[9]

Indeed, Arizona might provide matching funds to a "pro-life" Republican in one race, and the same day provide matching funds to a "pro-choice" Democrat in another race. Arizona might even provide matching funds to two publicly funded candidates *in the same race but with opposing viewpoints*.[10] Similarly,

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[9] *Turner* also reinforces the principle that the First Amendment favors regulations that "facilitate and enlarge public discussion and participation," *Buckley*, 424 U.S. at 92-93, even where they could impose an incidental burden on speech. The Court recognized that must-carry rules "interfere with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations," and "reduc[e] the number of channels for which they can compete," *Turner*, 512 U.S. at 643-44, 645. The Court nevertheless upheld the rules because they ensured access to "an important source of information to many Americans" that "has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 194 (1997).

[10] Moreover, whether matching funds are triggered by an independent expenditure does not turn on whether the candidate supported by that expenditure is a participating or a privately financed candidate. In either situation, participating candidates in the race (other than one who is supported by the expenditure) are entitled to triggered matching funds. Ariz. Rev. Stat. § 16-952.

Arizona might, on the same day and in the same race, provide matching funds based on an advertisement from a political action committee formed by a corporation and an advertisement, expressing a diametrically opposed viewpoint, from one formed by a union. Such a system would truly be an odd and ineffectual vehicle for suppressing particular ideas or disfavoring particular speakers.

In fact, by offering a viable alternative mode of funding, the Act has enhanced the ability of candidates to express *any and all* viewpoints in Arizona elections. *See* Ariz. Rev. Stat. § 16-940; (JA 535-36; 591). Thus, Arizona's matching funds create absolutely no risk that the government will drive certain ideas or viewpoints from the marketplace. *See Davenport v. Washington Educ. Assoc.*, 551 U.S. 177, 188 (2007) (holding that "strict scrutiny is unwarranted" for a content-based regulation unless it "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace" and that "it is well established that the government can make content-based distinctions when it subsidizes speech"). Quite the opposite: the effect of public financing has been more speech across the political spectrum and more competition in Arizona's elections.

Triggered matching funds are not "content-based" merely because they are provided only when expenditures are made in support of or opposition to a political candidate and cost more than a certain amount. Any contrary argument is refuted by this Court's decision in *Citizens United*. One of the disclosure laws upheld there, 2 U.S.C. § 434(f), required disclosure only when expenditures exceeded $10,000 for certain advertisements made shortly

before an election that "refer[] to a clearly identified candidate for federal office." Thus, that law's disclosure requirements are triggered only if an advertisement refers to a political candidate and costs more than a certain amount. Petitioners' position here would have required that Section 434(f) be subjected to strict scrutiny. That the *Citizens United* Court applied less than strict scrutiny to Section 434(f) demonstrates that strict scrutiny similarly does not apply here.

Petitioners argue that "traditional candidates are being targeted and punished as disfavored speakers" because they do not receive triggered matching funds when independent expenditure committees spend money in opposition to them or in support of their publicly funded opponents. (McComish Pet. 59-60.) But traditional candidates, unlike participating candidates, remain free to raise private contributions and spend unlimited amounts of money in order to respond to such independent expenditures. They have the opportunity to opt into Arizona's public funding system, but they voluntarily decide it is preferable to raise private contributions and spend unlimited amounts rather than being subject to a spending limit and only potentially eligible for matching funds. Again, Arizona has absolutely no control over which candidates choose public funding and which do not, making the triggered matching funds system a peculiarly irrational means of targeting "disfavored" speakers.

Petitioners further argue that the triggered matching funds provision is "concerned with the communicative impact of the regulated speech," because the Citizens Clean Election Commission ("CCEC") must assess whether an independent

expenditure supports or opposes a particular candidate. (McComish Pet. 59.) But, in doing so, the CCEC uses the standard formulated by the plurality in *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), for use in application of BCRA § 203: whether "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469-470; *see* Ariz. Rev. Stat. § 16-901.01(A) (defining "expressly advocates" to mean words such as "vote for" or "elect" and "words that in context can have no reasonable meaning other than to advocate the election or defeat of one or more clearly identified candidates"). If that standard is sufficiently clear to defeat a facial constitutional challenge in a situation where, as in *Wisconsin Right to Life*, a speaker risks felony prosecution if his advertisement falls within the standard, it suffices even more clearly here, where the consequence of an advertisement's falling within the standard is neither a criminal nor civil penalty against the speaker but merely the provision of supplemental funds to someone else.[11]

D. This Court's Forced-Access Cases Are Inapplicable.

Petitioners rely extensively but mistakenly on *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986), and *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). These "forced access"

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[11] Because the CCEC uses the *WRTL* standard, Petitioners are wrong when they suggest that, if an independent committee "just promotes the issues the group was founded to advance," matching funds will be triggered. (AFEC Pet. at 38-39.)

cases are inapplicable here because the Arizona system does not force privately financed candidates or independent committees to associate with any participating candidate's views or to use their property to subsidize or otherwise assist in the dissemination of those views.

In *PG&E*, the Court addressed an order that required a utility to distribute, *at its expense and in its envelopes*, speech by persons or groups "who disagree with [the utility's] views ... and who oppose [it] in Commission proceedings." *Id.* at 13. The plurality held the order unconstitutional both because it discriminated based on viewpoint, *id.* at 14 ("access is awarded only to those who disagree with appellant's views and who are hostile to appellant's interests"), and because it "impermissibly require[d] [the utility] to associate with speech with which [it] may disagree," *id.* at 15. Repeatedly, the plurality stressed that the utility was being required to use its own resources and property to disseminate a viewpoint with which it disagreed. *E.g.*, *id.* at 17 ("The Commission's access order thus clearly requires appellant to use *its* property as a vehicle for spreading a message with which it disagrees.") (emphasis in original). This Court's decision in *Miami Herald* is to similar effect. *See* 418 U.S. at 257 (characterizing right-of-reply statute as mandating "government-enforced access" to the newspaper's property); *see also PG&E*, 475 U.S. at 10 (explaining that right-of-reply statute was held unconstitutional in *Miami Herald* because "the newspaper's expression of a particular viewpoint triggered an obligation to permit other speakers, with whom the

newspaper disagreed, to use the newspaper's facilities to spread their own message").[12]

Neither prong of the *PG&E* plurality's reasoning has any application here. Arizona's triggered matching funds provision does not discriminate in any way based on viewpoint. *See Turner*, 512 U.S. at 654-655 (distinguishing *PG&E* and *Tornillo* on the ground that the regulations challenged in those cases turned on the particular messages being expressed). Moreover, neither privately funded candidates nor independent committees are forced to associate with any participating candidate's views or use their property to assist in the dissemination of those views. Even assuming that voters knew that a publicly funded candidate had received triggered matching funds (which is unlikely), there is no possibility that such voters, upon hearing messages promulgated by a publicly funded candidate, would infer that an opponent or independent committee was somehow associated with or endorsed those views. *Cf. Turner*, 512 U.S. at 655 ("there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator").

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[12] In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), cited by Petitioners, the Court struck down a federal statute that mandated assessments on handlers of fresh mushrooms to fund advertising, because the statute compelled companies to pay *their own money* to subsidize speech with which they disagreed, by a group to which they were required to belong. *Id.* at 408, 410-413. Nothing remotely similar exists here.

PG&E and *Miami Herald* might be relevant here if the Clean Elections Act required non-participating candidates or independent committees to pay for promulgation of those messages themselves or to include publicly funded candidates' messages in their own campaign communications. But the Act requires no such thing.

II. BY COMBATING CORRUPTION AND PROMOTING COMMUNICATION WITH THE ELECTORATE, ARIZONA'S TRIGGERED MATCHING FUNDS FURTHER COMPELLING INTERESTS

To survive the relevant level of scrutiny, Arizona's matching funds provision must bear a "substantial relation" to a "sufficiently important" government interest. *See Citizens United*, 130 S.Ct. at 914; *Buckley*, 424 U.S. at 64. The law does more than that. It directly promotes an interest this Court has found compelling—the anti-corruption interest—by making public financing a viable alternative to potentially corrupting private contributions. Moreover, matching funds further First Amendment values that this Court has deemed "vital" by providing candidates with more funding for campaign speech, promoting more contested and competitive elections, and freeing candidates from the rigors of private fundraising.

A. Triggered Matching Funds Serve Arizona's Compelling Anti-Corruption Interest

1. Arizona Has A Compelling Interest In Combating Corruption

This Court established over three decades ago that the government's interest in avoiding both the reality

and appearance of *quid pro quo* corruption like that seen in AzScam is both "sufficiently important" and "compelling." In upholding the disclosure provisions of FECA, *Buckley* held that the government had a "sufficiently important" interest in "deter[ring] corruption and avoid[ing] the appearance of corruption." 424 U.S. at 66-67. *Buckley* eloquently explained the government's vital interest in deterring corruption from private campaign contributions:

> Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. . . . To the extent that large contributions are given to secure a *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. . . .
>
> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."

Id. at 26-27 (citations omitted); *see also Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 390 (2000) ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.").

More recently, the Court has stated that the government's anti-corruption interest is not only "sufficiently important" but "compelling" as well. *See Davis*, 554 U.S. at 741 (noting "the interests the Court has recognized as compelling, i.e., the prevention of corruption or the appearance thereof") (quoting *Randall v. Sorrell*, 548 U.S. 230, 268 (2006) (Thomas, J., concurring in judgment)); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 (1995) (referencing the Government's "compelling state interest in avoiding . . . corruption"); *Federal Election Comm'n v. Nat'l Conservative PAC*, 470 U.S. 480, 496-97 (1985) (identifying "preventing corruption or the appearance of corruption" as "compelling government interests"); *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 486 (2007) (Scalia, J., concurring) ("The Court also recognized . . . that the Government has a compelling interest in prevention of corruption and the appearance of corruption." (internal quotations and citations omitted)); *see also Citizens United*, 130 S.Ct. at 908-10 (discussing government's interest in preventing corruption and the appearance of corruption).

Arizonans had a particularly compelling interest in addressing the problem of real and apparent corruption in politics. In the early 1990s, the AzScam scandal broke. Newspaper reports from the time recount Phoenix police officers videotaping Arizona legislators accepting campaign contributions and bribes in exchange for agreeing to support gambling legislation. (JA 122-161.) Those articles, with headlines such as "Videotapes Show Payoffs" and "Excerpts From Indictment Tell Tale Of Political Deals," described legislators stuffing tens of thousands of dollars into gym bags while making comments like "I sold way too cheap," "We all have

our prices," and "There's not an issue in this world I give a [expletive] about." (JA 121-161.) The newspaper reports quoted other legislators cynically acknowledging, "My favorite line is, 'What's in it for me?'" and "I like the good life, and I'm trying to position myself so that I can live the good life and have more money." (JA 146-147.) Accompanying these newspaper reports, the evidentiary record contains the depositions of an Arizona lobbyist and a former Arizona Governor who testified, respectively, that AzScam was "huge" at the time among the public and was highly publicized. (JA 588, 600.) Shortly after AzScam grabbed headlines, the state's major newspaper reported that 100 percent of journalists, 66 percent of legislative staffers, and 42 percent of legislators and lobbyists surveyed believed that most major contributors received special advantages from legislators. (JA 176.) The *Arizona Daily Star* ran an article entitled "AzScam Fallout Is Far From Over, Politicians Say." (JA 167.)

In the years following AzScam, troubling accounts of corruption in Arizona state government persisted. Just months before voters adopted the Act, *The Arizona Republic* reported in a front-page story that the Arizona Senate's President had "assigned the state's most powerful lobbyists to raise money for specific candidates" and had "warned . . . lobbyists that they [would] suffer political retribution in the next session of the Legislature if they raise[d] money" for the opposing party. (JA 214-15.) As the Court of Appeals aptly summarized the evidence, "[t]he record demonstrates that Arizona has a long history of *quid pro quo* corruption." *McComish*, 611 F.3d at 525.

In light of this history of corruption and scandal, the sufficiency and compelling nature of Arizona's

interest in preventing real and apparent corruption are undeniable. *See Nixon*, 528 U.S. at 393-394 (single legislator's declaration, newspaper accounts, and voters' passage of the statute easily sufficient to establish compelling anti-corruption interest).

2. Triggered Matching Funds Further Arizona's Anti-Corruption Interest

Spurred by these scandals, Arizona voters enacted a public financing system that directly furthers the government's compelling interest by reducing candidates' reliance on private contributions, enhancing political debate, and increasing the competitiveness of elections.

That public financing serves the anti-corruption interest has been well-established since *Buckley*. There, in considering the constitutionality of the Presidential public financing system, this Court held that "[it] cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions" furthers the government's anti-corruption interest. *Buckley*, 424 U.S. at 96. Moreover, the Court specifically emphasized that, given the simultaneous introduction of limits on the size of contributions, public financing, which serves as "a substitute for private contributions," furthers the anti-corruption interest by "relieving . . . candidates from the rigors of soliciting private contributions." *Id.* at 96, 99; *see also Republican Nat. Comm. v. Federal Election Comm'n*, 487 F. Supp. 280, 284 (S.D.N.Y. 1980), *aff'd* 445 U.S. 955 (1980) ("If the candidate chooses to accept public financing he or she is beholden unto no person and, if elected, should feel no post-election obligation toward any contributor of the type that

might have existed as a result of a privately financed campaign.").[13]

Of course, in a voluntary public financing system, some candidates will choose to rely on private contributions rather than public funding. But the record establishes that public financing also deters corruption among privately financed candidates by improving the competitiveness of Arizona elections. Dr. Green explained that "lack of electoral accountability is one of the most important determinants of corruption in politics" because it turns incumbents into "reliable long-term trading partners" and reduces the likelihood that *quid pro quo* arrangements will be exposed. (JA 964-65). By allowing more candidates to run for office, Arizona's system of public funding and triggered matching funds reduces the likelihood that incumbents will be unopposed and insulated from electoral competition. As noted, Arizona experienced a 20 percent increase in the number of contested state Senate races and a 300 percent increase in the percentage of incumbents running in competitive state Senate races since the

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[13] In arguing that contribution limits suffice to eliminate any concern about corruption, Petitioners rely heavily on the views of their expert. (McComish Pet. at 71.) Dr. Green examined the expert's statistical analysis and found it "deeply flawed," noting that it made an "elementary mistake" that precluded any reliable statistical interpretation of the expert's data. (JA 750-52.)

Act was adopted.[14] (JA 535-36.) In other words, the pro-competitive effect has been felt especially in districts where incumbents, who frequently are able to amass war chests, may previously have deterred strong opponents from challenging them. By increasing competition and subjecting candidates and officeholders to heightened public accountability, Arizona's system serves the anti-corruption interest in ways similar to disclosure laws. *See Buckley*, 424 U.S. at 67 ("disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity").

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[14] Contrary to Petitioners' suggestions, *see, e.g.*, AFEC Pet. 42, the Act and its matching funds provision cannot be characterized as incumbent-protection measures. *Cf. McConnell v. Federal Election Comm'n*, 540 U.S. 93, 249 (2003) (Scalia, J. concurring in part and dissenting in part) ("the present legislation *targets* for prohibition certain categories of speech that are particularly harmful to incumbents"). Indeed, Arizona voters enacted public financing after incumbent legislators refused to do so. Petitioners tout the fact that a legislative committee rejected public financing. (McComish Pet. at 70-71.) Yet the record contains no evidence that this was due to anything other than incumbent self-interest. (JA 121.) As Petitioner Martin candidly admitted, it is "[m]uch harder" for challengers to raise money than it is for incumbents. Martin recounted his own experience of witnessing an "existing legislator . . . threaten other people that he would remember if they supported the challenger . . . ." (JA 576.)

Because public financing serves the anti-corruption interest, federal courts have repeatedly found that states have a compelling interest in encouraging participation by candidates in their systems of public financing of elections. *See, e.g., Rosenstiel*, 101 F.3d at 1553 (holding that "the State has a compelling interest in stimulating candidate participation in its public financing scheme"); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39-40 (1st Cir. 1993) (same); *Wilkinson v. Jones*, 876 F.Supp. 916, 928 (W.D. Ky. 1995) (same).

By addressing what would otherwise be a powerful disincentive to participation in public funding, matching funds directly serve the government's compelling anti-corruption interest. As the Court of Appeals explained:

> A public financing system with no participants does nothing to reduce the existence or appearance of *quid pro quo* corruption. If participants were not given matching funds, they would not join the program because they would not be viable candidates in their elections.

McComish, 611 F.3d at 527; *see also Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000) ("in view of the initial moderate allowance, without the matching funds, even though they are limited in amount, candidates would be much less likely to participate because of the obvious likelihood of massive outspending by a non-participating opponent").

The record abounds with evidence that participation in Arizona's public funding system would decline absent matching funds. Numerous

participating candidates testified that the potential availability of matching funds played a key role in their decision to accept public funding. (JA 386-88, 439-43, 540-44.) A veteran Arizona campaign consultant testified that, without matching funds, participation in Clean Elections would fall. (JA 590-91.) Defendants' expert examined various public-financing systems and concluded that matching funds such as Arizona's are key to encouraging candidate participation in public financing. (JA 537-39.) Even a staunch opponent of publicly-funded elections testified that "we all are aware that if matching funds go away, the chance of candidates running as Clean Elections [candidates] probably would stop or would put a real damper on that." [15] (JA 638.) Unsurprisingly, Petitioners failed to present any evidence that participation rates in Arizona's public financing system would remain at current levels if matching funds were eliminated.

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[15] Petitioners rely throughout their brief on the testimony of Citizens Clean Election Commissioner Lori Daniels. The significance of her testimony, however, is undermined by the fact that she is a long-standing opponent of public financing in all its forms. (*See* JA 638 ("I don't believe in publicly funding elections. I'm not an advocate of this in any way, shape or form.").) Commissioner Daniels was a plaintiff in a lawsuit raising virtually identical claims to those raised by Petitioners here. *See Association of American Physicians & Surgeons v. Brewer*, 486 F.3d 586, 589 (9th Cir. 2007) (identifying Lori Daniels as a candidate who was a plaintiff in the action but who did not appeal).

In short, triggered matching funds directly further Arizona's compelling anti-corruption interest by making public financing a viable alternative to private fundraising, enhancing political debate, and increasing the competitiveness of elections. Triggered matching funds thus bear a "substantial relation" to a "sufficiently important" government interest and are constitutional. *See Citizens United*, 130 S.Ct. at 914; *see also Turner*, 512 U.S. at 662; *Buckley*, 424 U.S. at 64.

3. Petitioners' Proposed Alternatives Do Not Cast Doubt On The Constitutionality Of Triggered Matching Funds

Petitioners have proposed two alternatives to Arizona's system of triggered matching funds: (1) eliminating public financing entirely and relying solely on contribution limits; and (2) replacing matching funds with a higher initial grant of public funds (the "lump-sum alternative").

Because matching funds are not subject to the narrow tailoring requirement of strict scrutiny, Petitioners' suggested alternatives are inconsequential. To survive, triggered matching funds need only meet the "substantial relation" requirement, which this Court has never suggested contains a least-restrictive-alternative component.

To the contrary, this Court has indicated that the "substantial relation" test is significantly less searching than narrow tailoring. In rejecting the contention that FECA's disclosure thresholds were too low, *Buckley* stated that little evidence existed that Congress "focused carefully on the appropriate" thresholds. 424 U.S. at 83. Nevertheless, the Court

declined to second-guess these "necessarily . . . judgmental decision[s]," agreed with the lower court that "reasonable latitude [must be given] the legislature as to where to draw the line," and upheld FECA's disclosure thresholds because they were not "wholly without rationality." *Buckley*, 424 U.S. at 83.

Buckley's deferential approach to examining FECA's disclosure thresholds cannot be squared with the view that the "substantial relation" requirement is equivalent to narrow tailoring or incorporates a least-restrictive-alternative requirement. Based on *Buckley* and its progeny, lower courts have rejected attempts to conflate the "substantial relation" requirement with strict scrutiny. *North Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 439 (2008) (holding that, under the "substantial relation" test, "the state need not show that the Act achieves its purposes in the least restrictive manner possible"); *Daggett*, 205 F.3d at 466 (holding that, under the "substantial relation" test, determinations about the appropriate threshold for disclosure "will be deferred to unless 'wholly without rationality.'" (quoting *Buckley*, 424 U.S. at 83)).

This distinction between strict scrutiny and the "substantial relation" test not only is well-grounded in precedent but also reflects a common sense approach to First Amendment campaign finance doctrine. Campaign finance laws that this Court has subjected to strict scrutiny impose far greater and more certain burdens on First Amendment rights than do regulations that this Court has analyzed under lesser forms of scrutiny. When the government adopts restrictions that directly limit speech, coerce or compel speech, or discriminate among similarly

situated candidates, it should have to justify its chosen remedy as the least restrictive means of achieving a compelling interest. But where voters instead attempt to address documented instances of *quid pro quo* corruption and enhance political speech and competition through means that at worst have an incidental effect on spending, they should have much greater leeway in making reasonable judgments among competing alternatives.

In any event, the record demonstrates that Arizonans chose the best alternative for their State in light of its historical experience and the widely-varying costs of Arizona campaigns. In the narrow tailoring context, this Court has indicated that less restrictive alternatives must be "plausible" and cannot be "ineffective." *See Ashcroft v. ACLU*, 542 U.S. 656, 665, 669-70 (2004); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000). The record showed that neither alternative suggested by Petitioners satisfies this standard.

Arizonans experimented with contribution limits, but, by themselves, such limits failed to prevent scandals like AzScam or subsequent reports of improprieties. Limits on contributions to state

legislative candidates[16] had been in place *five years before* AzScam occurred. Moreover, a series of articles in the State's largest newspaper informed the public that lobbyists and elected officials regularly undermined the effectiveness of contribution limits through the practice of bundling—*i.e.*, by having lobbyists collect donations from multiple contributors such that the lobbyists received credit for amounts far greater than the contribution limit.[17] (JA 178-96.)

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[16] The limit for contributions to state legislative candidates was $200 in 1991. That limit has been periodically adjusted by the state legislature and is also subject to biennial adjustments by the Secretary of State to account for changes in the consumer price index. In 2009-2010, this contribution limit was $410, which is 28% higher in real dollars than the limit in place at the time of AzScam. *See* Ariz. Rev. Stat. § 16-905 & historical note.

[17] Petitioners characterize the collection of $5 qualifying contributions by campaign volunteers from voters in the candidate's district as "bundling." Unsurprisingly, Petitioners have adduced no evidence that the act of soliciting $5 contributions has ever resulted in actual or apparent *quid pro quo* corruption. As Dr. Green explained, because most anyone can collect $5 contributions, but only a select few can raise tens of thousands of dollars through the bundling of private contributions, the potential for participating candidates to incur debts to those who collect $5 contributions "does not compare" to the likelihood that privately financed candidates will become beholden to high-dollar bundlers. (JA 959-60.)

Arizona voters understandably concluded that restoring the integrity of the State's political system required supplementing contribution limits.

Petitioners' contention that contribution limits are a substitute for a system of public financing is also undermined by *Buckley*. There, this Court upheld both FECA's contribution limits and its simultaneously enacted system of public funding for Presidential elections. Far from viewing contribution limits as a sufficient replacement for public financing, this Court found that public financing complemented contribution limits by "relieving . . . candidates from the rigors of soliciting private contributions." 424 U.S. at 97.

The Act's drafters also examined the lump-sum alternative suggested by Petitioners. They rejected this approach because, given the widely-varying costs of campaigns in Arizona, a one-size-fits-all amount would be either too low to attract candidates facing potentially competitive campaigns or so high that the state's limited resources would be wasted. The lead drafter of the Act explained the rationale behind Arizona's carefully calibrated procedure for distributing scarce public funds. As he testified, in Arizona there was a "wide disparity . . . in the amount of money that was spent on various races." (JA 714.) Prior to the Act, over 80 percent of Arizona's legislative districts were uncontested or uncompetitive. In those districts, candidates tended to spend $10,000 or less. But, in a handful of competitive districts, average expenditures were three times that amount. (JA 715.) If all candidates received only $10,000 in public funding, it would be "too easy to outspend the Clean Elections candidate and no one would run as a Clean Elections

candidate." (JA 716.) On the other hand, if all candidates were given $30,000 in public funding, "there would be millions of dollars of wasted Arizona money." (*Id.*) Thus, a one-size-fits-all approach would not fit the political or budgetary realities in Arizona. By combining low initial disbursements with the potential for limited matching funds, the Act's drafters developed a system that "allow[ed] us to set the bar at the low amounts that would be needed for the bulk of campaigning, and yet allow it to flow upwards [when] there was a competitive race in which the candidate was opposing a well-funded opponent." (*Id.*)

Over the last decade, the calibrated funding mechanism chosen by the drafters and approved by the voters has satisfied these objectives. Because it provides sufficient funds to mount a competitive campaign, Arizona's public financing option is a viable alternative to private financing. In fact, two-thirds of candidates now run as participating candidates and thus are protected from the corrupting potential of private contributions. At the same time, Arizona has avoided wasting large sums of public funds. In 2006, for example, if Arizona had been forced to switch to a system in which the initial disbursement amount was tripled to offset the loss of matching funds, Arizona would have spent 132 percent more than it actually expended with matching funds in place. (ECF 309-15.)

The Court of Appeals, like the Act's drafters, justifiably concluded that the lump sum approach was not a realistic alternative to triggered matching funds:

> [I]f the Act were to raise the amount of its lump-sum grants and do away with matching funds

> altogether, it would make the Act prohibitively expensive and spell its doom. By linking the amount of public funding in individual races to the amount of money being spent in these races, the State is able to allocate its funding among races of varying levels of competitiveness without having to make qualitative evaluations of which candidates are more "deserving" of funding beyond the base amounts provided to all publicly-funded candidates. The State must walk a fine line between providing too much and too little funding to participating candidates, and we cannot conclude that the Act's matching funds provision has failed in this effort.

611 F.3d at 527.

Neither the Act's drafters nor the Court of Appeals erred in concluding that Arizonans could take account of fiscal and political realities in designing a workable public financing system that would not waste "large sums of public money." *See Buckley*, 424 U.S. at 96.

B. Arizona's Triggered Matching Funds Promote First Amendment Values Without Impermissibly Attempting To Level The Playing Field.

1. Triggered Matching Funds Encourage More Speech in Arizona Elections.

Arizona has a vital interest in encouraging more speech that informs the electorate of candidates' views and qualifications for public office. The Act and its matching funds provision, like the First Amendment, "rest[] on the assumption that the

widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *See Associated Press v. United States*, 326 U.S. 1, 19 (1945). This Court has consistently recognized that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner*, 512 U.S. at 663; *see also Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 231 (2000) (recognizing the "important and substantial purposes" of "facilitat[ing] a wide range of speech"). Indeed, in upholding the presidential public financing system, the *Buckley* Court reaffirmed that "[l]egislation to enhance these First Amendment values is the rule, not the exception." 424 U.S. at 93 n.127 (citing as examples aid to public broadcasting, preferential postal rates, and antitrust exemptions for newspapers) (internal citation and quotation omitted).[18]

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[18] The *Buckley* Court's invocation of these First Amendment precedents places public financing squarely within a line of cases upholding governmental subsidies designed to "provid[e] financial assistance to the exercise of free speech." *Buckley*, 424 U.S. at 93 n.127. This Court has repeatedly reaffirmed that government furthers the speech-enhancing values of the First Amendment when it "'expends funds to encourage a diversity of views from private speakers.'" *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S.Ct. 2971, 2986 n.13 (2010) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995)); *see also Turner*, 512 U.S. at

Arizona's triggered matching funds provision promotes First Amendment values by enhancing the quantity and diversity of information available to the electorate. In *Buckley*, this Court stated that public financing of elections "furthers, not abridges, pertinent First Amendment values," by "facilitat[ing] and enlarg[ing] public discussion and participation in the electoral process, *goals vital to a self-governing people*." 424 U.S. at 92-93 (emphasis added). Matching funds, like public financing more generally, advance First Amendment values in a number of ways. Most obviously, matching funds increase the amount of money available to participating candidates. Those funds in turn can be used to finance campaign ads, mailers, and events—more speech that informs the electorate of the candidate's views and qualifications for public office. By providing candidates with resources, matching funds help promote the "uninhibited, robust, and wide-open" debate that the First Amendment was intended to encourage. *Buckley*, 424 U.S. at 93 n.27 (internal citation and quotation omitted). Matching funds also make public financing viable, and in doing so, allow candidates to run who otherwise would not, thereby producing more contested and competitive races. Moreover, the voluntary nature of Arizona's system ensures that matching funds will promote, rather than restrict, political speech. "Since the candidate remains free to choose between funding alternatives, he or she will opt for public funding only if, in the

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663 ("[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.").

candidate's view, it will enhance the candidate's powers of communication and association." *Republican National Comm.*, 487 F. Supp. at 285.

Further, a viable public funding system frees candidates from the burdens of private fundraising and therefore gives them more time to concentrate on public business and to communicate with the electorate. *See Buckley*, 424 U.S. at 96 (recognizing "public financing as an appropriate means of relieving . . . candidates from the rigors of soliciting private contributions").

The record evidence indisputably establishes that speech has in fact increased in Arizona since the adoption of the Act in 1998. Between 1998 and 2006, political spending and competition in Arizona increased in a number of important ways: independent expenditures rose by a massive 253% (PA 284-85); overall candidate expenditures increased between 29 and 67 percent and average candidate expenditures increased between 12 and 40 percent (JA 916-17); general election spending by the top 10 percent of candidates increased by 16 percent (PA 290); and the percentage of incumbents facing serious challengers increased significantly (JA 335-36).

The result is that voters hear more information about more candidates in more vigorously contested campaigns. This cannot be what the First Amendment was intended to prevent.

2. Triggered Matching Funds Do Not Restrict Petitioners' Spending And Thus Do Not Impermissibly Level The Playing Field

Petitioners argue incorrectly that triggered matching funds are intended to "level the playing field" in the same manner as expenditure limits or Section 319(a) of the BCRA. What the Court said in *Buckley* and reiterated in *Davis*, however, is only that "the interest in equalizing the financial resources of candidates" does not provide a "justification for *restricting*" candidates' spending or speech. *Davis*, 554 U.S. at 741 (quoting *Buckley*, 424 U.S. at 56-57) (emphasis added); *see also id.* ("the interest in 'equalizing the relative ability of individuals and groups to influence the outcome of elections' cannot support a *cap* on expenditures . . . as 'the concept that government may *restrict* the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment'") (quoting *Buckley*, 424 U.S. at 48-49) (emphases added); *id.* at 741-42 ("The argument that a candidate's speech may be *restricted* in order to 'level electoral opportunities' has ominous implications . . . .") (emphasis added). Thus, in *Buckley*, it was impermissible for the government to restrict candidates' spending in an effort to equalize resources; and, in *Davis*, it was impermissible to attempt to equalize candidates' resources by restricting the fundraising of some more severely than that of others.

Arizona's law does not seek to equalize candidates' resources by restricting any candidates' fundraising or spending. Instead, as contemplated by *Buckley*, it "substitutes public funding for what the parties

would privately raise." 424 U.S. at 96 n.129. This Court has never held that government may not *enhance* the speech of candidates who elect public financing and forgo private contributions, by providing them with funds sufficient to run competitive campaigns, while not placing restrictions on non-participating candidates' freedom to raise and spend unlimited amounts of money. To the contrary, this Court upheld just such a system in *Buckley* and summarily affirmed its constitutionality four years later. *See Republican National Comm.*, 487 F.Supp. at 283-286. Like Arizona's triggered matching funds, the Presidential public financing system upheld in these two decisions is intended to enhance the speech of publicly financed candidates and enable them to run competitive campaigns. By doing so, both Arizona's system and the federal system encourage participation in public funding and further the government's compelling interests, without running afoul of the Court's holding that government may not "level the playing field" by restricting some candidates' financial resources.

3. The Act Has Served Its Purposes Of Promoting Free Speech And Reducing The Potential For Corruption

Ironically, Petitioners assert that some participants in Arizona's political system have used triggered matching funds strategically to *increase* spending in favor of their preferred candidates—a phenomenon Petitioners label "gaming." This Court has never held that a campaign finance system must be 100 percent fool-proof against circumvention in order to further the government's anti-corruption interest; it has instead afforded lawmakers the flexibility to craft

solutions that address circumvention strategies as they arise. *See McConnell v. Federal Election Comm'n*, 540 U.S. 93, 223-24 (2003) (upholding most provisions of BCRA while recognizing that further reforms would likely be enacted to address new campaign-finance strategies that would arise in response to BCRA); *Buckley*, 424 U.S. at 105 ("a statute is not invalid under the Constitution because it might have gone farther than it did, that a legislature need not strike at all evils at the same time, and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966)) (internal quotations omitted)).

In any event, documented instances of actual gaming are either non-existent or isolated. Petitioners, for example, have submitted no evidence that, in the decade that matching funds have been in place, an independent committee has ever succeeded in triggering matching funds for a participating candidate that it favors by running an advertisement that appears to support, but in fact harms, the candidate it opposes. Petitioners have cited two instances where a so-called "teaming" strategy was employed to increase spending. But since those isolated incidences occurred, the agency charged with

enforcing the Act has adopted regulations that preclude this practice from occurring in the future.[19]

CONCLUSION

Arizona's triggered matching funds provision does not place a substantial burden on political speech, and it directly furthers the state's compelling interests in combating corruption and enhancing electoral debate and competition. The judgment of the Court of Appeals should accordingly be affirmed.

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[19] The Citizens Clean Elections Commission ("CCEC") adopted amendments to its rules that prohibit matching funds being generated through coordination among participating and non-participating candidates, thereby precluding use of a teaming strategy. *See* CCEC Rules R2-20-113(A)(1), (B), (F), and R2-20-702(C)(7) (collectively, "the Amended Rules"). For example, under the Amended Rules, the CCEC must decline to issue matching funds "on account of expenditures by or contributions to the non-participating candidate with whom the participating candidate made [a] joint expenditure." CCEC Rule R2-20-113(F). Further, the Amended Rules preclude a participating candidate from making "[a] joint campaign expenditure with a nonparticipating candidate who has previously triggered matching funds for the participating candidate . . . ." CCEC Rule R2-20-702(C)(7).

BRADLEY S. PHILLIPS*
GRANT A. DAVIS-DENNY
ELISABETH J. NEUBAUER
MICHAEL J. MONGAN
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
brad.phillips@mto.com

Counsel for Clean Elections Institute, Inc.

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*Counsel of Record

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ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, et al.,

Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, et al.,

Respondents.

JOHN MCCOMISH, et al.,

Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF STATE RESPONDENTS

ERIC J. BISTROW
Chief Deputy Attorney General
MARY R. O'GRADY
Solicitor General
JAMES E. BARTON II*
THOMAS COLLINS
Assistant Attorneys General
1275 West Washington
Phoenix, Arizona 85007-2926
(602) 542-3333
james.barton@azag.gov

Counsel for Respondents Arizona Secretary of State Ken Bennett and Members of the Arizona Citizens Clean Elections Commission

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Does the First Amendment allow Arizona to condition the release of a portion of government subsidies to publicly funded candidates on the campaign activity of privately funded candidates and independent expenditure groups?

PARTIES TO THE PROCEEDINGS

State Respondents agree with the parties to the proceedings that Petitioners list, but note that Timothy J. Reckart has replaced Gary Scaramazzo on the Citizens Clean Elections Commission and that Royann J. Parker has resigned from the Commission and therefore is no longer a party. Sup. Ct. R. 35.

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STATEMENT OF THE CASE

I. POLITICAL CORRUPTION IN ARIZONA AND THE PASSAGE OF THE CITIZENS CLEAN ELECTIONS ACT.

Over the past twenty-five years, Arizona voters have attempted to address the threat of corruption and its deleterious effects on the public's faith in government. In 1986, voters passed Proposition 200, which established Arizona's contribution limits for state-level campaigns. Ariz. Rev. Stat. ("A.R.S.") § 16-905 (2010) (historical and statutory note). Under those original contribution limits, individual contributors could give up to $200 per election to a legislative candidate and up to $500 per election to a statewide candidate.[1] *Id.*

Five years into Arizona's experiment with contribution limits, Arizona voters witnessed the worst public corruption scandal in its history. Joint Appendix ("J.A.") 122-161, 600. The scandal, which came to be known as AzScam, resulted from a police sting operation in which an undercover informant posed as a

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[1] Pursuant to A.R.S. §§ 16-905(H) and -959(A), the Secretary of State adjusts the dollar amounts in many Election Code and the Clean Elections Act provisions for inflation every two years. For simplicity, except where otherwise indicated, the brief will cite the current values from the relevant statutes. *Participating Candidate Expenditure & Contribution Limits for 2010 Elections*, http://www.azsos.gov/election/2010/Info/CCEC_Biennial_Adjustment_Charts.htm; *2009-2010 Contribution Limits*, http://www.azsos.gov/election/2010/Info/Campaign_Contribution_Limits_2010.htm.

Nevada businessman seeking to open a casino in Arizona. Newspaper reports from the time recounted Phoenix police officers videotaping state legislators accepting campaign contributions and bribes in exchange for agreeing to support gambling legislation. J.A. 122-24. Those videotapes revealed elected officials accepting thousands of dollars in bribes while cynically proclaiming that "do[ing] deals" was the way of the Legislature. J.A. 142. State Representative Bobby Raymond scoffed that there was "not an issue in the world that I give a (expletive) about." J.A. 147. "I like the good life," said State Senator Carolyn Walker, "and I'm trying to position myself [so] that I can live the good life and have more money." J.A. 146-47. "We all have our prices," she told the undercover agent after accepting $15,000. J.A. 141. Representative Don Kenney planned to "quarterback" the effort to legalize gambling while serving as the judiciary committee's chairman. J.A. 137-38. He brought a gym bag to his meeting with the informant to haul in his take of $55,000 in cash. J.A. 138. In sum, close to ten percent of the state Legislature was implicated, allegedly receiving more than $370,000 in bribes. J.A. 152; *see State v. Walker*, 914 P.2d 1320, 1324-29 (Ariz. Ct. App. 1995) (detailing allegations).

AzScam inspired another round of anticorruption legislation. 1991 Ariz. Sess. Laws, 3d Spec. Sess., ch. 2 (imposing more stringent restrictions on lobbying activities). Yet despite those new laws, the appearance of *quid pro quo* corruption persisted. A seamless interplay between fundraising and lawmaking cast a

web of perceived corruption over the Arizona capitol. *See* J.A. 178-81, 190, 206-07, 214.

Tired of political scandals, Arizona voters passed the Citizens Clean Elections Act (the "Act") on November 3, 1998. A.R.S. § 16-940 (historical and statutory note). In approving the measure, voters declared their intent to "improve the integrity of [an] Arizona state government" that "[a]llows Arizona elected officials to accept large campaign contributions from private interests over which they have governmental jurisdiction[,]" "[u]ndermines public confidence in the integrity of public officials[,]" and ultimately results in misuse of public resources through "subsidies and special privileges for campaign contributors." *Id.* It appears that candidates welcomed the opportunity to have a viable public-financing option, as participation in the Clean Elections system has increased from the first year of its implementation through 2008, when two-thirds of the candidates in the primary and general elections accepted public funding. J.A. 982, 663-64; McComish Pet. App. 15.

II. THE ACT'S OPERATION AND PROVISIONS.

The Act combats corruption and promotes free speech by providing an independent funding source for those candidates willing to abide by several restrictions while permitting traditional candidates to continue to use private funds. It establishes a finely calibrated system of issuing public funds that enables

it to meet its speech-enhancing and anticorruption goals by encouraging participation without wasting public funds.

To participate in the public-financing system, candidates must first raise a certain number of five-dollar qualifying contributions. A.R.S. §§ 16-946(B), -950(B), (D).[3] These contributions are not for the candidate's use, but rather are nominal demonstrations of public support that participants must turn over to the Clean Elections Fund to qualify for public funding. *Id.* § 16-946(A).

Next, participating candidates agree to a variety of restrictions on their campaign activities. They can raise only a limited amount of exploratory funds, or "seed money," from private contributions. Total private contributions are capped at ten percent of the initial grant, *id.* § 16-945(A)(2), and can be raised only from individuals and only in donations of $100 or less, *id.* § 16-945(A). Furthermore, publicly funded candidates may raise seed money only during the exploratory and qualifying periods that end seventy-five days before the general election. *Id.* §§ 16-945(A),

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[3] The number of five dollar qualifying contributions required varies based on office. For example, legislative candidates must collect 220, candidates for treasurer 1,650, and candidates for governor 4,410. A.R.S. § 16-950(D). Pursuant to A.R.S. § 16-956(F), the Commission may adopt rules to adjust the number required. *See* Ariz. Admin. Code R2-20-105(D); *Citizens Clean Elections Act & Rules Manual*, http://azcleanelections.gov/ (follow "Acts and Rules Manual" hyperlink).

-961(B)(2), (3); *cf. id.* § 16-201 (setting the primary election on the tenth Tuesday before the general election). In raising seed money, candidates may not accept money from a political party or from political action committees. *Id.* § 16-941(A)(1). Moreover, the Act limits how much participating candidates may contribute to their own campaigns, *id.* § 16-941(A)(2), and requires them to attend public debates that the Citizens Clean Elections Commission sponsors, *id.* § 16-956(A)(2).

For both the primary and general elections the Act divides the distribution of public funding into two parts: the initial grant and subsequent matching funds. First, participating candidates receive one-third of the total funding allotment available in the form of an initial grant. *Id.* §§ 16-951(A), (C) (stating that the initial grant is equal to the original spending limits set for participating candidates), -952(E) (capping total funding at three times the original spending limit). There is an exception to this rule for candidates who run unopposed throughout a campaign, including in the primary and the general elections. *Id.* § 16-951(A)(3). For those candidates, the Commission releases only an amount of assistance equal to five dollars multiplied by the number of qualifying contributions that the candidate collected. *Id.* These candidates do not qualify for matching funds. *Id.* § 16-952(A).

Second, capped matching funds are issued to publicly funded candidates when (1) a privately funded opponent's expenditures (or, during the general election,

a candidate's receipts, less expenditures made during the primary campaign) exceed the publicly funded candidate's initial disbursement amount; (2) an independent expenditure committee makes an expenditure opposed to the publicly funded candidate; or (3) an independent expenditure committee makes an expenditure in support of a publicly funded candidate's opponent. *Id.* §§ 16-952(A)-(C)(2). If none of these occurs, then the participating candidate does not receive any public funds beyond the initial grant. Matching funds account for two-thirds of the total funds available to publicly funded candidates, which is to say they are capped at twice the initial grant. *Id.* § 16-952(E).[3]

The Act contains other provisions to ensure the efficient use of public money while providing a viable substitute for private campaign funding. For example, because independent candidates do not face primary challengers, the Act provides them with only a fraction of the initial grant normally given to participating candidates for primary elections. *Id.* § 16-951(A)(2).

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[3] The initial grant, and therefore full funding levels, vary based on the office. For example, legislative candidates are initially issued $14,319 for the primary election and $21,479 for the general election. Candidates for treasurer are initially issued $91,645 for the primary, and $137,468 for the general election. Gubernatorial candidates are initially issued $707,447 for the primary election, and $1,061,171 for the general election. *Participating Candidate Expenditure & Contribution Limits for 2010 Elections*, http://www.azsos.gov/election/2010/Info/CCEC_Biennial_Adjustment_Charts.htm; *see* A.R.S. § 16-961(G), (H). Thus, the full funding for a participating candidate running for governor in the general election is $3,183,583. A.R.S. § 16-952(E).

Also, candidates who campaign in one-party dominant districts may reallocate funds from the general election to the primary election with a corollary reduction in their general election outlay. *Id.* § 16-952(D). In all cases, unspent funds must be returned to the fund at the end of both the primary and general elections. *Id.* § 16-953.

None of the restrictions discussed above apply to nonparticipating candidates. The matching funds provision places no limit on the total amount of funds that they may raise from private donors, and they are free to raise private money throughout the entire campaign. *Id.* § 16-905(A)-(E) (contribution limits for nonparticipating candidates). They may also raise private money in larger amounts than participating candidates. For example, a non-participating gubernatorial candidate may accept contributions of up to $840 from individuals, which is eight times the limit imposed on participating candidates. *Id.* §§ 16-905, -945(A). They may also accept money from political parties or political action committees. *Id.* § 16-905(C)-(D). Finally, there is no limit on the amount of personal money that non-participating candidates may use on their own campaigns. *Id.* § 16-905(N).

A five-member, bipartisan Citizens Clean Elections Commission administers the Act. *Id.* § 16-955(A). Among other duties, the Commission oversees the distribution of monies from the Clean Elections Fund. *Id.* § 16-952(A)-(B). The Clean Elections Fund, which the Act established, is financed by voluntary donations, tax contributions, levies on criminal and civil

fines, and qualifying contributions that Arizona voters make. *Id.* §§ 16-946(A), -954(A)-(C). The Commission is a public body that is subject to Arizona's open meetings law, and therefore may take official action only in public meetings. *Id.* § 38-431.01. It is empowered to make rules to administer the program after public comment, *id.* § 16-956(C), and is responsible for educating voters about candidates through publications and debate sponsorship, *id.* § 16-956(A)(1)-(2).

Although the Act gives the Commission authority to enforce its terms, *id.* § 16-956(A)(7), it sharply limits the Commission's discretion in issuing matching funds. When the Commission receives notice from a report that is filed or from other information that is brought to its attention that an event requiring it to distribute funds to a candidate has occurred, it must distribute these funds immediately. *E.g.*, *id.* § 16-952(A) (stating that the Commission "shall immediately pay . . . to the campaign account of any participating candidate"). Similarly, in the case of independent expenditures, matching funds are distributed after a communication expressly advocates for or against a candidate using specific words, or otherwise has "no reasonable meaning other than to advocate the election or defeat of the candidates." *Id.* §§ 16-901.01(A)(1), -952(C). Commission actions

are subject to judicial review. *Id.* §§ 41-1092 to -1092.12.[4]

III. MATCHING FUNDS PRINCIPLES.

The amount of money necessary to run a viable campaign depends on how competitive the race is, and Arizona races have varied widely in their competitiveness. J.A. 714-15. Research indicated that in the years immediately preceding the Act's adoption, campaign costs varied from $10,000 to $80,000. J.A. 715. Given that variance, the Act's drafters believed they could not set a fixed amount of public assistance for all elections without overfunding some campaigns and underfunding others. J.A. 715-16. "[I]f we kept the dollar amount given to the Clean Elections Act candidates at a, say, 10,000-dollar amount, then we could have a situation where it would be too easy to outspend the Clean Elections candidate and no one

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[4] Although these are not relevant to the questions presented, Petitioner McComish's efforts to discredit the Commission are not accurate. McComish Br. at 77. Petitioners' cited statements do not support Petitioners' allegations of bias. The Arizona Republic Editorial does not mention the Commission's actions, J.A. 303, nor does former Governor Janet Napolitano mention the Commission in her speech to the Brennan Center for Justice. J.A. 352-53. The Foothills Focus article details complaints by a person unhappy with the results of decisions in favor of an opposing party's politicians. J.A. 305-07. Similarly, the news reports address only disgruntled Commission employees and campaigns. J.A. 888, 890-91.

would run as a Clean Elections candidate," framer Louis Hoffman testified. J.A. 715-16.

> On the other hand, if we set the Clean Elections allocation at $30,000, so as to cover the bulk of the competitive races as well . . . then we would have an enormous waste of government money. . . . [I]n addition we would encourage, excessively encourage candidates to run as Clean Elections Act candidates, because, you know, they would be getting such a large amount of money. . . .

J.A. 716. To provide for an efficient, effective public-funding scheme, the Act correlates the release of public funds to the actual campaign activity of each race. Doing so saves the State money and ensures that no more assistance than necessary to disseminate the candidate's message is distributed.

Arizona's finely calibrated system reflects the realities of campaign operations. The initial disbursement allows a participating candidate to make the investment necessary to run a credible campaign. J.A. 430, 716. And when opponents and independent groups attack the participating candidates, the participating candidates respond, just as they would in a purely privately funded election. Participating candidates and officeholders have stated that the availability of matching funds was a critical factor in their decision to participate in the Clean Elections program. J.A. 387-88, 429, 441, 537-39. Without matching funds, they would have not been able to communicate with voters or respond to false or misleading attacks by

independent groups. J.A. 429. Participation in the Clean Elections program would decline if matching funds were eliminated. J.A. 537-39, 590-91, 638. However, the Act's framers saw no need to provide unlimited public assistance. J.A. 716-17. As Louis Hoffman explained, "[W]e thought that at some point there was – you would have enough money to get out your message. And if the non-participating candidate outspent you, so be it." J.A. 717.

As anticipated, matching funds have engendered more political speech. J.A. 591, 717. Since the Act's adoption in 1998, Arizona has experienced an increase in both the number of candidates running for elected office and the amount of money being spent in state elections. J.A. 534-37, 876, 915-16, 921-22, 942. Historical evidence therefore disproves Petitioners' claims that matching funds burden speech. If matching funds deterred speech, then nonparticipating candidates facing Clean Elections candidates would spend *up to but not beyond* the matching funds threshold. J.A. 876. That has not been the case. J.A. 876-87. Anecdotally, Petitioners could not cite specific instances in which they decided not to raise or spend funds. Dean Martin could not recall if he actually triggered matching funds in his 2006 race for state treasurer. J.A. 575, 579. State Senator Burns could not show that he had reduced his political campaigning as a result of the Act. J.A. 436-38. He further testified that he would raise and spend whatever money was necessary to get out his message. J.A. 434. Representative Murphy testified that he had

never turned away a campaign donation, and he could not identify anyone who chose not to contribute to him because of matching funds. J.A. 412. Representative Murphy's own campaign consultant advised him to raise as much money as he could from all sources regardless of its effect on matching funds. J.A. 594-95. In sum, nonparticipating candidates continue to raise and spend money without considering their opponents' ability to receive matching funds. J.A. 433-34.

IV. PETITIONERS' MISLEADING STATEMENTS.

Petitioners' statements regarding the Act's purposes are misleading and are in many cases belied by the very documents and testimony upon which they rely. First, contrary to Petitioners' claims, the Act was not designed to advance a particular political agenda. Arizona Free Enterprise ("AFE") Br. at 9-10. An internal memo by the initiative's campaign manager explicitly rejected the notion that the initiative sought particular legislative or ideological outcomes. J.A. 213. So too did the testimony of current commissioner and Act proponent Louis Hoffman. He testified that "[w]e were trying to set a policy that would apply globally, regardless – not against particular individuals." J.A. 722. Arizona Free Enterprise Petitioners claim that Mr. Hoffman "sought to reduce the influence and relative voice of certain business groups." AFE Br. at 9. Yet when Mr. Hoffman acknowledged the perceived power of particular individuals – whether they were involved in real estate development or

casino gaming – he did so in light of then-recent scandals such as AzScam and the Keating Five. J.A. 719-23. Similarly, supporting arguments produced for the Arizona Secretary of State's ballot proposition guide did not advocate for the Act as a substantive policy, but as an election reform to "halt[ ]" or "stop[ ]" corruption. J.A. 226-30. Proponents spoke from firsthand experience of the "pervasive and corrosive effects of lobbyist money in political campaigns." J.A. 229. To the extent that supporters of the Act believed that particular issues were shortchanged in the then-existing finance system, their perceptions were fueled by "ample evidence" of "continuing and repeated corruption in Arizona." McComish Pet. App. 9.[5]

Petitioners' allusions to "leveling the playing field" are not presented in an accurate manner either. *See* AFE Br. at 9; McComish Br. at 38, 66. Petitioners suggest that "leveling the playing field" means creating equal resources for candidates, but the cited materials do not support their sweeping factual claims. They proffer a chart of statements ostensibly

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[5] Although not relevant to the McComish Petitioners' alleged burden or the matching funds' substantial relation to preventing corruption, McComish Petitioners assert that "gaming" of the matching funds system is "rampant." McComish Br. at 71-72. Yet these allegations are isolated, rumored and/or theoretical. What is more, Petitioners do not acknowledge that the commission has since amended its rules to prohibit matching funds in the event of teaming tactics. Ariz. Admin. Code R2-20-113(F); *Citizens Clean Elections Act & Rules Manual*, http://www.azcleanelections.gov/ (follow "Act and Rules Manual" hyperlink).

demonstrating matching funds' ulterior purpose in limiting speech and equalizing resources. AFE Br. at 9 (citing J.A. 809-55); McComish Br. at 38, 66 (same). First, the chart does not distinguish between post- and pre-enactment statements. Second, the chart indiscriminately cites statements without regard to whether the alleged speaker was involved in the development of the Act or was actually a proponent. For example, the chart includes news reports that do not necessarily reflect the views of the Act's supporters. *E.g.*, J.A. 813, 814, 845.

Third, most of the statements relating to spending limits focus on the limits by which participating candidates themselves choose to abide. *E.g.*, J.A. 810 (entry from Frequently Asked Questions about Arizona's Clean Elections System) (explaining participants agreements); *id.* (entry from Talking Points) (explaining limitations on participants); J.A. 813 (entry from Why Clean Elections is Important) (noting that "*[c]andidates who run [c]lean* abide by spending limits to keep the cost of campaigns down") (emphasis added); J.A. 815 (entry from Color of Money: the 2004 Presidential Race); J.A. 818 (entry from Clean Money Campaign Reform); J.A. 820 (entry from Revitalizing Democracy, Clean Elections Reform Shows the Way Forward); J.A. 829 (entry from Summary of the Arizona Clean Elections Institute); J.A. 833 (entry from Clean Elections Media Kit).

Finally, only a handful of the quotations in the chart even address the matching funds provision, and even these statements demonstrate the different contexts in which the phrase "level the playing field"

has been used. *E.g.*, J.A. 811, 845, 851. The term "playing field" has been used in the context of promoting of voter participation through qualifying contributions, *e.g.*, J.A. 308, 852, and of expanding electoral opportunities to include candidates who might otherwise choose not run. *E.g.*, J.A. 816, 819, 821. Neither of these has anything to do with equalizing resources.

V. THE PROCEEDINGS BELOW.

On August 21, 2008, McComish Petitioners filed their Complaint against the Arizona Secretary of State and the Citizens Clean Election Commission members. J.A. 1. They alleged that the matching funds provision violated their rights under the First and Fourteenth Amendments to the U.S. Constitution and they sought to deny their opponents access to two-thirds of the funds made available to participating candidates in the form of matching funds. They claimed that conditioning the distribution of funds on the activities of nonparticipating candidates and of those making independent expenditures had a chilling effect on their spending because it caused them to avoid or delay spending to prevent participating candidates from receiving matching funds. After considerable discovery, cross-motions for summary judgment were filed. J.A. 31-32.

On January 20, 2010, the district court granted Petitioners' motions for summary judgment, denied Respondents' motions for summary judgment, and enjoined enforcement of the Act's matching-funds provision, A.R.S. § 16-952. McComish Pet. App. 47-80.

Even in granting summary judgment for Petitioners, the district court found no definitive evidence that matching funds in fact deterred spending in Arizona, *id.* at 54, and recognized that it was "illogical to conclude that the Act creating more speech is a constitutionally prohibited 'burden' on Plaintiffs." *Id.* at 66 (citing *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam)).

After acknowledging there would be no question of the Act's constitutionality if it simply provided the full amount of available funds, the district court noted that "[i]f a single lump sum award would not burden Plaintiffs' free speech rights in any cognizable way, finding a burden solely because of the incremental nature of the awards seems difficult to establish," *id.* at 66-67 (footnote omitted). The district court, however, concluded that "[d]espite the unsettling nature of Plaintiffs' claims, *Davis* [*v. Federal Election Commission*, 554 U.S. 724 (2008)] requires this Court find Plaintiffs have established a cognizable burden." *Id.* at 67. The court also believed that notwithstanding these findings *Davis* required it to hold that matching funds are subject to strict scrutiny. *Id.* at 69. The court recognized that the "anticorruption interest supports some aspects of the Act," but found that "the Act's application to self-financed candidates" was not justified by that interest. *Id.* at 70-71. The court also found that the Act did not survive strict scrutiny because it was not narrowly tailored to the extent it burdened the speech of self-financed candidates. *Id.* at 72.

The Ninth Circuit reversed. *Id.* at 39. First, on the issue of what burden matching funds imposed on Petitioners' speech, the court of appeals recognized that "[a]lthough Plaintiffs [could] not point to any specific instance in which their speech has been chilled because of the Act," *id.* at 32, there existed the potential for "a theoretical chilling effect on donors," *id.* at 34. Such a "minimal" burden on speech, the court concluded, is subject to intermediate scrutiny. *Id.*

Next, the court of appeals held that the Act satisfied intermediate scrutiny. *Id.* Arizona's "interest in eradicating the appearance of *quid pro quo* corruption to restore the electorate's confidence in its system of government is not 'illusory,' it is substantial and compelling." *Id.* at 35 (quoting *Buckley*, 424 U.S. at 26-27). The court also found that "the State has an interest in providing matching funds to encourage participation in its public funding scheme." *Id.* Finally, the court rejected the district court's reasoning that this interest was mitigated when a publicly financed candidate was running against a self-funded candidate because "[i]t is not relevant under this analysis what the source of a nonparticipating candidate's campaign contributions is when he or she triggers matching funds." *Id.* at 37. Thus, the court of appeals held that "matching funds bear a substantial relation to the State's anticorruption interest." *Id.*

In reaching this conclusion, the court of appeals rejected Petitioners' claims that *Davis* dictated the

result in this case. *Id.* at 28. The court observed that "[t]he law in *Davis* was problematic because it singled out the speakers to whom it applied based on their identity." *Id.* Furthermore, the scheme in *Davis* was designed to "'level electoral opportunities'" between candidates by seeking to "disadvantage the rich." *Id.* at 27 (quoting *Davis*, 554 U.S. at 741). The court concluded that in contrast, Arizona's program involves candidates in distinct regulatory regimes and does not "single[ ] out the speakers to whom it applie[s] based on their identity." *Id.* at 27-28. The court recognized that Arizona's procedure does not change the "playing field" between two candidates as the scheme in *Davis* did, but rather provides funding regardless of the nonparticipating candidate's financial resources. *Id.*

In his concurrence, Judge Kleinfeld agreed that the Act passed constitutional muster, but reasoned that Arizona's public-financing system simply imposed "no limitations whatsoever on a [nonparticipating] candidate's speech." *Id.* at 39. He further reasoned that "[t]he Arizona scheme does not manipulate the limits on private donors' contributions according to whether a competing candidate is participating in the government funding scheme. Had it done so, *Davis* would apply by analogy." *Id.* at 39-40.

SUMMARY OF ARGUMENT

The court of appeals correctly upheld Arizona's matching funds provision against Petitioners' First Amendment challenges. The matching funds provision is an important part of the voter-approved Citizens Clean Elections Act, which deters *quid pro quo* corruption and the appearance of corruption by providing Arizona candidates with an option to run for office without depending on outside contributions. The matching funds provision conditions the release of two-thirds of the total public funds available in a race on the aggregate campaign activity in that race. As a result, Arizona's public-funding system is tailored to provide candidates in competitive races with sufficient funds to run effective campaigns. At the same time, the public-funding system protects the public fisc by not overfunding candidates in less competitive races. Finally, the matching funds provision creates a viable public-funding option that does not run the risk of coercing any candidate into accepting that option.

1. In *Davis*, the Court applied strict scrutiny to a provision that granted a discriminatory, asymmetric fundraising advantage to one privately financed candidate when another privately financed candidate spent a specific amount of personal funds. 554 U.S. at 729. The Court found this provision to be an "unprecedented penalty" against the privately funded candidates who chose to spend personal funds on their campaigns. *Id.* at 739. *Davis* does not require strict scrutiny in the instant case because the matching

funds provision is not a penalty. First, the matching funds provision is not applied in a discriminatory or asymmetric way because it does not treat similarly situated candidates differently. Publicly funded candidates accept a host of countervailing burdens in order to qualify for matching funds; by contrast, the privately funded candidates in *Davis* who benefited from the fundraising advantage accepted no additional restrictions or limitations. *Id.* at 729-30. Second, the provision at issue in *Davis* was a contribution limit that was stricter for one privately funded candidate than it was for another, *id.* at 738; the matching funds provision provides public funds to publicly funded candidates, but does not limit the fundraising or spending of privately funded candidates. Third, no matter how much personal money the self-funded candidate in *Davis* spent after reaching the threshold, his opponent would receive a fundraising advantage until the opponent raised funds to match the self-funded candidate's. *Id.* at 729.

Conversely, the matching funds provision is simply a method of allocating the total public funds available to publicly funded candidates, and is therefore capped, allowing privately funded candidates to outspend publicly funded candidates. For these reasons, conditioning the release of two-thirds of the total public grant on the aggregate campaign activity in a particular race is not a penalty against any privately funded candidate or independent expenditure group in that race. This is consistent with the factual record in this case in which Petitioners have been unable to demonstrate that the matching funds

provision has chilled their speech or the speech of other political actors in Arizona. Consequently, *Davis* does not require that strict scrutiny apply to the matching funds provision.

Citizens United v. Federal Election Commission, 130 S. Ct. 876, 914 (2010), is a better analogy to this case. In that case, the Court required that disclosure and disclaimer requirements be substantially related to a sufficiently important governmental interest in order to survive a First Amendment challenge because these requirements "may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." *Id.* at 914 (internal quotation marks omitted). Despite record evidence to the contrary, Petitioners claim that they may restrict their campaign activity in an effort to delay or prevent their publicly funded opponents from receiving the matching funds portion of public funding. AFE Br. at 30; McComish Br. at 55. So Petitioners allege that the matching funds provision may burden their ability to speak, but it imposes no ceiling on campaign-related activities and does not prevent Petitioners from speaking. Accordingly, the Court should require that the matching funds provision be substantially related to a sufficiently important governmental interest in order to survive Petitioners' First Amendment challenge.

2. Preventing corruption and the appearance of corruption is a sufficiently important governmental interest to justify the matching funds provision. The framers recognized that a successful government required "that every practicable obstacle should be

opposed to cabal, intrigue, and corruption." *The Federalist No.* 68, at 364 (Alexander Hamilton) (IndyPublish 2002). Furthermore, this Court has frequently recognized "preventing corruption or the appearance of corruption are . . . legitimate and compelling government interests . . . for restricting campaign finances." *Federal Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) (*NCPAC*).

It is just as well established that public-funding systems serve to prevent *quid pro quo* corruption and the appearance of corruption. Over thirty years ago the Court wrote, "It cannot be gainsaid that public financing . . . furthers a significant governmental interest." *Buckley*, 424 U.S. at 96. It follows that a system which eliminates the need for a candidate to accept private dollars would prevent "financial *quid pro quo*: dollars for political favors." *NCPAC*, 47 U.S. at 497. Indeed, in *Davis*, the Court recognized that self-funded candidates were less susceptible to corruption because they were not dependant on outside contributions. 554 U.S. at 738. This reasoning applies equally to publicly funded candidates who are not dependent on outside contributions. What is more, the record demonstrates that when Arizona voters approved the Citizens Clean Elections Act, they were well aware of very serious corruption in their state.

3. The matching funds provision is substantially related to preventing corruption by making a public-funding program available while protecting the public fisc. In *Buckley*, this Court approved a public-funding

system that "substitutes public funding for what the parties would raise privately," 424 U.S. at 96 n.129, which is exactly the role of matching funds in Arizona's public-funding system. The matching funds provision also prevents the public-funding system from providing more funds than are necessary to run an effective campaign both because it caps total funds at three times the initial grant, and because it only disburses money when campaign activity exceeds the initial grant amount. A.R.S. § 16-952. Overfunding candidates would waste public money and run the risk of coercing candidates who would not otherwise choose to participate in the public-funding system to do so.

At bottom Arizona's public-funding system, which distributes two-thirds of the total funds available only as required by total spending in a particular race, is substantially related and narrowly tailored to Arizona's compelling interest in preventing *quid pro quo* corruption and the appearance of corruption, and for that reason the Court should uphold the court of appeals' decision rejecting Petitioners' First Amendment challenge.

ARGUMENT

I. BASED ON THE NATURE OF THE HARM THAT PETITIONERS ALLEGE, THE COURT SHOULD APPLY INTERMEDIATE SCRUTINY TO THE MATCHING FUNDS PROVISION OF ARIZONA'S PUBLIC FINANCING SYSTEM.

More than thirty years ago, this Court upheld the constitutionality of an optional public campaign-funding program in *Buckley*, 424 U.S. at 86-108. *Buckley's* analysis of the First Amendment and Equal Protection challenges to public funding did not apply strict scrutiny and deferred to congressional judgments regarding the funding and structure of the public-funding program. *Id.* at 90-108. In rejecting constitutional challenges based on various legal theories, this Court noted that the federal public-funding program was "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93. For that reason, the program "further[ed] . . . First Amendment values." *Id.* at 93.

In the instant case, Petitioners allege that their speech is chilled because they may choose to delay or avoid raising or spending money for their campaigns in an effort to delay or prevent public funds from being disbursed to their publicly funded opponents. *See, e.g.*, AFE Br. at 30 (alleging that independent expenditure groups and privately financed candidates

will avoid "spending money in support of their political cause" to prevent triggering matching funds); McComish Br. at 55 (alleging independent expenditure groups and privately financed candidates will "limit their fundraising and expenditures to avoid triggering matching funds"). The case law analogies that Petitioners ask the Court to accept do not support their position that strict scrutiny should govern the analysis of Petitioners' claims. First, the Court's *Davis* decision does not apply to this case because issuing matching funds is not a penalty or a discriminatory or asymmetric burden. Second, matching funds are not a variety of compelled speech because the provision neither requires Petitioners to fund the speech of their opponents, nor creates any confusion regarding the sponsorship of their opponents' speech.

The matching funds provision places no limit on the amount of funds that privately funded candidates and their supporters can raise or spend. It is merely a mechanism for allocating funds to candidates in a public-funding system. Thus, the burden that Petitioners allege is the kind of indirect, hypothetical burden on speech that the Court reviews under intermediate scrutiny. The Court's *Citizens United* decision affirming *Buckley* makes clear that campaign-finance regulations that limit neither contributions nor expenditures, such as disclosure requirements that are triggered by a privately funded candidate raising and spending money for political speech, are reviewed under intermediate scrutiny. *Citizens United*, 130 S. Ct. at 913-14; *Buckley*, 424 U.S. at 64-65.

A. This Court's *Davis* Decision Does Not Warrant Applying Strict Scrutiny Because the Act Is Nondiscriminatory, Does Not Limit Petitioners' Ability to Raise and Spend Money and Caps Participants' Funding Regardless of the Petitioners' Activities.

The upshot of Petitioners claim is that the Act's matching funds provision discriminates against them in a manner like the statute that this Court struck down in *Davis*. Not so. The provision at issue in *Davis* tied the hands of self-funded candidates with respect to their efforts to raise funds while releasing opponents from the same restrictions. The Act's matching funds provision does not discriminate against any political actor's speech, but rather distributes funds for which participating candidates have qualified based on aggregate activity in a race. It thus neither discriminates on the basis of identity nor imposes any limitations on political actors. The Court should decline to adopt Petitioners' mistaken reading of *Davis*.

In urging the Court to expand *Davis*, Petitioners oversimplify the Court's analysis and the details of the Bipartisan Campaign Reform Act of 2002 § 319(a) ("Millionaire's Amendment"). The Court noted in *Davis* that "[u]nder the usual circumstances, the same restrictions apply to all the competitors for a seat." 554 U.S. at 728; *see also* 2 U.S.C. § 441a(a)(1) (subjecting all congressional campaigns to the same contribution limits); 2 U.S.C. § 434(a)(2) (subjecting all congressional campaigns to the same disclosure requirements).

The Millionaire's Amendment replaced the normal rule in congressional elections with "a new, asymmetrical regulatory scheme." *Davis*, 554 U.S. at 729. In particular, § 319(a) provided that, once one of two or more privately funded candidates in a race spent more than $350,000 of personal funds on his campaign (subject to certain adjustments), the initial contribution limits were tripled and the limits on coordinated party/candidate expenditures were eliminated entirely – *but only for that privately financed candidate's privately financed opponent*. *Id.* at 729. Because the Millionaire's Amendment subjected otherwise similarly situated candidates to "asymmetrical" and "discriminatory" fundraising limitations based solely on one candidate spending personal funds, the Court concluded that the law resulted in an "unprecedented penalty" that was subject to strict scrutiny and was unsupported by any compelling interest. *Id.* at 739-40.

The matching funds provision of Arizona's public-financing system is not discriminatory or asymmetrical. First, consistent with *Buckley*, the Act offers all candidates a choice between two entirely different systems of financing, each with its own separate and distinct set of regulatory benefits and burdens. 424 U.S. at 87-90. The Act is not "discriminatory" or "asymmetrical" merely because only publicly funded candidates receive public funds, including matching funds. *See id.* at 97-98. Holding that issuing public funds to publicly funded candidates is somehow discriminatory or asymmetric would lead to the

"grossest" kind of discrimination because publicly funded candidates are subject to an entirely separate and distinct regulatory scheme. *Id.* ("Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike. . . .") (internal quotation marks and citation omitted).

Unlike the Millionaire's Amendment, the matching funds provision does not impose any limit either on privately funded candidates or on their supporters. Rather, it empowers such entities to impact the timing and amount of money that will be disbursed to publicly funded candidates, potentially preventing publicly funded candidates from receiving up to two-thirds of the total funds available to them. In his deposition, campaign consultant Constantin Querard recognized that a publicly funded candidate must wait "for matching funds where your opponent can wait so long to spend that they give it to you at the last minute. You can't spend it." J.A. 597. Although empowered to do so, it is rarely wise for the privately funded candidate to suppress an opponent's speech by limiting the privately funded candidate's campaign activity. Dr. Kenneth Mayer stated in his declaration that "[t]he literature on campaign finance is nearly universal on this point: other things being equal, it is *always* in the candidate's interest to spend more money," and for that reason, he "would advise privately-funded candidates that it is unreasonable for them not to spend money on his or her campaign, solely because this might result in increased expenditures for the competing candidates." J.A. 539. Even if

the Court views this incentive to prevent one's opponents from speaking as a disincentive for privately funded candidates to speak, it is not the unprecedented penalty that the Court considered in *Davis* because it is neither discriminatory nor asymmetric.

In *Davis*, other privately funded candidates enjoyed higher contribution limits based solely on Davis's spending. The federal provision penalized privately funded candidates who chose to use personal monies to support their campaign and did not present self-financed candidates with a genuine choice between financing options as the public-funding scheme had in *Buckley*. 554 U.S. at 739.

In *Buckley*, the publicly funded candidates' countervailing burden of an expenditure limit offset any potential disadvantage that public funding imposed on the privately funded candidates. 424 U.S. at 95. The voluntary expenditure cap meant that nonparticipating "candidates [would] be able to spend more in relation to the [participating] candidates." *Id.* at 99. Because of this tradeoff, the public-funding scheme did "not unfairly or unnecessarily burden[ ] the political opportunity of any party or candidate." *Id.* at 95-96. Likewise, Arizona provides public funding of political campaigns, but only if participants agree to all of the following countervailing burdens: limits on their expenditure of personal funds, A.R.S. § 16-941(A)(2); limits on overall expenditures, *id.* § 16-941(A); lower contribution limits, *id.* § 16-945(A)(1); a requirement of collecting a minimum number of qualifying contributions, *id.* § 16-950(B), (D); a requirement of

participating in at least one public debate, *id.* § 16-956(A)(2); and a requirement of returning all unspent money to the Commission following the election, *id.* § 16-953. When compared to the gratuitous benefit granted to privately funded candidates in *Davis* who were not self-funded, the trade-offs and countervailing burdens required before a candidate becomes eligible for matching funds demonstrate that the provision does not grant publicly funded candidates a discriminatory or asymmetric advantage.

Petitioners acknowledge that "[i]nstead of imposing different fundraising limits on candidates in the same race, the Matching Funds Provision provides direct subsidies to candidates who participate in Arizona's public financing system." AFE Br. at 24. The Court recognizes the "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy," and reviews the latter less strictly because "[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." *Maher v. Roe*, 432 U.S. 464, 475 & n.9, 476 (1977) (citing *Buckley*, 424 U.S. at 94-95). Through the asymmetrical contribution limits in *Davis*, the government imposed its will by force of law. A public campaign-financing system provides funding to encourage actions deemed to be in the public interest. This distinction underlies Judge Kleinfeld's concurring opinion where he observed that "[b]ecause the

challenged scheme imposes no contribution or spending limits, it does not restrict speech at all . . . [he] cannot see why heightened scrutiny would apply." McComish Pet. App. 41.

Under Arizona's system, privately financed candidates and independent expenditure groups "retain the unfettered right to make unlimited . . . expenditures," while recipients of matching funds agree to strict limitations, including an absolute cap on expenditures. *Compare Davis*, 554 U.S. at 739, *with* A.R.S. § 16-952(E). As was the case in *Buckley*, the concomitant expenditure limit enhances privately funded candidates' ability to outspend participating candidates. 424 U.S. at 104 ("The expenditure limitations on major parties participating in public financing enhance the ability of nonmajor parties to increase their spending relative to the major parties."). Like the public-funding program in *Buckley*, Arizona's public-funding program with matching funds may facilitate the ability of nonparticipating candidates to raise funds by making more private money available for political donations. *Id.* at 94 n.128; *see also id.* at 94-95 (noting that if privately funded candidates are unable to wage effective campaigns, it would not result from the public funds disbursed to their opponents but because of "their [own] inability to raise private contributions").

Once a publicly financed candidate reaches the matching funds cap, he or she receives no more funding, cannot raise additional funds, and is never relieved from other restrictions based on his or her

opponent's actions. A.R.S. § 16-952(E). The privately funded candidates in *Davis* who benefited from the Millionaire's Amendment, on the other hand, did not have to abide by any program restrictions and were free to outraise and outspend their privately funded, self-financed opponents even before the threshold was reached. Thus, *Davis*'s unique penalty on privately funded candidates who used personal monies does not control the analysis of Arizona's public-funding program.

B. *Pacific Gas* and *Tornillo* Do Not Apply Because the Act Does Not Compel Privately Funded Candidates to Promote Their Opponents' Political Speech.

This is also not a compelled speech case. No candidate or independent expenditure group is "obliged personally to express a message he disagrees with, imposed by the government." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005) (citing examples such as requiring students to recite the Pledge of Allegiance or license plates to bear the state's motto). Nor is any candidate or independent expenditure group "required by the government to subsidize a message he disagrees with, expressed by a private entity." *Id.* at 557-58 (identifying examples such as the use of mandatory bar fees or union dues to finance political speech unrelated to the private association's principal role for which membership is required). Finally, no candidate or independent expenditure group is forced to give others access to its own media

or to associate with a message with which it disagrees. *Cf. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1986) (plurality opinion); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

Compelled access cases, a subset of compelled speech cases, are distinguishable from the public campaign-funding program at issue here. First, in the compelled access cases, a utility company and a newspaper were required to directly assist – through billing envelopes and column space, respectively – in disseminating the speaker's message. *Pac. Gas*, 475 U.S. at 6-7; *Tornillo*, 418 U.S. at 244. That is not the case here. The public-funding program is financed through voluntary donations, tax contributions, levies on criminal and civil fines, and qualifying contributions from Arizona voters. A.R.S. §§ 16-946(A), -954(A)-(C). Arizona does not require privately funded candidates to contribute air time or billboard space to disseminate the views of their publicly funded opponents. Thus, in addition to not requiring privately funded candidates and independent expenditure groups to finance the speech of publicly funded candidates, the Act does not create an impression that privately funded candidates or independent expenditure groups endorse the message of publicly funded candidates.

Second, the compelled access in *Pacific Gas* and *Tornillo* were content-based. *Pac. Gas*, 475 U.S. at 14-15 (citing *Buckley*, 424 U.S. at 97-105, and *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546-50 (1983)). In contrast, matching funds are available to candidates regardless of either the content or

medium of the message they produce with the funds. *See Regan*, 431 U.S. at 548 (holding that government subsidies of veterans organizations' lobbying was content-neutral because the groups received the subsidy "regardless of the content of any speech they may use, including lobbying"). Furthermore, the matching funds provision provides funding based on disclosures of electioneering communication required by circumstances analogous to those required by federal election law. *Compare* A.R.S. §§ 16-901.01, -958 *with* 2 U.S.C. § 434(f); *see also Federal Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449 (2007). This Court has expressly held that strict scrutiny does not apply to such regulations. *Citizens United*, 130 S. Ct. at 914; *see also Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188-89 (2007) (stating that strict scrutiny is not warranted where the risk that government might drive certain ideas from the marketplace is "inconsequential" and noting that "it is well established that the government can make content-based distinctions when it subsidizes speech"). In addition, Arizona frequently disburses matching funds to candidates in the same race who have opposing viewpoints. *See, e.g.*, J.A. 756 (matching funds issued to Corporation Commission candidates of both parties), 760 (same for State Representative District 8). Hence the matching funds provision is content-neutral.

Finally, even though the Court cited *Pacific Gas* in *Davis*, the Court has made clear that the "[f]acilitation of speech to which a . . . party may choose to respond does not amount to forcing the . . . party to

speak." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 n.10 (2008); *see also Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006) ("The compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate."). Nothing in the record supports the conclusion that any candidate's or independent expenditure committee's "own message" was affected by the issuance of matching funds. Petitioners do not "have the right to be free from vigorous debate," *Pac. Gas*, 475 U.S. at 14, which is exactly the remedy that they seek here.

C. The Matching Funds Provision Imposes No Ceiling on Campaign-Related Activity and Creates at Most a Hypothetical, Indirect Burden on the Speech of Privately Funded Speakers.

The heart of Petitioners' claim is that the manner in which the State distributes two-thirds of the public funding available to participating candidates may, like the compelled disclosure requirements in *Buckley*, "deter some individuals who otherwise might contribute" from contributing to campaigns. 424 U.S. at 65-68. The Court should analyze the funding provision under intermediate scrutiny, as it does other hypothetical, indirect burdens on speech. The Ninth Circuit explained that "[a]lthough Plaintiffs cannot point to any specific instances in which their speech

has been chilled because of the Act, we recognize that under the Supreme Court's jurisprudence, even laws that create only potential chilling effects impose some First Amendment burden." McComish Pet. App. 32. Although the Act's structure and purpose support Judge Kleinfeld's view that Arizona's law imposes no burden at all on the speech of privately funded candidates and their supporters, *id.* at 39, the majority's analysis is also consistent with this Court's precedent.

In *Buckley*, this Court drew the analogy between campaign finance and other electoral regulations. 424 U.S. at 95. Thus in campaign finance regulation, as in other electoral regulations, the Court should apply a "flexible standard" that assesses whether state interests are "sufficiently weighty to justify the limitation" and "reject[ ] the argument that strict scrutiny applies to all laws imposing a burden." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190-91 & n.8 (2008) (plurality opinion) (internal quotation marks and citations omitted). Arizona's matching funds provision imposes no direct limits on either contributions or expenditures of non-participating candidates and their supporters. A.R.S. § 16-952. Indeed, as was true in the law upheld in *Buckley*, the candidates choosing to accept public funding are subject to strict contribution and expenditures limits that do not apply to non-participating candidates. *Compare id.* § 16-941(A) (restrictions on candidates participating in Clean Elections program), *with Buckley*, 424 U.S. at 94-95. The matching funds provision at issue here is merely

a mechanism for determining how much public funding to release to participating candidates from the preset allocation. *Cf. Buckley*, 424 U.S. at 91 n.124 ("The . . . check-off is simply the means by which Congress determines the amount of its appropriation.").

The burden that Petitioners postulate is similar to the burden associated with disclosure requirements. In considering the constitutionality of the disclosure provisions in the Federal Election Campaign Act ("FECA"), the *Buckley* Court assumed that "compelled disclosure ha[d] the potential for substantially infringing the exercise of First Amendment rights" and that it would "deter some individuals who otherwise might contribute." *Id.* at 66, 68. *Buckley*, however, did not apply strict scrutiny to FECA's disclosure provisions. Instead, it inquired whether those provisions exhibited a "substantial relation between the governmental interest and the information required to be disclosed." *Id.* at 64 (internal quotation marks, citations, and footnote omitted). In applying this intermediate level of scrutiny, the Court recognized that the burdens of disclosure were not equivalent in magnitude to the burden of an expenditure limit because "disclosure requirements impose no ceiling on campaign-related activities." *Id.* Requiring disclosure of independent expenditures, the Court held, "is no prior restraint, but a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Id.* at 82 (footnote omitted).

The Court recently reaffirmed the appropriateness of applying intermediate scrutiny to campaign-finance laws that may indirectly burden campaign expenditures. In *Citizens United*, the Court upheld disclaimer and disclosure provisions of the BCRA. 130 S. Ct. at 913-14. The disclaimer provision required, among other things, that a televised electioneering communication include a statement that "_____ is responsible for the content of this advertising," while its disclosure provision compelled those spending above $10,000 on electioneering communications to report their expenditures to the Federal Election Commission. *Id.* This Court in *Citizens United* as it had in *Buckley* found that disclaimer and disclosure requirements may burden speech, but that they impose no ceiling on campaign-related activities and do not prevent anyone from speaking. *Id.* at 914; *see also Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010) (intermediate scrutiny applies to disclosure of referendum petition information). The Court has subjected these requirements to exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest. *Doe*, 130 S. Ct. at 2818; *Citizens United*, 130 S. Ct. at 914.

Like disclosure requirements, matching funds do not impose a ceiling on campaign activities and do not prevent anyone from speaking. They do not operate as expenditure limits. Candidates may choose to exceed the threshold for triggering matching funds and, as the record demonstrates, have done so repeatedly

in the past. *See, e.g.*, J.A. 479-529 (CCEC 2002 Disbursement Summary indicating numerous matching payments), 876-77 (identifying 2006 candidates that triggered matching funds), 974-75 (Lang Declaration reporting matching funds triggered by Petitioners).

Even if matching funds pose a "potentially significant burden" in some circumstances as the Court suggested by citing *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), in *Davis*, 554 U.S. at 739, that does not mean that the Court must apply strict scrutiny in this case. For example, in *Buckley* this Court assumed that "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights," but it still reviewed the disclosure requirements under intermediate scrutiny. *Buckley*, 424 U.S. at 66. The Court characterized the harm in *Davis* as more than a "potentially significant burden"; it described the provision at issue there as an "unprecedented penalty" on the candidate who chose to use personal funds to support his campaign. 554 U.S. at 739. The matching funds provision imposes no penalty on privately funded candidates; it merely establishes the timing and allocation of limited public funds based on aggregate campaign activity.

The record below confirms that Arizona's public-funding program has not resulted in less speech. Spending by privately funded candidates has not clustered just below the matching funds threshold as one would have expected it to if matching funds discouraged expenditures. J.A. 876-77. As the district court found, "[i]t is undisputed that campaign spending has

increased since the Act's passage," and "[p]laintiffs' testimony is somewhat scattered and shows only a vague interpretation of the burden of the Act." McComish Pet. App. 53-54. Some Plaintiffs could not even recall whether they had triggered matching funds in their campaigns. *See, e.g.*, J.A. 433-34 (Robert Burns Deposition), 575 (Dean Martin Deposition). "Plainly, campaigns can be successfully carried out by means other than public financing; they have been up to this date, and this avenue is still open to all candidates." *Buckley*, 424 U.S. at 101. This has remained true in Arizona. From 2002 to 2008, between thirty-three and forty-eight percent of candidates for state office have privately financed their campaigns. McComish Pet. App. 15-16.

Petitioners claim that the Ninth Circuit was wrong to rely on this Court's approval of public campaign-financing in *Buckley* but recognize that "the system in *Buckley* was designed to provide an alternative to candidates who wished to lessen their reliance on private funds." AFE Br. at 36. Arizona voters provided an alternative to candidates who wish to lessen their reliance on private funds by approving a law that explicitly declared the "intent to create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special interest money." A.R.S. § 16-940(A).

The exercise of free speech has increased since the Act's passage. Again, the district court found, "[i]t is undisputed that campaign spending has increased

since the Act's passage." McComish Pet. App. 53. By providing for increased debate about issues of public concern that privately funded candidates raise, the Act's matching funds promote the free and open debate that the First Amendment was intended to foster. Like the federal program at issue in *Buckley*, Arizona voters did not adopt the Act "to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." 424 U.S. at 92-93. Striking down the matching funds provision would reduce "the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. This would ultimately undermine the First Amendment's purpose. *See Bigelow v. Virginia*, 421 U.S. 809, 829 (1975) ("[T]he First Amendment favors dissemination of information and opinion."); *see also Citizens United*, 130 S. Ct. at 911 (heralding "our law and our tradition that more speech, not less, is the governing rule"). "[T]here is no such thing as *too much* speech." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 259 (2003) (Scalia, J., concurring in part and dissenting in part), *overruled in part on other grounds by Citizens United*, 130 S. Ct. at 913.

Because the Act only indirectly burdens privately funded candidates and independent expenditure groups, and because it, like the program approved in *Buckley*, promotes free speech, the Court should

review the Act's matching funds provision under intermediate scrutiny.

II. THE CITIZENS CLEAN ELECTIONS ACT FURTHERS ARIZONA'S IMPORTANT AND COMPELLING GOVERNMENTAL INTEREST IN PREVENTING CORRUPTION AND THE APPEARANCE OF CORRUPTION.

The Act furthers Arizona's interest in preventing corruption and the appearance of corruption. Corruption strikes at the core of self-government – it is an attack on democracy itself. Accordingly this Court has long recognized that fighting corruption and the appearance of corruption is "'critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley*, 424 U.S. at 27 (quoting *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)). The structure of the Constitution itself is a bulwark against corruption. The Framers recognized that a successful government required "that every practicable obstacle should be opposed to cabal, intrigue, and corruption." *The Federalist No.* 68, at 364 (Alexander Hamilton). Elections themselves are part of the Constitution's anticorruption structure, because "if the proofs of that corruption should be satisfactory, the usual propensity of human nature will warrant us in concluding that there would be commonly no defect of inclination in the body to divert the public resentment from themselves by a ready sacrifice of the authors of their mismanagement and disgrace."

The Federalist No. 66, at 356 (Alexander Hamilton); *see generally* Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341 (2009) (reviewing the evolution of the concept of corruption since the framing of the Constitution). In passing the Citizens Clean Elections Act, the citizens of Arizona were participating in the long American tradition of forming a system of government that would be resistant to cabal, intrigue, and corruption.

A. States Have Authority to Enact Measures to Prevent Corruption and the Appearance of Corruption.

States have a "legitimate and compelling" interest in preventing corruption and its appearance. *NCPAC*, 470 U.S. at 496-97; *accord Colo. Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 641 (1996) (Thomas, J., concurring) (noting that in "the context of campaign finance reform, the only governmental interest that we have accepted as compelling is the prevention of corruption or the appearance of corruption"); *see also Wisc. Right to Life, Inc.*, 551 U.S. at 478 (noting Court's long recognition of government's interest in preventing corruption or the appearance of corruption). Accordingly, the Court has approved state actions that punish corruption, such as bribery laws, and prevent such abuses, such as campaign finances laws, and will not "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Federal Election Comm'n v.*

Nat'l Right to Work Comm., 459 U.S. 197, 210 (1982). In *Citizens United*, the Court upheld disclosure requirements because they addressed the practice of independent groups "running election-related advertisements while hiding behind dubious and misleading names," noting that disclosures "help citizens make informed choices in the political marketplace." 130 S. Ct. at 914 (internal quotation marks and citations omitted).

The Court has similarly recognized the state's strong interest in undertaking prophylactic measures to protect the integrity of the election process itself. *See Crawford*, 553 U.S. at 194-95, 203 (upholding photo-identification to deter voter fraud); *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion) (upholding prohibition on campaigning within 100 feet of polling place and explaining that "[t]he Court . . . has recognized that a State 'indisputably has a compelling interest in preserving the integrity of its election process'") (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)); *see also Doe*, 130 S. Ct. at 2819 (states may disclose signatory information of referendum petitions to preserve "the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability").

The voters in Arizona who enacted the Act were cognizant of actual and apparent political corruption of all kinds. A.R.S. § 16-940; *see Buckley*, 424 U.S. at 27 (noting "the impact of the appearance of corruption stemming from public awareness of the

opportunities for abuse inherent in" campaign financing). As the Ninth Circuit explained, Arizona citizens endured images of legislators and lobbyists scoffing at contributions limits and literally taking duffle bags full of cash in exchange for sponsoring legislation. Pet. App. 8-9 (describing AzScam as "[a] sting operation [that] caught state legislators on videotape accepting campaign contributions and bribes in exchange for agreeing to support gambling legislation"); *see also* J.A. 138, 150; *see generally* J.A. 122-212, 214-25. These examples demonstrate that, as was the case in *Buckley*, "the problem is not an illusory one." 424 U.S. at 27.

Providing a public-funding option to candidates is a powerful tool in preventing what the Court has described as "[t]he hallmark of corruption . . . financial *quid pro quo*: dollars for political favors." *NCPAC*, 470 U.S. at 497; *see Buckley*, 424 U.S. at 96 (identifying "public financing as a means of eliminating the improper influence of large private contributions"). The Act explicitly seeks to reform Arizona's election-financing system to eliminate dollars for political favors, or in the words of the Act, "subsidies and special privileges for campaign contributors." A.R.S. § 16-940(B)(6). The Act offers an avenue for candidates to avoid "receipt of what we can call the 'quids' in the *quid pro quo* formulation." *McConnell*, 540 U.S. at 292 (Kennedy, J., concurring in part and dissenting in part). Indeed, publicly funded candidates may not accept any 'quids,' except for an extremely limited number of small private contributions. A.R.S.

§ 16-945(A). As this Court explained in *Davis*, "the use of personal funds . . . reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which . . . contribution limitations are directed." 554 U.S. at 738 (internal quotation marks omitted) (quoting *Buckley*, 424 U.S. at 53). Likewise, the use of public funds *eliminates* the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which contribution limits are directed.[8]

The matching funds provision is an important part of Arizona's public campaign-financing system, making it possible to offer a viable public-financing option within the constraints of scarce government resources. *See Buckley*, 424 U.S. at 103 (recognizing government's interest in placing limits on public financing to protect the public fisc). The record supports the conclusion that the matching funds provision enables

---

[8] To the extent petitioners seek to controvert the State's asserted interest, their arguments surely fail. "The quantum of evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the *novelty and plausibility* of the justification raised." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) (emphasis added). Like the contribution limits at issue in *Nixon*, the Act is not justified on a novel theory, and "[i]n any event, this case does not present a close call requiring further definition of whatever the State's evidentiary obligation may be." *Id.* at 393.

candidates to participate in public financing. *E.g.*, J.A. 429-30, 542-43. And the record demonstrates that campaign consultants and the Act's opponents recognize that without the matching funds provision participation "probably would stop." J.A. 590-92, 638. Likewise, expert testimony establishes that matching provisions are key to encouraging participation. J.A. 537-39.

B. The Act Does Not Level Electoral Opportunities Unconstitutionally.

Attempting to avoid these settled principles concerning the State's legitimate anticorruption interests, Petitioners claim that the "true" purpose of the matching funds provision is to "level the playing field," and that such an interest is illegitimate. *E.g.*, AFE Br. at 57-58. However, if one interest is sufficient to justify a statute, the Court need not examine the sufficiency of each interest promoted by a statute. *See, e.g.*, *Citizens United*, 130 S. Ct. at 915-16 ("Because the informational interest alone is sufficient to justify application of § 201 to these ads, it is not necessary to consider the Government's other asserted interests."). Furthermore, "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 361, 383 (1968). While legislative history may assist in the construction of an act, "[i]t is entirely a different matter when [the Court is] asked to void a statute that is, under

well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of [people] said about it." *Id.* This is particularly so, where, as in this case, Petitioners rely principally on statements not of legislators or voters who enacted the measure, but "the motives of a particular group that lobbied for or against a certain proposal – even assuming the precise intent of the group can be determined, a point doubtful both as a general rule and in the instant case." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 120 (2001). In any event, as the Ninth Circuit acknowledged, legitimate concerns about *quid pro quo* corruption and the appearance of corruption in Arizona politics motivated voters to approve the Act. McComish Pet. App. 9-11.

Petitioners attempt to leverage any use of the phrase "level the playing field" into a statement of illicit intent is misleading in the context of their challenge to the matching funds provision. As noted above, Petitioners rely on numerous statements by purported proponents of the Act in an attempt to suss out some illegitimate motive. However, isolated claims made during the Act's drafting and passage by supporters are not probative of the electorate's intent. Arizona courts interpret the view of the electorate with reference to the State-issued materials provided to voters. *See, e.g., State v. Gomez*, 127 P.3d 873, 877 (Ariz. 2006) (examining findings in State publicity pamphlet to determine purpose). Further, post-enactment statements are of no value whatever. *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*,

130 S. Ct. 1396, 1409 (2010) ("Needless to say, this [material] does not qualify as legislative 'history,' given that it was written 13 years after the amendments were enacted. It is consequently of scant or no value for our purposes.").

Petitioners argue that the term "level the playing field" is always the equivalent of the Court's use of the phrase "level electoral opportunities." *See, e.g.*, McComish Br. at 38, 64 (suggesting that use of the phrase "level the playing field" is always equivalent to its usage in *Davis*); AFE Br. at 8-12 (same); *see also Davis*, 554 U.S. at 741-42 (rejecting the notion that one may level electoral opportunities by "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others") (quoting *Buckley*, 424 U.S. at 48-49). But contrary to Petitioners' claim, the term "level the playing field" has been used in a variety of ways by the Commission and others and not synonymously with the Court's description of "level electoral opportunities."

The promotion of participation by voters through qualifying contributions, J.A. 308, 852, or expanding electoral opportunities to candidates who might otherwise choose not run, J.A. 816, 819, 821, does not imply that the matching funds provision was designed to limit the expenditures of non-participants, AFE Br. at 9. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 648 (1994) (finding that the government's recognition of the "intrinsic value" of speech does not demonstrate purpose of the must-carry provision was to discriminate against other speech). Nor do

statements from unrelated administrative hearings conducted more than a decade ago support Petitioners, but confirm that the Commission's position was to oppose matching funds grants that penalized nonparticipating candidates. J.A. 236. Likewise, to the extent the term "level the playing field" has been used to describe the matching funds provision, the statements relied upon by Petitioners make clear that the provision operates to allay candidate concerns that choosing public financing will prevent them from running a viable campaign. J.A. 811, 845, 851. In other words, the term "level the playing field" in the context of the matching funds provision only speaks to the very real concern that absent a mechanism that reflected the operation of campaigns, the public financing system simply could not operate.

Petitioners' reliance on *Davis* in this context is particularly misplaced. *See, e.g.*, McComish Br. at 64, AFE Br. at 24-25. The statutory provision in *Davis* did not prevent corruption, but "level[ed] electoral opportunities for candidates of different personal wealth." 554 U.S. at 741. The Millionaire's Amendment discouraged wealthy candidates from using their wealth to contribute to the outcome of the election by first requiring such candidates to declare within fifteen days of entering the race by how much they intended to exceed the threshold, then requiring reports within twenty-four hours of expenditures, and finally, based on reports from the self-funded candidate, and only the self-funded candidate, allowing the privately funded candidates that were not self-funded

to raise funds "pursuant to the asymmetrical limitations." *Id.* at 730-31. By contrast, the Act does not require those who intend to engage in express advocacy to announce their intentions at the beginning of the campaign and all privately funded candidates have the same reporting requirements. *See, e.g.*, A.R.S. § 16-958. Under the Commission's rules, publicly funded candidates have additional reporting requirements. Ariz. Admin. Code R2-20-109(B), *Citizens Clean Elections Act & Rules Manual*, http://azcleanelections.gov/ (follow "Acts and Rules Manual" hyperlink). Most importantly, in issuing funds pursuant to the matching funds provision, the Act does not discriminate based on the source of the campaign activity. A.R.S. § 16-952. All in all, the operation of the Millionaire's Amendment was focused completely on the self-funded candidate and discouraging his or her spending; the operation of the matching funds provision is focused on the publicly funded candidate and allocating the remaining public funds to him or her.

C. The Act Does Not Unconstitutionally Seek to Reduce the Cost of Elections.

Similarly, Petitioners' argument that the purpose of the Act and the matching funds provision is to unconstitutionally limit campaign spending misstates the history of the act. AFE Br. at 37-39; McComish Br. at 65-66. There is no dispute that a problem identified in the Act with Arizona's election-financing system was that it "[d]rives up the cost of running for state office, discouraging otherwise qualified

candidates who lack personal wealth or access to special-interest funding." A.R.S. § 16-940(B)(7). And, indeed, the Act explicitly limits campaign spending of participating candidates – it is central to the agreement that participating candidates make. *Id.* § 16-941(A). The Act does not, however, address the rising cost of running for state office through compelling all parties to spend less; rather, it provides a viable, voluntary alternative to private funding. And, as noted above, the matching funds provision wholly grants privately financed actors control over the amount of spending in a race – it does not limit their expenditures and gives them authentic power over the amount of money a participating candidate will actually receive. Further, even if an isolated statement by Act supporters ties the matching funds provision to the idea of creating disincentives to speech by privately funded actors, "what motivates one [person] to make a speech about a statute is not necessarily what motivates scores of others to enact it." *O'Brien*, 391 U.S. at 384.

III. THE MATCHING FUNDS PROVISION SURVIVES BOTH INTERMEDIATE AND STRICT SCRUTINY BECAUSE IT IS SUBSTANTIALLY RELATED AND NARROWLY TAILORED TO A SUFFICIENTLY IMPORTANT AND COMPELLING ANTICORRUPTION INTEREST.

As discussed above, Arizona has a sufficiently important, even compelling, anticorruption interest

that is served by its public-financing system. *Buckley*, 424 U.S. at 96 (noting that "[i]t cannot be gainsaid that public financing . . . furthers a significant governmental interest"). A public-funding system "substitutes" for a private-funding system. *See id.* at 96 n.129. The matching funds provision allows for funds to be distributed based on activity in a particular race. A.R.S. § 16-952. In races that are very competitive, as indicated by significant spending by independent expenditure groups or privately financed candidates, the public-funding system must provide sufficient funds for a viable publicly funded campaign. As the Ninth Circuit found, removing this funding "would substantially diminish the Act's ability to attract participants, thereby undermining its ability to prevent corruption." McComish Pet. App. 38.[7] Of course, the Act need not, and does not, provide

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[7] Petitioner McComish reaches outside the record to note that participation in the program continued to be about 50 percent for the 2010 election cycle after the matching funds provision was enjoined in June of that election year. McComish Br at 85 n. 5. They argue that this shows that participation will continue even without the funds. *Id.* This speculation is inappropriate for two reasons. First, this Court's review of the Ninth Circuit decision should be based on the summary judgment record, not information that is outside the record and untested through the discovery process. *Lawn v. United States*, 355 U.S. 339, 354 (1958) (noting that the Court "must look only to the certified record in deciding questions presented"). Second, the participation level found at the cite provided by Petitioners is actually lower than the participation rates since 2002, McComish Pet. App. at 15-16, and matching funds were available until June 2010, meaning some campaigns that might have otherwise decided not to participate did not have time to change strategy for the 2010 elections.

equality of funding. A publicly funded candidate facing privately funded opponents that spend in aggregate more than three times the initial grant will have no additional resources to respond. A.R.S. § 16-952(E). Nonetheless, the citizens of Arizona determined that three times the initial grant was sufficient to create a viable public-funding option even in the most competitive races. *See* J.A. 716 (Hoffman Deposition discussing the basis of setting funding limits).

As the Court of Appeals explained, "[t]he more candidates that run with public funding, the smaller the appearance among Arizona elected officials of being susceptible to *quid pro quo* corruption, because fewer of those elected officials will have accepted a private campaign contribution and thus be viewed as beholden to their campaign contributors or as susceptible to such influence." McComish Pet. App. 37. Dr. Mayer's expert report provides empirical evidence to support the logical connection between matching funds and participation in the public-funding system. J.A. 537-39. In Wisconsin, where candidates receive an initial grant comparable to that issued in Arizona, but where there are no matching funds, participation in 2006 was only 15%, as compared to 60% in Arizona that year. *Id.* 537-38.[8] Arizona's interest in keeping its

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[8] In contrast, the court in *Day* did not address whether the law at issue served an anti-corruption purpose because participation in the public finance system was nearly 100% without matching funds. *See Day*, 34 F.3d at 1361. Further, the State in that case did not develop a factual record as to whether participation would decline absent the matching funds provision, which is not the case here. *Id.* at 1361 n.6.

matching funds provision in place is compelling and not at all abstract and it is substantially related to the Act's purpose.

Petitioners argue that the Act "does not directly serve anticorruption purposes," and should, thus, be subjected to the same level of scrutiny as BCRA's provision that made "it a crime for any labor union or incorporated entity . . . to use its general treasury funds to pay for any 'electioneering communication.'" *Wisc. Right to Life*, 551 U.S. at 457 (quoting 2 U.S.C. § 441b(b)(2)); *see* McComish Br. at 81-83; AFE Br. at 54. This argument is incorrect as it removes *Wisconsin Right to Life* from its contextual moorings. In that case, the government argued that an "expansive definition of 'functional equivalent' is needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions." 551 U.S. at 479. In other words, the government argued that one speech restriction was required to enforce another speech restriction. By contrast, public financing is a direct effort to fight corruption that does not in and of itself burden speech. The matching funds provision directly serves the anticorruption interest because without it, candidates would not participate in the public financing system. Further, to the extent that it burdens speech at all, a point which the State does not concede, the burden is functionally identical to burdens this Court has routinely upheld.

The district court noted that "[i]f a single lump sum award would not burden Plaintiff's free speech in any cognizable way, finding a burden solely because of the incremental nature of the awards seems difficult to establish." McComish Pet. App. 66-67. Petitioners do not, and cannot, claim that a single lump sum payment to publicly funded candidates burdens the speech of privately funded candidates and independent groups. In *Buckley*, the Court upheld a series of laws providing "[f]ull funding for major party candidates" and partial "funding for minor party, new party, and independent candidates . . . based upon their performance in the last election or showing." S. Rep. No. 93-689, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5587, 5589. Congress manifested its intent to provide complete support by establishing "public financing equal to the full amount of expenditures permitted to be made in a campaign." *Id.* at 5, 1974 U.S.C.C.A.N. at 5592. Public funding served to guarantee serious candidates the "adequate financing to run a fully informative and effective campaign." *Id.* at 6, 1974 U.S.C.C.A.N. at 5592; *see Buckley*, 424 U.S. at 85-109 (upholding public funding).

Arizona's public-funding system provides full funding to candidates only when necessary to run a "fully informative and effective campaign." S. Rep. No. 93-689, at 6, 1974 U.S.C.C.A.N. at 5592. These piecemeal grants distributed throughout the campaign are more closely drawn to the Act's interest in

preventing corruption while protecting the public fisc than a single lump-sum payment.

The matching funds provision along with other provisions of the Act, such as the requirement that publicly funded candidates return all unspent money to the Commission following the election, A.R.S. § 16-953, and providing only limited funds to unopposed candidates, *id.* § 16-951(A)(3), ensure that the Act does not grant publicly funded candidates more funds than necessary to encourage participation. If Arizona is prohibited from tailoring the timing and amount of funds to the needs of individual races, it will necessarily run the risk of underfunding competitive races – thus limiting the Act's anticorruption impact – or overfunding uncompetitive races – thus wasting public money and running the risk of making the program impermissibly coercive, *cf. Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993) ("[T]here is a point at which regulatory incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive.").

The Act, including its matching funds provision, represents the least restrictive means for the citizens of Arizona to discourage *quid pro quo* corruption within their state. In *Buckley*, the Court rejected the assertion that campaign contribution limits were a more restrictive alternative to fighting the corruption of large campaign contributions than enforcing criminal bribery laws or disclosure requirements. 424 U.S. at 27-28. The Court explained that bribery laws "deal with only the most blatant and specific" examples of

corruption and "Congress was surely entitled to conclude that disclosure was only a partial measure." *Id.* Accordingly, the Court upheld contribution limits as a means to address the corruption associated with large donations. *Id.* Whatever claims Petitioners can make about a chilling effect when funds are issued to publicly funded candidates, such action is less restrictive than directly limiting the contributions to Petitioners or expenditures made by Petitioners. Furthermore, given Arizona's history of political corruption even within a system of contribution limits, the Act and its matching funds provision precisely address the issue of *quid pro quo* corruption. A voluntary public-financing system, which conditions the release of public funds on the aggregate campaign activity in a race, is the least restrictive, effective means for the State to fight *quid pro quo* corruption."

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* McComish Petitioners argue the Court may affirm the district court based on the Ninth Circuit's treatment of the summary judgment evidence. McComish Br. at 86 n.6. This is distinct from the constitutional claims asserted in their petition and is not fairly included in the question presented. *See* Sup. Ct. R. 14.1; *see also Wood v. Allen*, 130 S. Ct. 841, 851 (2010). Further, the Ninth Circuit correctly concluded the district court's ruling did not approve, sub silentio, plaintiff's evidentiary objections. McComish Pet. App. 21 & n.8; *Vinson v. Thomas*, 288 F.3d 1145, 1152 & n.8 (9th Cir. 2002).

(Continued on following page)

CONCLUSION

Based on the foregoing, Respondents request that the Court affirm the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

ERIC J. BISTROW
Chief Deputy Attorney General
MARY O'GRADY
Solicitor General
JAMES E. BARTON II*
THOMAS COLLINS
Assistant Attorneys General

Counsel for Respondents
Arizona Secretary of State
Ken Bennett and Members
of the Arizona Citizens
Clean Elections Commission

**Counsel of Record*

February, 2011

McComish Petitioners also argue if the Court invalidates § 16-952 it should "strike down the entire system." McComish Br. at 80. If reached, the Court should reject this argument. Under A.R.S. § 16-960, "[i]f a provision of this act . . . is held invalid, the invalidity does not affect other provisions . . ." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) ("Severability is of course a matter of state law."); *Randolph v. Groscost*, 989 P.2d 751, 755 (Ariz. 1999) (holding that the valid portion of a voter-approved measure will be upheld unless doing so would produce an absurd result).

REPLY BRIEF

Nos. 10-238, 10-239

Supreme Court, U.S.
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ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, et al.,
Petitioners,
v.
KEN BENNETT, et al.,
Respondents.

JOHN MCCOMISH, et al.,
Petitioners,
v.
KEN BENNETT, et al.,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONERS ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ET AL.

INSTITUTE FOR JUSTICE
WILLIAM R. MAURER*
JEANETTE M. PETERSEN
101 Yesler Way, Suite 603
Seattle, WA 98104
Tel: (206) 341-9300
Fax: (206) 341-9311
wmaurer@ij.org
jpetersen@ij.org

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
STEVEN M. SIMPSON
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
wmellor@ij.org
ssimpson@ij.org

INSTITUTE FOR JUSTICE
TIMOTHY D. KELLER
PAUL V. AVELAR
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
Tel: (480) 557-8300
Fax: (480) 557-8305
tkeller@ij.org
pavelar@ij.org

Counsel for Petitioners
Arizona Free Enterprise Club's Freedom Club PAC, et al.
**Counsel of Record*

CUCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Just three years ago, in *Davis v. FEC*, this Court struck down a law under which "the vigorous exercise of the right to use personal funds to finance campaign speech produce[d] fundraising advantages for opponents in the competitive context of electoral politics." 554 U.S. 724, 739 (2008). In *Davis*, those who chose to exercise "the First Amendment right to engage in unfettered political speech" by spending more of their own money on campaign speech than the government preferred were subjected to the "special and potentially significant burden" of higher contribution limits for their opponents. *Id.* Here, independent groups and candidates who choose to exercise their First Amendment rights by raising and spending what the government considers to be too much money on political speech face the burden of direct grants of government subsidies to their opponents. Otherwise, the cases are identical. In this case, as in *Davis*, strict scrutiny applies and Respondents must demonstrate that this law is narrowly tailored to achieve a compelling state interest. They have not done so.

Respondents cannot escape the application of *Davis* here. Instead, they attack the premises on which *Davis* was based, hoping to convince this Court to abandon *Davis*'s reasoning without explicitly overturning that case. Thus, they claim that Petitioners have not proven that their speech was chilled, ignoring that this Court did not require such evidence in *Davis* and that, in any event, the record contains substantial evidence that the law has altered the

timing, nature, and amount of political speech in Arizona. Similarly, Respondents claim that Arizona's Citizens Clean Elections Act (the "Act") places no limits on Petitioners' ability to raise and spend campaign funds and that it is simply an effort to allow some candidates to compete with others, ignoring that *Davis* considered and rejected these arguments as well.

Respondents also contend that *Davis* is distinguishable because the candidates there were "similarly situated," and here they are not because some have chosen to forego private financing in favor of public financing with a spending cap. For independent expenditure groups, this choice does not exist – a fact which Respondents and their supporting *amici* steadfastly ignore. Moreover, for candidates, "similarly situated" is a distinction without a difference. Jack Davis, too, could have chosen to fund his campaign with private donations, like his opponents, and thus avoided triggering fundraising advantages to them. This, however, is precisely the "choice" this Court held that the government could not impose.

Misunderstanding *Buckley v. Valeo*, 424 U.S. 1 (1976), Respondents view public funding as a constitutionally favored option that entitles those who choose it to demand a level playing field upon which to run for office. But *Buckley* simply upheld initial-grant public financing as one funding option among many from which candidates could choose. It did not authorize the government to burden the speech of those who do not choose public funding in order to correct alleged financial imbalances that result from the free choices of those who do.

From top to bottom, the Act is an effort by the State of Arizona to manipulate the speech-related decisions of candidates and independent groups in campaigns. Its structure, its effects, and the intentions of its drafters, proponents, and administrators all make clear that its purpose was to impose a harsh disincentive to raise and spend private funds for campaign speech in order to reward those who chose to accept government subsidies. It is a quintessential example of a state "arrogat[ing] the voters' authority to evaluate the strengths of candidates competing for office." *Davis*, 554 U.S. at 742. This Court did not permit the government to engage in such "dangerous business" in *Davis*. It should not do so here.

I. THE MATCHING FUNDS PROVISION SEVERELY BURDENS POLITICAL SPEECH.

Respondents'[1] chief argument is that the Matching Funds Provision does not severely burden speech. Respondents' argument is a full attack on the reasoning of *Davis* that stops just short of calling for its reversal. If Respondents were to prevail, it would not just fatally undermine *Davis*, but it would also spell an effective end to this Court's well-established jurisprudence regarding self-censorship. Respondents'

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[1] Petitioners shall refer to Respondents and their supporting *amici* collectively as "Respondents" because supporting *amici* largely repeat Respondents' arguments. We will specifically refer to *amicus* briefs only in those instances where *amici* present distinct arguments.

argument also demonstrates a highly selective and inaccurate reading of the record, as well as a misunderstanding of how campaigns are conducted and the Act's effect on political activity.

A. Respondents' Efforts To Distinguish *Davis* Fail Because Their Argument Attacks the Premises on Which *Davis* Rests.

Respondents contend that *Davis* simply held that the government may not impose unequal contribution limits on candidates in the same race. *See, e.g.*, Br. for Clean Elections Institute at 2; Br. of State Resp'ts at 27. This misstates the reasoning and holding in *Davis*, as well as its broader recognition that allowing the government to manipulate the speech-related decisions of speakers and voters during elections – as Arizona is doing here – is "dangerous business" that is not only *not* compelling, it is not even a legitimate governmental interest. *Davis*, 554 U.S. at 742.

In *Davis*, this Court recognized that the nature of the harm at issue stemmed not simply from the unequal contribution limits, but from the fact that the government handing a substantial "fundraising advantage[ ]" to one side in a competitive election necessarily harms the other. 554 U.S. at 739. That fundraising advantage was uniquely burdensome to the candidate who did not receive it because it was triggered by his speech. *Id.* at 740. Whether that advantage comes in the form of a higher contribution

limit or an additional direct subsidy, the burden on the opposing candidate is the same: When he speaks more than the government prefers, he faces the "special and potentially significant burden" of additional grants to his opponent. *Id.* at 739.

In reality, Respondents' argument against the application of *Davis* to this case is simply an attack on *Davis* itself. But because nearly every major argument Respondents make here was raised and rejected in *Davis*, there is no way this Court can accept Respondents' arguments without fatally undermining that case.[2]

For example, in *Davis*, the FEC argued that the Millionaire's Amendment imposed no ceiling on Davis's expenditures and did not prevent him from spending his own money. *See* Br. for Appellee at 25-26, 28-29, *Davis v. FEC*, 554 U.S. 724 (2008) (No. 07-320), U.S. S. Ct. Briefs LEXIS 318, at **45, 49 ("FEC *Davis* Br."). Respondents, too, claim that Petitioners have suffered no actual injury and they are free to spend as much as they want. *See, e.g.*, Br. for Clean Elections Institute at 13; Br. of State Resp'ts at 35, 38. Yet the response from *Davis* is equally applicable here: While some candidates may choose to continue spending, they will nonetheless face the "special and potentially significant burden" of having the state grant

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[2] Not coincidently, the district court in *Davis* upheld the Millionaire's Amendment by relying on cases approving clean elections systems like Arizona's. *See Davis v. FEC*, 501 F. Supp. 2d 22, 29 (D.D.C. 2007).

their opponents a fundraising advantage. 554 U.S. at 739.

Likewise, in *Davis*, the FEC argued that the Millionaire's Amendment was an effort "to 'enhance the relative voice' of non-wealthy candidates *without* 'restrict[ing] the [self-financing candidate's] speech.'" FEC *Davis* Br. at 29; *see also Davis*, 554 U.S. at 753 (Stevens, J., dissenting) ("Enhancing the speech of the millionaire's opponent, far from contravening the First Amendment, actually advances its core principles."). Respondents claim that the Matching Funds Provision serves the same purpose. *See* Br. for Clean Elections Institute at 17-18. In both cases, however, the answer is the same: The government cannot constitutionally "arrogate the voters' authority to evaluate" candidates to itself, which this Court termed a "dangerous business." *Davis*, 554 U.S. at 742.

In *Davis*, the FEC claimed that *Buckley* authorized the government to grant fundraising advantages to one speaker based on the speech of the other. FEC *Davis* Br. at 4. Respondents make the same claim here. *See, e.g.*, Br. for Clean Elections Institute at 17. But this Court rejected that argument in *Davis* in terms that apply equally here. The choice in *Buckley* is fundamentally different than the choice Petitioners face, in that independent groups and candidates who do not choose to take public funding will trigger matching funds whenever they speak above a certain point. *See Davis*, 554 U.S. at 739-40.

Respondents do not only challenge *Davis*'s harm standard, however. They also challenge *Davis*'s broader conclusion that the government cannot manipulate spending in campaigns in an effort to correct alleged financial imbalances. In *Davis*, this Court recognized the threat to the First Amendment extended to the effect on the nature of our competitive electoral system as a whole. The First Amendment assigns decision-making authority in elections to candidates, their supporters, and voters. *Id.* at 742 (stating that "[d]ifferent candidates have different strengths" including different fundraising abilities and sources and the candidates and voters – not government – must decide how those strengths contribute to the outcome of elections). The Millionaire's Amendment, by attempting to correct a "financial imbalance" among candidates, contravened this purpose by giving government the authority to "mak[e] and implement[ ] judgments about which strengths [of candidates] should be permitted to contribute to the outcome of an election." *Id.* at 736, 742.

The Matching Funds Provision operates in the same manner. It attempts to correct a purported imbalance between candidates who choose to accept public financing and those who do not. And it operates within a public funding scheme whose avowed purpose is to limit overall campaign spending, "level the playing field,"[3] and crowd out private financing –

[3] Of course, whether a political field is "level" and whether such an imbalance justifies limits on speech are inherently

(Continued on following page)

even private funds raised in the face of one of the lowest contribution limits in the nation. *See* Br. of Pet'rs at 56 n.13. Whether Respondents agree that this is the purpose of the law is irrelevant. It is inherent in the statute and is its obvious effect. It thus represents a comparable effort by Arizona to influence judgments about candidates that, as the Court recognized in *Davis*, must remain with the people.

This Court should not accept Respondents' invitation to discard *Davis* three years after it was decided. *Davis* was correctly decided then and its reasoning is equally vital now.

B. The Purpose and Function of the Matching Funds Provision Is To Create a Drag on Speech and, as such, the Law Constitutes a Severe Burden on Protected Expression.

The Matching Funds Provision was designed to serve the Act's purposes of restricting overall

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subjective questions "especially susceptible to the infiltration of illicit factors. It is the rare person who can determine whether there is 'too much' of some speech (or speakers), 'too little' of other speech (or speakers), without any regard to whether she agrees or disagrees with – or whether her own position is helped or hurt by – the speech (or speakers) in question." Elena Kagan, *Private Speech, Public Purpose*, 63 U. Chi. L. Rev. 413, 469-70 (1996). Therefore, "[l]aws directed at equalizing speech . . . demand strict scrutiny because of heightened concerns relating to improper purpose." *Id.* at 472.

campaign spending and equalizing electoral speech. Joint Appendix (JA) at 109-10, 213, 719-24, 809-55; ECF No. 288-4 at 132. Toward that end, the Matching Funds Provision creates "various disincentives" to independent expenditure groups and privately financed candidates to outpace their publicly financed opponents by spending more money on speech. JA 96.

Respondents ignore the obvious purpose and operation of the Matching Funds Provision and instead argue that Petitioners must present specific evidence of a chilling effect to prevail. *See, e.g.*, Br. for Clean Elections Institute at 14-16. But this Court has never required speakers to make such a showing, because it places the burden of proof on the wrong party. Instead of looking to the severity of a burden, this Court looks to the nature of the governmental action to determine the burden on speech. *See, e.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (stating that, in the First Amendment context, courts must "look through forms to the substance" of government conduct to see if the law or policy at issue represents an intrusion into constitutionally protected freedoms); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 402 (1950). Not surprisingly, this Court did not require the plaintiff in *Davis* to present specific instances where he did not contribute to his campaign or where he did not spend money. *See* 554 U.S. at 738-39 ("While BCRA does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right.").

Respondents' approach would, if adopted, require courts to create the fine distinction among favored and disfavored speech that this Court specifically rejected in *Citizens United v. FEC*, 130 S. Ct. 876, 891 (2010) (rejecting a test that would "create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable"); *see also FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (opinion of Roberts, C.J.) (stressing that First Amendment standards must "entail minimal if any discovery" and "eschew 'the open-ended rough-and-tumble of factors,' which 'invit[es] complex argument in a trial court and a virtually inevitable appeal'" (first alteration in original)). Under Respondents' heightened evidentiary standard, proof of a chilling effect would require speakers to show they did not spend as much as they otherwise would have.

In other words, Respondents seek a standard for First Amendment harm that requires proof that individuals have chosen not to speak. *Cf. City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988) (recognizing that self-censorship may be difficult to detect because it derives from an individual's own actions). In the context of campaign finance laws, political speakers, under Respondents' test, would have to track and disclose what they have *not* spent and what others have *not* contributed if they are to prevail. This Court's First Amendment jurisprudence would devolve into an array of multi-factor tests to determine just how much non-fundraising

and non-spending is enough to constitute a sufficiently "severe" chilling effect for the courts to intervene. *Cf. Citizens United*, 130 S. Ct. at 895 (noting the inherent harm to political speech caused by complex, multi-part tests used to determine the validity of a particular expression).

Instead of requiring plaintiffs to prove a negative, this Court should adhere to its longstanding practice of looking to the structure of the governmental action at issue to determine whether, by its nature, it involves "risk[s] of a 'reaction of self-censorship' on matters of public import." *Snyder v. Phelps*, 131 S. Ct. 1207, 1215-16 (2011) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985)); *see also Thornhill v. Alabama*, 310 U.S. 88, 98 (1940) ("Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusations or the evidence under it, which prescribes the limits of permissible conduct . . . ."). The Court took this approach in *Davis*. 554 U.S. at 739. It should do the same here.

C. The Record Contains Extensive Evidence That the Matching Funds Provision Severely Burdens Speech.

Nonetheless, if this Court were to require that Petitioners meet Respondents' novel evidentiary standard, Petitioners have done so. This is despite the fact that Respondents, like the Ninth Circuit, contend that there is no evidence of harm in this case. The

Ninth Circuit failed in its "obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (internal quotations and citations omitted). The record belies both Respondents' arguments and the Ninth Circuit's conclusion. For example:

- Dr. David Primo: Petitioners' expert found that privately financed candidates facing the prospect of triggering matching funds changed the timing of their fundraising activities, the timing of their expenditures, and, thus, their overall campaign strategy. JA 791-92, 922. The U.S. Government Accountability Office made a similar finding and found evidence that independent expenditure groups do likewise. U.S. Gov't Accountability Office, GAO-10-390, *Campaign Finance Reform: Experiences of Two States That Offered Full Public Funding for Political Candidates* 80 (2010), *available at* http://www.gao.gov/new.items/d10390.pdf. Researcher Michael Miller came to the same conclusion. JA 363-72 (Michael Miller, *Gaming Arizona: Public Money and Shifting Candidate Strategies*, 41 PS: Political Science & Politics 527 (2008)). The decision to delay spending does not simply shift political activity to some other time. It reduces the time the speaker has to speak and the

listener has to hear and consider his message. *See* App. to McComish Pet'rs' Pet. for a Writ of Cert. ("McComish App.") at 311.[4]

- Rick Murphy: In 2006 and 2008, Murphy curtailed his fundraising to avoid triggering matching funds. JA 567. In 2008, he declined to send out a mailer in order to conserve resources for the general election where he would face three publicly financed opponents. JA 567. He also delayed raising money until "the very end of my general campaign so that even if I did trigger matching funds to my opponents, I would do so late enough in the process that their advantage would be lessened." App. to Pet'rs' Pet. for a Writ of Cert. ("App.") at 168. Murphy's own father and stepmother declined to contribute to his campaign because of the effect of matching funds. JA 569.

- Dean Martin: In his 2010 election, Martin delayed private fundraising to avoid triggering matching funds and ultimately chose to run as a publicly financed candidate to avoid the burdens of matching funds. App. 153; ECF No. 432-1 at 2-4. In the 2006 general election, he raised about $72,000 and then stopped soliciting funds in order to keep his campaign near the trigger level. JA 578-79. Martin has

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[4] Respondents almost completely ignore Dr. Primo's findings and do not mention the GAO report at all.

also actively discouraged independent expenditures on his behalf and none were made on his behalf. JA 578.

- Tony Bouie: Bouie ceased promoting his campaign and held his expenditures until they could be timed to minimize matching funds. McComish App. 310-11. As a result, he refrained from sending out mailers, making auto-calls, and distributing information, which meant the public had less time to consider his message. McComish App. 311. In 2010, he chose to run for a different office because the contest for that office would be less likely to implicate matching funds. McComish App. 296-97.

- John McComish: In the 2008 election, McComish did not spend money on an auto-dialer to avoid triggering matching funds. McComish App. 328-29.

- Matt Salmon: The Club for Growth chose not to contribute to or make an independent expenditure in support of his campaign specifically to avoid triggering matching funds. JA 290.

- Political consultants: Political campaign consultants in Arizona routinely advise their clients to minimize the competitive disadvantage of matching funds by minimizing fundraising or spending in ways that minimize matching funds. JA 927-28. An experienced campaign consultant testified that "particularly with the

traditional candidate in a multicandidate race where one or more is a Clean Elections candidate, it is a part of basically every spending decision that would put you over that minimum, and sometimes part of the decision is that you don't because you know you only have so much to spend before you start to trigger. So you're always aware of the cost of spending that first incremental dollar." JA 596.

- Independent expenditure groups: Victory 2008 and Arizonans for a Healthy Economy both stated that if they knew their 2008 independent expenditures were going to trigger matching funds to the campaign of David Stevens, they would not have made them and that matching funds chilled their ability to effectively implement campaign plans. JA 548-49, 550-52, 553-55, 557-58. In 2006, the Arizona Taxpayers Action Committee (ATAC) declined to spend money on auto-dialers in one election to avoid triggering matching funds. JA 581-83. Matching funds are "certainly [a] top-of-mind issue" for ATAC and "an important factor" in their decision to make expenditures. JA 584. When they have made expenditures that would trigger matching funds, they have done so at the end of October to minimize the fundraising benefits to the candidates they oppose. JA 583-84. Similarly, a representative from Arizona Free Enterprise Club's

> Freedom Club PAC ("Freedom Club") testified that matching funds determined when they would spend money. JA 670. In short, matching funds impact "every spending decision" both ATAC and Freedom Club make. JA 777, 782.

Respondents and the Ninth Circuit ignored this evidence and focused on select portions of the record that Respondents view as inconsistent with their opinion of how campaigns should operate. For instance, Respondents make much of Martin's inability to specifically recall triggering matching funds, Br. for Clean Elections Institute at 6-7, but ignore that his campaign strategy was to keep his political activity sufficiently low to avoid triggering them. JA 574. Regarding the 2006 campaign, Martin testified that as soon as he realized that his 2006 general election opponent would receive matching funds based on his primary and general election fundraising, "[w]e stopped fundraising, stopped actively soliciting. And that, for the most part, brought everything to a crawl on the fundraising side." JA 578-79, 729. Because he curtailed his political activities, Martin was able to minimize the amount of matching funds – only $1,800 – he ultimately triggered to his opponent. JA 755. This was despite the fact that Martin had the ability to raise tens of thousands of dollars more for his campaign. JA 578.

Similarly, Respondents fault Murphy for failing to track and report people who did not give him money. Br. for Clean Elections Institute at 7. Like the

Ninth Circuit, they ignore his testimony regarding how the Matching Funds Provision caused him to stop fundraising, delay his speech, and forego communications with potential voters (and thereby reduce all contributions). *See supra* p. 13.

This testimony demonstrates the real-world burden the Matching Funds Provision imposes on speech.[5] But to Respondents, the fact that a candidate brought his political activity "to a crawl" is less important than whether he specifically remembered triggering less than $2,000 in matching funds.

D. Self-Censorship Caused by Government Policy Is Not a "Strategic Choice," But a Severe Burden on Political Speech.

Where Respondents do recognize matching funds' impact on speech, they, like the Ninth Circuit before

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[5] Respondents argue as well that a lack of "clustering" around the trigger amount demonstrates a lack of First Amendment harms. But, as the district court concluded, "this evidence does not dispose of Plaintiffs' claims that their speech was chilled and will be chilled. For example, some of the Plaintiffs triggered matching funds. Those individuals now claim they would have spent more or spent at a different time if matching funds were not a possibility." App. 52. Moreover, the lack of "clustering" is consistent with the evidence of the Matching Funds Provision delaying speech set out by the GAO, Dr. Primo, and Mr. Miller. If independent expenditure groups and privately financed candidates delay spending money until the final weeks of the campaign, it is logical that their spending would not cluster at the trigger limit.

them, dismiss it as merely a "strategic choice." Br. for Clean Elections Institute at 16. But this is meaningless, as one could describe the decision to alter one's speech in response to any burdensome law short of a complete ban as a "strategic choice."

For example, in *United States v. Playboy Entertainment Group*, this Court struck down a law that gave cable television operators the choice between fully blocking adult entertainment or limiting it to specified hours. 529 U.S. 803, 806, 827 (2000). This Court has come to similar conclusions in other cases. *See, e.g., Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991) (holding "Son of Sam" law unconstitutional despite fact that authors could choose to forego payment for writing books); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591 (1983) (holding tax on paper and ink expenditures above $100,000 unconstitutional despite publishers having a "choice" to avoid tax by using less); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305 (1965) (striking down law that required addressees of "communist political propaganda" to choose to receive it before it could be delivered). In each case, the law presented speakers with "strategic choices" between speaking on their own terms or altering their speech to conform to government disincentives. In each case, this Court concluded that the government's imposition of such a choice violated the First Amendment.

By causing candidates and independent groups to change their spending decisions, the Matching Funds

Provision severely burdens speech by injecting the government directly into the speaker's decisions about whether, when, and what the speaker will speak. *See Hurley v. Irish Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (recognizing "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message"). In *Davis*, this Court did not hesitate to strike down a law that had a similar impact on speech. It should take the same approach here.

E. Cases Involving the Mechanics of Elections Do Not Apply Because This Case Involves Core Political Speech.

The U.S. Solicitor General argues that in campaign finance cases this Court applies a sliding scale of review based on the severity of the harm to the plaintiff. Br. for the United States at 14-15. In support, he relies on cases involving challenges to government regulations of the time, place, and manner of elections. *Id.*[6]

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[6] The Solicitor General views the Matching Funds Provision as "integral" to Arizona's public financing system. Br. for the United States at 32. The Solicitor General, of course, represents a governmental entity that has a public financing system that does not contain a triggered matching funds component. The purported "integral" nature of triggered matching funds is therefore undercut by the considered view of Congress, which

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This argument is misplaced, however, as this Court has recognized a distinction between election regulations, which are justified by the need to make elections fair and honest and to impose order on the democratic process, and regulations of core political speech. *Compare Burdick v. Takushi*, 504 U.S. 428, 433 (1992), *and Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."), *with McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345-46 (1995) (noting that courts will resort to the severe/lesser burden framework only if a challenged election law regulates "the mechanics of the electoral process," not speech), *and Buckley v. Valeo*, 424 U.S. at 17-18; *see also Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 206-07 (1999) (Thomas, J., concurring in the judgment) (distinguishing between election regulations and those that affect political speech and stating that in the latter case courts must apply strict scrutiny).

This case, like *Davis*, involves a law that burdens political speech – it has nothing to do with the mechanics of elections.

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has consistently rejected public financing systems with triggered matching funds for years. *See id.*

II. STRICT SCRUTINY APPLIES TO THE MATCHING FUNDS PROVISION.

Despite the similarities between the Matching Funds Provision and the Millionaire's Amendment at issue in *Davis*, Respondents argue that intermediate scrutiny applies here because the Millionaire's Amendment applied to candidates who were "similarly situated," whereas the Matching Funds Provision applies to those who operate under different funding systems. Br. for Clean Elections Institute at 22-23; Br. of State Resp'ts at 27.

Davis did not turn on whether the candidates were or were not similarly situated. Indeed, that distinction is entirely in the eye of the beholder. The candidates in *Davis* could just as easily be described as not similarly situated in that one was a millionaire and the other was not. And the choice in Arizona to accept public financing or not cuts just as much against Respondents, because those who accept public funding could easily choose not to do so. The fact that some candidates have made that choice does not entitle the government to manipulate campaign spending so that their political activity is always at the same level as (or often times, significantly above) those who choose not to take the government's money.

As this Court made clear in *Davis*, governmental attempts to "equalize" speech based on the speech of others impose a severe burden on political speakers. 554 U.S. at 739-40. Respondents do not point to any case that entitles the government to impose such a

burden on a person who *refuses* to participate in a government spending program. In *Buckley*, the government-created burdens fell on candidates who accepted government grants; it did not create a new avenue for government regulation of speech by giving the government the power to burden the speech of nonparticipants. *Cf.* 424 U.S. at 57 n.65.[7]

Moreover, independent expenditure groups cannot choose public funding at all. Respondents and their supporting *amici* only acknowledge this fact once in a footnote and then only to suggest the issue be remanded. Br. of Former ACLU Officials at 19 n.10. Thus, even under Respondents' cramped reading of *Davis*, the Matching Funds Provision is as asymmetrical and discriminatory as Respondents read the Millionaire's Amendment to have been.

The Matching Funds Provision is also subject to strict scrutiny because the trigger for matching funds is content-based. In an election with a publicly financed candidate and a privately financed candidate, speech in favor of the publicly financed candidate triggers no government action. An identical expenditure in favor of the privately financed candidate

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[7] For this reason, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), and *Rust v. Sullivan*, 500 U.S. 173 (1991), have no application here. Both cases dealt with challenges by recipients of government funding to restrictions attendant to such funding. Neither dealt with challenges with burdens placed on people who refused funding or were not eligible for it.

triggers matching funds to the publicly financed candidate. Despite Respondents' attempts to argue that the Act is not content-based because it is not viewpoint-based, Br. for Clean Elections Institute at 33, such a law "does not evade the strictures of the First Amendment merely because it does not burden the expression of particular *views* . . . ." *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). Here, there is no way for an independent expenditure group supporting a privately financed candidate to avoid triggering matching funds except to change who they support or to stop speaking altogether.

Finally, Respondents' attempts to decouple *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986) and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) from *Davis* and this case are unpersuasive. This Court answered Respondents' argument that those cases only apply to the physical appropriation of property when it applied the rationale from *Pacific Gas* to the campaign finance system in *Davis*. Moreover, despite Respondents' arguments to the contrary, in *Pacific Gas*, the plurality explained that appropriation of a speaker's physical property was not the key to those decisions. Instead, the plurality explained, the decision in *Miami Herald*

> emphasizes that the right-of-reply statute impermissibly deterred protected speech. In the last paragraph of the opinion, the Court concluded that an *independent* ground for invalidating the statute was its effect on editors' allocation of scarce newspaper space.

> That discussion in no way suggested that the State was free otherwise to burden the newspaper's speech as long as the actual paper on which the newspaper was printed was not invaded.

Pac. Gas, 475 U.S. at 12 n.7 (citations omitted).

In short, strict scrutiny applies. For the Matching Funds Provision to survive, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Ark. Writers' Project*, 481 U.S. at 231. That is, the government must meet the same standard as that set out in *Davis*. As explained in Petitioners' opening brief, this cannot be done. Because there is no way for the Matching Funds Provision to avoid strict scrutiny, there is no way for it to survive – as Respondents have conceded by failing to argue otherwise.

III. PURPORTED INCREASES IN OVERALL SPENDING CANNOT JUSTIFY BURDENS ON INDIVIDUAL SPEECH.

Respondents argue that the Act has increased spending in Arizona and therefore any resulting burden on the speech of independent groups or privately financed candidates is justified. Whether this increase in spending relates to the Act, however, is questionable; as the district court found, "it is unclear whether that increase can be traced to the Act." App. 51. Moreover, if one takes into account the increase in Arizona's population, Respondents are incorrect that

overall spending has gone up in Arizona at all. JA 767-68, 915-23. And as Dr. Primo testified, many states have seen a surge in campaign spending since 1998; Arizona is not one of them. JA 922. Indeed, Respondent Clean Elections Institute's expert testified that the Act has reduced the amount of spending that would have occurred had the Act not been in place. JA 768.

More importantly, the First Amendment protects the rights of individual speakers, and those rights are not subordinated to the rights of other speakers. This Court has specifically rejected the idea that a restriction on a speaker can be justified by the fact that someone else may speak: "It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him." *Ark. Writers' Project*, 481 U.S. at 231 (citation omitted). Any contrary ruling would also run afoul of the line of cases holding that the government may not open opportunities for some individuals to speak by abridging the First Amendment rights of other individuals. *E.g.*, *Pac. Gas*, 475 U.S. at 14 ("Appellant does not, of course, have the right to be free from vigorous debate. But it *does* have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents." (quoting *Buckley*, 424 U.S. at 49 n.55)). Respondents' attempt to absolve the state from liability by noting benefits purportedly received by other speakers must fail.

CONCLUSION

For the reasons discussed above and in Petitioners' brief, and the briefs of the petitioners in Case No. 10-239, the Ninth Circuit should be reversed.

Respectfully submitted,

INSTITUTE FOR JUSTICE
WILLIAM R. MAURER*
JEANETTE M. PETERSEN
101 Yesler Way, Suite 603
Seattle, WA 98104
Tel: (206) 341-9300
Fax: (206) 341-9311
wmaurer@ij.org
jpetersen@ij.org

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
STEVEN M. SIMPSON
901 North Glebe Road,
Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
wmellor@ij.org
ssimpson@ij.org

INSTITUTE FOR JUSTICE
TIMOTHY D. KELLER
PAUL V. AVELAR
398 South Mill Avenue,
Suite 301
Tempe, AZ 85281
Tel: (480) 557-8300
Fax: (480) 557-8305
tkeller@ij.org
pavelar@ij.org

Counsel for Petitioners
Arizona Free Enterprise Club's Freedom Club PAC, et al.

**Counsel of Record*

REPLY BRIEF

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In The
Supreme Court of the United States

JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,

Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, LOUIS HOFFMAN and LORI DANIELS, in their official capacities as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

CLINT BOLICK
NICHOLAS C. DRANIAS*
GOLDWATER INSTITUTE
SCHARF-NORTON CENTER
FOR CONSTITUTIONAL LITIGATION
500 East Coronado Road
Phoenix, AZ 85004
telephone: (602) 462-5000
facsimile: (602) 256-7045
ndranias@goldwaterinstitute.org

Counsel for Petitioners
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

"Every dollar I spend over the threshold starts feeding the alligator trying to eat me." JA364. That's the reality of Arizona's matching funds system as reported by traditional candidates in the peer-reviewed article, *Gaming Arizona: Public Money and Shifting Candidate Strategies*, PS: Political Science & Politics (2008), 41:527-532. JA365. By defeating the purpose of candidates engaging in campaign fundraising and spending – which is to win an election – Arizona's system silences core political speech without ever having to resort to the crude method of direct censorship. If the Court were to allow Arizona's system to stand, it would establish the precedent that the government is free to destroy the value of campaign speech by lavishing subsidies on opposing candidates for the explicit purpose of equalizing electoral opportunities.

On June 8, 2010, the Court was right to take the extraordinary step of stopping Arizona from paying matching campaign subsidies to publicly-financed candidates when competing privately-financed candidates and independent groups raised or spent campaign money above a "spending limit." This dramatic action was justified because Arizona's system obviously contravened the Court's 2008 decision in *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008), that the government violates the First Amendment when it imposes competitive disadvantages on candidates as a condition and consequence of exercising their First Amendment rights. Arizona's system also threatened the core First Amendment principle, most recently

applied in *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876 (2010), that the government must not meddle in the open marketplace of ideas to equalize electoral opportunities. Simply put, Arizona's "experiment" with triggered matching funds is a Frankenstein's monster grafted together from discarded bits and pieces of discredited regulatory regimes. The experiment needs to end.

REBUTTAL OF RESPONDENTS' FACTUAL ALLEGATIONS

1. *Arizona's Matching Funds System Has Deterred Campaign Speech.* Respondents inexplicably assert that Petitioners have failed to advance evidence showing that triggered matching funds deter campaign speech. CEI Br. 6, 19-20; CCEC Br. 11. Respondents should know better. They previously admitted that "political campaign consultants in Arizona routinely advise their traditional candidate clients to minimize the competitive disadvantage of Matching Funds by minimizing fundraising or spending to minimize matching funds and/or to alter their mode of fundraising and spending in ways that minimize the benefit of matching funds." JA927-28(¶101). Moreover, Petitioners, at least one Respondent, Petitioners' experts Drs. Osborn and Primo, Respondent's expert Dr. Green, and *ten* nonparty witnesses – including the current Arizona Attorney General – have all testified to the chilling effects that result from the threat of triggered matching funds; including fear of

triggering matching funds, hesitancy before engaging in campaign fundraising or spending, delay in campaign spending until the last possible minute, cancellation of specific campaign promotions, and refraining from campaign fundraising or spending altogether. McComish Br. 30-36; 10-239PA237-54, 296; JA1003-04; Record 13-4(4:25-28, 5-7:1-2), 357(52:19-25, 53:1-23). This testimony was corroborated by the peer-reviewed political science article, *Gaming Arizona*, which reported the results of survey responses from 69 candidates (40% traditional), including follow-up interviews with 16 candidates (25% traditional). JA363-72, 377.

2. *Dr. Green's Unscientific Testimony Disproves Nothing.* Dr. Green's quantitative theory that a deterrent effect from matching funds could only be proven if campaign spending were clustered around the spending limits that trigger matching funds is fatally flawed for at least four reasons. CEI Br. 7, 18; CCEC Br. 39-40. First, Dr. Green's clustering theory disregards the fact that the deterrent effect from matching funds typically causes candidates to delay or completely refrain from campaign fundraising or spending. Spending that *never happens* obviously cannot be measured by looking for clusters of *reported* spending around spending limits. Likewise, the fact that traditional candidates often delay spending until the eve of an election and then launch a barrage of spending well over the spending limit will not be revealed in the form of spending clusters around spending limits. Dr. Green's clustering theory thus

cannot measure much of the deterrent effect of matching funds.

Second, Dr. Green's opinion falsely assumes that the reported date of campaign spending reflects the actual timing of campaign finance decisions. In fact, there is no necessary connection between the *reporting* of fundraising and expenditures and the *decisions* that prompt them. The practices of Petitioner Bouie's campaign consultant, for example, often resulted in erratic reporting of campaign expenditures during the 2008 election cycle. 10-239PA299-300.

Third, Dr. Green's clustering theory does not grapple with the fact that independent expenditures are treated as if they were expenditures of traditional candidates, which means that matching funds are triggered when the sum of independent expenditures and candidate spending exceeds the relevant spending limit. A.R.S. § 16-952(C). Traditional candidates, who anticipate matching funds being triggered by independent expenditures, may refrain from campaign spending well before it could cluster around the relevant spending limit. As explained by Petitioner Bouie in the midst of the 2008 election cycle, "I feel compelled to conserve money for damage-control in anticipation of poorly-conceived independent expenditures backfiring after they triggered matching funds." Record 13-4(4:20-23).

Fourth, Dr. Green's quantitative theory is just not probative because it falsely assumes that speech regulations must measurably stifle speech to burden

speech. Even if traditional candidates courageously disregarded the obvious disadvantage of triggering government subsidies to their political opponents, just as Jack Davis disregarded the Millionaire's Amendment, that fact would not lift the burden imposed on them by the threat of matching funds. *Cf. Davis*, 554 U.S. at 732.

Dr. Green's failure to consider the foregoing facts in developing and testing his "clustering" theory reflects his deliberately uninformed methodology. JA969-70. He admitted not reading the Clean Elections Act. Record 357(16:25-17:1-2). He admitted having no experience in Arizona campaign consulting. *Id.* (7:2-19). He admitted ignorance of Arizona campaign tactics and strategies. *Id.* (9:10-14, 9:23-25, 10:1-19, 11:8-13). He did not read the depositions of fact witnesses. *Id.* (18:9-25, 19:1-22, 20:1-25, 21:3-25, 22:2-8, 29:13-25, 30:1-25). And he considered only the evidence that was given to him by defense counsel. *Id.* (21:3-25, 22:2-8).[1]

3. *Matching Funds Have Not Increased Free Speech.* To their credit, Respondents have abandoned their false district court testimony that independent

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[1] The district court's decision granting Petitioners' motion for summary judgment should be construed as impliedly striking Dr. Green's testimony. McComish Br. 86 n.6. Such relief is fairly included in the questions presented to the Court because an assessment of the admissibility of evidence is "a predicate" to their "intelligent resolution." *Cf. Ohio v. Robinette*, 519 U.S. 33, 38 (1996).

expenditures increased 3,300% between 1998 and 2006, which resulted from Respondents and their purported experts overlooking the fact that the electronic records they relied upon were obviously incomplete. 10-239PA278-86. But in now claiming that independent expenditures increased by "a massive 253%" between 1998 and 2006, Respondents neglect to mention that an entire banker's box of original campaign finance reports from 1998, which likely contained evidence of independent expenditures, was never produced by the Secretary of State. *Compare* CEI Br. 18, 58, *with* 10-239PA284 n.1. Consequently, all one can truthfully say is, *if* independent expenditures increased at all, they increased *no more* than 253%. 10-239PA279, 285-86. But this finding must kept in context: Arizona's increase in population of 32.37% between 1998 and 2006 was nearly *four times* that of the nation's population increase. *Id.* As a result, Arizona's increase in independent expenditures lagged per capita growth in national political action committee expenditures by *at least 33%*. *Id.*

Similarly, Respondents have laudably stepped away from their false district court candidate spending estimates, which were overstated "nearly 13 times" in one case and in another case "nearly 33 times the actual amount." JA917. But Respondents still misleadingly claim, "overall candidate expenditures increased between 29 and 67 percent and average candidate expenditures increased between 12 and 40 percent; general election spending by the top 10 percent of candidates increased by 16 percent." CEI

Br. 58. Respondents' first two representations lump together spending by traditional and participating candidates. JA916-17. And the last representation evades the implications of Arizona's 32.37% population growth between 1998 and 2006. 10-239PA285.

The truth is that average spending by traditional candidates in constant dollars between 1998 and 2006 has either lagged population growth or actually shrunk in absolute terms. As compared to population growth of 32.37%, an analysis of traditional candidate spending reveals that in constant dollars: a) average primary election spending by major party candidates, whose spending was in the top 10%, decreased 2.3% ($63,928.21 to $62,453.74); b) average general election spending by major party candidates, whose spending was in the top 10%, increased 15.7% ($40,354.05 to $46,685.08); and c) average total spending by major party candidates increased 24.4% between 1998 and 2006 ($23,164.37 to $28,806.84). 10-239PA290.

SUMMARY OF ARGUMENT

1. Respondents have disregarded the main lessons of *Citizens United* and *Davis*. The Court has repeatedly underscored the overriding importance of fully protecting unfettered and uninhibited political speech from government interference. *Citizens United*, 130 S.Ct. at 896; *Davis*, 554 U.S. at 739-40. This means individuals in a free society cannot be forced to

choose between silence or exercising their First Amendment rights and disseminating hostile speech. *Davis*, 554 U.S. at 739-40. The government cannot create a drag on the exercise of First Amendment rights by undercutting a candidate's purpose for speaking in order to equalize electoral opportunities. *Id.* The government cannot single out disfavored speakers for value-laden content-based speech regulation. *Citizens United*, 130 S.Ct. at 898-99, 908. And the right to speak freely about electoral politics cannot be held hostage to dueling expert witnesses and years of complex litigation. *Id.* at 891, 896. Arizona's matching funds system violates all of these principles; and its multipronged assault on freedom of speech has had severe real world consequences.

2. There is no record evidence of any traditional candidate or any independent group romping through an Arizona election uninhibited and unaffected by the threat of triggering matching funds. To the contrary, "[f]irst time candidates, veteran candidates, sophisticated independent expenditure committees and even a member of the CCEC all confirmed in their interviews or testimony that the matching funds component of the Clean Election[s] Act created a drag or 'chilling effect' on their campaign fundraising and expenditures that tended to restrict and delay campaign fundraising and spending." 10-239PA231. Despite this fact, Respondents have failed to show that imposing the speech burden of triggered matching funds substantially or directly advances any governmental interest, compelling or otherwise, in a

reasonably or narrowly tailored manner. Far from advancing anticorruption purposes, the only real explanation for Arizona's matching funds system is that it is chiefly a comprehensive effort by the government to manipulate electoral opportunities.

I. Matching funds trigger strict scrutiny under *Davis*.

Respondents have not asked the Court to reconsider and overturn *Davis*. Instead, by tallying up the number of times the Court mentioned "asymmetrical" or "discriminatory" contribution limits, Respondents essentially contend that the rationale and holding of *Davis* is confined to the Millionaire's Amendment as a special case of impermissible speech regulation. CEI Br. 25. But the rationale underpinning the result reached in *Davis* cannot logically be confined to just striking down the Millionaire's Amendment.

The "unprecedented penalty" that concerned the Court in *Davis* was not the intrinsic unfairness of self-financed millionaire candidates being unable to raise funds from third parties on equal terms as their donor-financed opponents. The Court, after all, did not reach any equal protection claim in rendering its decision. *Davis*, 554 U.S. at 744 n.9. Rather, the "unprecedented penalty" that concerned the Court consisted of causing Jack Davis' campaign spending to give his opponent a "fundraising advantage," thereby forcing him to "help disseminate hostile speech." *Id.* at 738-39.

Underpinning the outcome of *Davis* was the Court's recognition that in the zero-sum "competitive context of electoral politics," one candidate's gain is the other candidate's loss. *Id.* at 739. By undermining the competitive purpose of campaign spending, the Millionaire's Amendment imposed a "drag" on the unfettered exercise of First Amendment rights. By this standard, Arizona's matching funds system is clearly more burdensome on speech than the Millionaire's Amendment.

Arizona's guarantee that government subsidies will be given to participating candidates imposes a far more onerous penalty than the mere threat an opponent might raise more campaign money in asymmetrical increments. It gives participating candidates the tangible fundraising advantage of free money and even more directly causes the dissemination of hostile speech. The resulting drag on the exercise of First Amendment rights created by the *certainty* of triggering government subsidies is more speech-inhibiting than the drag created by the mere *possibility* of successfully hustling for third party contributions. This obvious point was even recognized by the Solicitor General during oral arguments in *Davis*, who defended the Millionaire's Amendment while conceding, "if they went further and basically said we're going to give you public financing if your opponent self-finances, and we're going to give you two dollars for every dollar that your opponent self-finances, I think at that point as a practical matter the regime would operate as a ban on – as a cap, just like this Court

held in *Buckley*." *Davis v. Federal Election Comm'n*, 2008 U.S. Trans. LEXIS 40 *39 (April 22, 2008).

A. Triggered matching funds do not impose a permissible "strategic" choice.

Nevertheless, Respondents still advance the Ninth Circuit's claim that triggered matching funds impose only an insubstantial "strategic" choice on traditional candidates and independent groups. CEI Br. 16. But the choices traditional candidates and independent groups make under the threat of triggering matching funds are no more "strategic" than the choices made by citizens under the threat of fines for illegal political activity. As chilling effect doctrine illustrates abundantly, a regulatory regime is not shielded from challenge under the First Amendment if, instead of being physically silenced, people are allowed to "strategically" curtail their speech based on an assessment of the risks and rewards imposed by the law. McComish Br. 53-57; Wyoming Liberty Br. 17-35.

B. The choices made by participating candidates do not justify triggered matching funds.

Respondents also claim that the purportedly "voluntary" nature of Arizona's matching funds system, and the speech limits assumed by participating candidates, wash-out any cognizable burden on traditional candidates. CCEC Br. 29. But as emphasized in *Davis*, 554 U.S. at 739, and *Citizens United*, 130

S.Ct. at 896, individuals and groups are entitled to a baseline of freedom from governmental interference with the unfettered exercise of First Amendment rights. A participating candidate's choice to take government money in exchange for agreeing to various spending and fundraising limits cannot justify imposing the burden of triggered matching funds on traditional candidates and independent groups, who are entitled to be left alone.

C. Triggered matching funds are not like symmetrically elevated contribution limits.

Finally, Respondents claim Arizona's system is saved by dicta in *Davis* that the First Amendment would not be offended by a system that would trigger symmetrically elevated contribution limits for all competing candidates. CEI Br. 26. But while it is virtually tautological that freedom of speech could not be violated by a hypothetical system that would evenhandedly relax government speech restraints, Arizona's matching funds system simply does *not* evenhandedly relax government speech restraints. Moreover, unlike the hypothetical system contemplated in *Davis*, Arizona's matching funds system does not confront candidates with the prospect of their speech generating *freer* speech by *all* participants in an electoral contest that is *not* skewed by the government to favor some candidates over others; rather, Arizona's system wrongfully threatens traditional candidates with the prospect of helping to

disseminate disproportionate *government-subsidized* speech by participating candidates in an electoral contest that has been manipulated to equalize electoral opportunities. In short, it is a complete *non sequitur* to analogize Arizona's matching funds regime to a system that would trigger symmetrically elevated contribution limits for all competing candidates.

II. Matching funds trigger strict scrutiny because the system violates principles of speaker autonomy.

Respondents contend that Arizona's matching funds system does not offend the principles of speaker autonomy applied in *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Calif.*, 475 U.S. 1 (1986), arguing that the rule against forcing people "to help disseminate hostile speech" only applies to circumstances of forced association, forced direct subsidization of private speech, forced access to private property, or interference with editorial control. CEI Br. 37-38; CCEC Br. 32-35. But even if dicta in prior cases could be read as limiting *Pacific Gas & Elec. Co.* to these narrow circumstances, *Davis* has clarified that this interpretation of the law is incorrect. In striking down the Millionaire's Amendment, *Davis* applied *Pacific Gas & Elec. Co.* even though Jack Davis was not forced to associate with his opponents, give them access to his property, personally subsidize their fundraising, or give them editorial control over his messaging. It was sufficient that the Millionaire's Amendment forced Davis "to help disseminate hostile

speech" when he exercised his First Amendment rights. *Davis*, 554 U.S. at 739. Following *Pacific Gas & Electric* and *Davis*, strict scrutiny must be applied to Arizona's system for the same reasons.

III. Matching funds trigger strict scrutiny because the system enforces value-laden speaker and content-based speech regulation.

Respondents contend that Arizona's matching funds system does not trigger strict scrutiny because it does not enforce a governmental preference for particular viewpoints. CEI Br. 32-33. But the rule requiring strict scrutiny for speaker or content-based speech regulation does not only apply to laws that enforce a governmental preference for particular viewpoints. It also applies to speech regulations that are more generally "value-laden;" i.e., prompted by governmental "animosity and distrust" of the merits of the speech regulated or the merits of what the regulated speaker would say. *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 696 (1990) (Kennedy, J., dissenting). Moreover, in *Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 658 (1994), the Court underscored that *Buckley v. Valeo*, 424 U.S. 1, 17 (1976), held that the rule encompasses speech regulations that are meant "to ensure that the political speech" of the targeted speaker does "not drown out the speech of others." This is because such regulations embody a value judgment by the government that there would

be something undesirable about allowing the targeted speaker's speech to stand without rebuttal. *Pacific Gas & Elec. Co.*, 475 U.S. at 12-15 (citing *Miami Herald Publishing v. Tornillo*, 418 U.S. 241, 258 (1974)).

By these standards, Arizona's matching funds system clearly enforces value-laden speaker and content-based speech regulation. First of all, Arizona's system indisputably regulates similar speech differently depending on who is speaking. For example, if a traditional candidate and a participating candidate spend money opposing the same participating candidate in the same race, only the traditional candidate will trigger matching funds. A.R.S. § 16-952(A), (B). Secondly, the CCEC must assess the content of independent expenditures before awarding matching funds because independent groups can avoid triggering matching funds in a contest between traditional and participating candidates *only if* they oppose traditional candidates. A.R.S. § 16-952(C). Thirdly, by labeling public financing "clean campaign funding" in the context of a system that castigates the "influence of special interest money," Arizona's system obviously paints a "Scarlet Letter" on private campaign financing, traditional candidates and those who would support them, reflecting a governmental judgment that disparages the legitimacy of their campaign speech. *See* A.R.S. §§ 16-940(A), 16-951. Fourthly, and finally, there is no question that triggered matching funds are designed "to ensure that the political speech" of traditional candidates and independent groups does

"not drown out the speech" of participating candidates. Arizona's matching funds system thus triggers strict scrutiny as value-laden speaker and content-based speech regulation. *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994).

IV. Matching funds cannot withstand any level of heightened scrutiny because the system is superfluous and counterproductive.

Respondents cannot carry their burden of proving that triggered matching funds advance anti-corruption purposes under any level of heightened scrutiny. McComish Br. 62-85. They have advanced no evidence to counter the sworn testimony of Clean Elections Commissioner Lori Daniels that the Clean Elections Act does not prevent actual or apparent corruption. JA661-62. Indeed, Dr. Green freely admitted he had no direct "statistical or other evidence that demonstrates" Arizona's system prevents actual or apparent corruption. Record 321(8:2-7). Moreover, Respondents have advanced no evidence to rebut Dr. Osborn's testimony that Arizona's extremely low contribution limits and extensive disclosure requirements are adequate by themselves to prevent actual or apparent corruption. 10-239PA109, 255-75; JA462-64, 474; Record 143-6(6-7), 144-4(18-21), 144-5(1-3, 7), 145-1(36:13-25, 37:1-20). Respondents have instead rested on Dr. Green's pontification that Dr. Osborn's statistical analysis was "deeply flawed." CEI Br. 45 n.13. This is despite the fact that Dr. Green ignored Dr. Osborn's *qualitative* analysis and deliberately "closed his eyes" to reading Dr. Osborn's supporting

doctoral dissertation. Record 357(17:12-14, 23:5-25, 24:2-22, 27:23-25, 28:1-24, 38:10-25, 39:1-7, 43:6-10).

Not even the sliding scale applied in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), countenances such complete evidentiary abdication. It is simply not settled law that public financing in any form and under all circumstances always prevents actual or apparent *quid pro quo* corruption. To the contrary, even Justices who favor campaign finance regulation have recognized that, depending on the circumstances, public financing can itself enhance "the danger of real or perceived corruption." *See, e.g., Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 516-17 (1985) (White, J., dissenting). In the context of Arizona's rigorous system of campaign finance regulation, Respondents' notion that public financing in the form of triggered matching funds "is a direct effort to fight corruption" is completely implausible. *Compare* CCEC Br. 55 *with* 10-239PA264-70.

The bottom line is that triggered matching funds are superfluous because there is no significant risk of actual or apparent *quid pro quo* corruption from private campaign financing in Arizona. 10-239PA264-70. In constant dollars, Arizona's current $410 legislative and $840 statewide contribution limits are between one-tenth and one-fifth of the limits that were upheld in *Buckley* as preventing actual or apparent corruption.[5]

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[5] Adjusted for inflation, a $1000 contribution limit in 1974 would be a $4,467.00 contribution limit today. *See* Bureau of

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All campaign expenditures and contributions are fully disclosed. And bundling of private contributions is comprehensively regulated a) by an aggregate cap on political committee contributions, b) by requiring organized efforts to pool contributions to register as political committees, which entails a vast array of disclosure requirements, and c) by a general prohibition on intentional efforts to circumvent contribution limits. *See* A.R.S. §§ 16-901(19), 16-902.01, 16-905(1)(6); 1990 Ariz. Op. Atty Gen. 121. The Court has never held that public financing prevents actual or apparent corruption in a system, like Arizona's, that permits only *tiny*, fully disclosed, heavily regulated private campaign contributions. Indeed, Arizona's matching funds system is counterproductive because, unlike lump sum public financing, triggered matching funds are easily rendered the functional equivalent of unlimited and undisclosed private contributions through various deceptive gaming strategies.

Dr. Osborn testified unequivocally based on his extensive experience as a professional campaign consultant that gaming strategies are routinely used and will continue to be used because of the incentives created by triggered matching funds. 10-239PA270-75. Even Dr. Green admitted that "the Arizona Clean Elections System effectively allows private individuals to bypass candidate contribution limits by running as

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Labor Statistics Inflation Calculator, http://146.142.4.24/cgi-bin/cpicalc.pl?cost1=1000&year1=1974&year2=2011 (last visited March 13, 2011)

a self-financed traditional candidate who is teamed with participating candidates." Record 321(12:13-17, 13:1). Moreover, it is undisputed that a) self-financed traditional candidate Sam George deliberately triggered $1,000,000 to his teamed participating candidates, b) Republican candidates for the same office boasted of a similar strategy, and c) hundreds of signs were posted during the 2008 election cycle using the tactic of reverse targeting. McComish Br. 71-75.

Although Respondents trumpet administrative rules that purportedly restrict overt candidate teaming, such regulations only illustrate the severity of the problem. The rules against overt teaming cannot prevent would-be donors to participating candidates from running as "placeholder" traditional candidates in order to trigger matching funds to their *covertly* teamed (or merely favored) participating candidates. Likewise, rules against overt teaming cannot stop donors or independent groups from contributing to traditional candidates in order to trigger matching funds to favored participating candidates. And such rules cannot stop independent groups from using reverse targeting to trigger matching funds to preferred competing participating candidates.

Until the government develops the capacity to read minds, triggered matching funds will inevitably be gamed to serve deceptively as the functional equivalent of unregulated private campaign financing. 10-239PA270-71. And to the very extent that unregulated private campaign financing is asserted to create actual or apparent corruption, so will

triggered matching funds. Consequently, Arizona's matching funds system fails any level of heightened scrutiny because it is both superfluous and counterproductive.

V. Matching funds cannot withstand strict scrutiny because lump sum public financing is less restrictive and feasible.

Respondents have failed to carry their burden of proving that lump sum public financing is not a feasible less restrictive alternative to triggered matching funds. McComish Br. 83-86. Lump sum public financing does not link the exercise of First Amendment rights by traditional candidates and independent groups to the dissemination of hostile speech. It is therefore plausible to conclude that lump sum public financing is less burdensome than an equivalent amount of triggered matching funds. Respondents have advanced no evidence showing otherwise. Likewise, nothing supports the claim that replacing matching funds with lump sum public financing "would make the Act prohibitively expensive." CEI Br. 55. The Court can take judicial notice that the CCEC has continuously returned tens of millions of dollars to the general fund for years. *Compare* McComish Br. 85 n.5 *with Crawford v. Marion County Election Bd.*, 553 U.S. 181, 199 (2008) (relying on "evidence in the record and facts of which we may take judicial notice").

But even if the CCEC's resources were more limited than its press release would suggest, Respondents

advance a straw man argument in contending that there is not enough money to disburse lump sum public financing equal to triple the initial disbursement of clean campaign funds. CEI Br. 54. Respondents have advanced no evidence that triple the initial disbursement of clean campaign funding is needed for a viable system of public financing – especially when nearly 50% of races in the 2010 election cycle were won by participating candidates with only the initial disbursement. McComish Br. 85 n.5.

Respondents' argument that a single lump sum amount would underfund or overfund candidates due to the disparity of campaign spending from legislative district to district is also a straw man. Lump sum public financing does not have to be "one size fits all." To deal with the range of spending levels that vary from legislative district to district, a carefully calibrated system of lump sum financing could simply target average spending levels in each district using prior election data adjusted by population and inflation. Given that Arizona's matching funds system has overfunded participating candidates as much as 136% more than traditional candidates on average, there is no reason to believe that Arizona's system of matching funds is intrinsically better calibrated than lump sum public financing. 10-239PA290-92. Because Respondents have failed to show that lump sum public financing is not a feasible less restrictive alternative to triggered matching funds, Arizona's matching funds system fails strict scrutiny.

VI. Matching funds fail any level of heightened scrutiny because the system is chiefly interested in equalizing electoral opportunities.

Respondents claim that Petitioners are plumbing the motives of the drafters of Arizona's matching funds system in claiming that it is chiefly interested in equalizing electoral opportunities. CEI Br. 40; CCEC Br. 47-48. The converse is true. Petitioners are merely taking Arizona law at its word. It is Respondents who urge the Court to disregard the text, context and enforcement of the law in order to adopt the implausible position Arizona's system was primarily motivated by the goal of preventing *quid pro quo* corruption stemming from private campaign corruption.

The Clean Elections Act's chief interest in rebalancing influence and resources among competing candidates and interest groups is clear and unambiguous. A.R.S. § 16-940(A) specifically describes the purpose of the system as to diminish "the influence of special interest money." A.R.S. § 16-940(B)(2), (4), (7) criticizes the prior system as having given "incumbents an unhealthy advantage over challengers," "suppresse[d] the voices and influence of the vast majority of Arizona citizens in favor of a small number of wealthy special interests," and driven "up the cost of running for state office, discouraging otherwise qualified candidates who lack personal wealth or access to special-interest funding." A.R.S. § 16-952 specifically describes Arizona's matching funds provision as "Equal Funding of Candidates." Triggered

matching funds are repeatedly described by the CCEC in its rules as "equalizing funds." *CCEC Admin. Rules* R2-20-113; JA885. And the CCEC has repeatedly taken the official position that the goal of Arizona's system is to "level the playing field." JA308, 457, 840, 854-55.

Of course, Respondents essentially contend that this verbiage is mere puffery meant to encourage voter participation and describe the goal of promoting competitive elections. CEI Br. 60; CCEC Br. 13-15, 49-50. But whether an election is competitive is necessarily judged in relation to the opportunity to become elected. By claiming that Arizona's matching funds system is aimed at generating competitive elections or "expanding" electoral opportunities, Respondents are necessarily admitting that the system is aimed at manipulating electoral opportunities. *Cf. Scott v. Roberts*, 612 F.3d 1279, 1293 (11th Cir. 2010). Whether or not government manipulation of electoral opportunities to generate competitive elections could indirectly serve anticorruption purposes, the Court has long held fast to the bright line rule that the First Amendment does not condone such governmental intervention into electoral contests. McComish Br. 64-65. The risks associated with the government burdening speech in order to pick winners and losers are simply too great. *Citizens United*, 130 S.Ct. at 904-05; *Davis*, 554 U.S. at 742-43.

But it should still be emphasized that the text of the Clean Elections Act only contains vague allusions to the sort of appearances and influences that the

Court has already rejected as the equivalent of actual or apparent *quid pro quo* corruption in *Citizens United*. *Compare* A.R.S. § 16-940(A), (B) *with Citizens United*, 130 S.Ct. at 909-12. The Act makes no reference to AzScam or "corruption" at all. These omissions constitute substantial evidence that Arizona's matching funds system has little, if anything, to do with preventing actual or apparent *quid pro quo* corruption.

Significantly, the bipartisan legislative committee convened to recommend reforms to prevent another AzScam specifically rejected public financing in 1991. JA116-21; Record 352(2-6). Instead, it recommended, and Arizona adopted in 1993, new provisions and definitional changes that closed loopholes in Arizona's system of exceedingly low contribution limits and comprehensive campaign finance disclosures. *Id.* Thus, it makes perfect textual *and* contextual sense to conclude that Arizona's matching funds system is *not* "chiefly interested" in preventing actual or apparent *quid pro quo* corruption – it was overlaid on a system of private campaign finance regulation that addressed that goal five years earlier.

Not surprisingly, Respondents ultimately retreat to the Ninth Circuit's fallback position that the goal of "leveling the playing field" evidences only one interest among many others, which cannot alone condemn Arizona's system. But whatever diversity of interests Arizona's system purportedly serves, the Court is still duty-bound by the First and Fourteenth Amendments to assess whether the system is chiefly interested in equalizing electoral opportunities

through resource or influence leveling. *Davis*, 554 U.S. at 740 n.7. In so doing, the Court simply cannot ignore the clear implications of A.R.S. § 16-954(F), which Respondents fail to address in their briefings.

When inadequate public financing exists to pay matching funds, A.R.S. § 16-954(F) transforms the matching funds trigger into a mechanism that permits participating candidates to engage in private campaign financing to match fundraising and expenditures by traditional candidates and independent groups dollar-for-dollar. This provision of Arizona's law enables participating candidates to obtain up to twice as much private campaign financing as public financing. In other words, when the goal of keeping candidates "clean" clashes with the goal of equalizing electoral opportunities, the former yields to the latter. There could not be a more clear textual basis for concluding Arizona's matching funds system is chiefly interested in equalizing electoral opportunities. The lingering atmospherics of the decades-old AzScam scandal cannot salvage this patently unconstitutional policy choice.

Still, from a certain perspective, Respondents are right. The text of the law *is* misleading. Arizona's matching funds system does not merely equalize influence and resources among candidates and interest groups. Some candidates and interest groups are more equal than others. Under the guise of "leveling the playing field" and "Equal Funding for Candidates," Arizona's system typically unleashes a deluge of resources in favor of participating candidates.

McComish Br. 29-32, 67-68. The electoral playing field is "leveled-up" to create an uphill contest for traditional candidates and independent groups who do anything other than oppose traditional candidates.

The term "equalizing funds" and the phrase "leveling the playing field" are euphemistic. They actually denote a system that comprehensively manipulates the incentives underpinning campaign fundraising and spending to undermine the electoral opportunities of traditional candidates. Arizona's system can be seen as "equalizing" electoral opportunities and "leveling the playing field" only through the eyes of a zealot who believes that disproportionate funding of participating candidates and incentivizing independent groups to oppose traditional candidates is necessary to equalize the disproportionate "voices and influence" of "wealthy special interests." Such an "equalizing" purpose is obviously contrary to the principles articulated and enforced in *Citizens United* and *Davis*. Regardless of whether the Court applies strict or intermediate scrutiny, Arizona's matching funds system must be struck down under the First Amendment for being chiefly interested in manipulating electoral opportunities under the banner of egalitarianism. *Citizens United*, 130 S.Ct. at 904-05; *Davis*, 554 U.S. at 740 n.7, 742-43.

CONCLUSION

Respondents deny that triggered matching funds chiefly aim to equalize resources and electoral opportunities, even though A.R.S. § 16-952 is plainly titled "Equal Funding of Candidates." They insist that Arizona's system has nothing to do with equalizing influence, despite A.R.S. § 16-940 aspiring to diminish "the influence of special interest money." They contend that no one is compelled to help disseminate hostile speech as a condition of speaking, while admitting that equalizing funds are triggered by continuous, compulsory disclosures of campaign financing by traditional candidates. They dispute the existence of a chilling effect from the threat of triggered matching funds, while admitting that campaign consultants advise their clients to delay or cease their campaign spending and fundraising to avoid that threat. They deny that Arizona's "Clean Elections" system engages in content-based discrimination against traditional candidates, even though independent groups can only avoid triggering matching funds to competing publicly-financed candidates by *opposing* traditional candidates. They claim gaming of the system is only hypothetical while trumpeting efforts to restrict gaming of the system. Finally, they claim the purpose of triggered matching funds is really to prevent corruption even though that purpose appears nowhere among the Clean Elections Act's verbose findings, and a bipartisan legislative committee explicitly *rejected* public financing as the remedy for AzScam *seven years* before Arizona's system became law.

In essence, the opposition asks, "Who are you going to believe, me, or your own eyes?" The answer should be as obvious as when Chicolini Marx posed the question in *Duck Soup*. The case for sustaining Arizona's matching funds system under *Davis* and *Citizens United* is just not credible. Accordingly, the Court should vindicate the First and Fourteenth Amendments by restoring the district court's permanent injunction on A.R.S. § 16-952, together with appropriate ancillary relief as previously requested.

Respectfully submitted,

CLINT BOLICK
NICHOLAS C. DRANIAS*
GOLDWATER INSTITUTE
SCHARF-NORTON CENTER
FOR CONSTITUTIONAL LITIGATION
500 East Coronado Road
Phoenix, AZ 85004
telephone: (602) 462-5000
facsimile: (602) 256-7045
ndranias@goldwaterinstitute.org

Counsel for Petitioners
**Counsel of Record*

AMICUS CURIAE BRIEF

16

Nos. 10-238 and 10-239

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In the Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ET AL., PETITIONERS

v.

KEN BENNETT, IN HIS OFFICIAL CAPACITY AS ARIZONA SECRETARY OF STATE, ET AL.

JOHN MCCOMISH, ET AL., PETITIONERS

v.

KEN BENNETT, IN HIS OFFICIAL CAPACITY AS ARIZONA SECRETARY OF STATE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
WILLIAM M. JAY
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

10-238 & 10-239 (43)

QUESTION PRESENTED

Whether the "matching funds" provisions of the Arizona Citizens Clean Elections Act violate the First Amendment.

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In the Supreme Court of the United States

No. 10-238

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ET AL., PETITIONERS

v.

KEN BENNETT, IN HIS OFFICIAL CAPACITY AS ARIZONA SECRETARY OF STATE, ET AL.

No. 10-239

JOHN MCCOMISH, ET AL., PETITIONERS

v.

KEN BENNETT, IN HIS OFFICIAL CAPACITY AS ARIZONA SECRETARY OF STATE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case presents the question whether Arizona's system of public financing for state elections violates the First Amendment. More specifically, petitioners contend that their own campaign-related speech is unconsti-

tutionally burdened because the amount of money the State provides to a publicly financed candidate depends in part on the amounts raised and spent by that candidate's privately financed opponent.

Congress has adopted systems of public financing for presidential primary and general elections. See Presidential Election Campaign Fund Act (Presidential Fund Act), 26 U.S.C. 9001 *et seq.*; Presidential Primary Matching Payment Account Act (Presidential Primary Act), 26 U.S.C. 9031 *et seq.* Like Arizona, Congress has adopted an optional public-financing system while separately limiting monetary contributions to candidates for federal office, see 2 U.S.C. 441a(a).

Although neither federal statute uses the sort of triggered "matching funds" that are the specific subject of this litigation, Congress has previously considered, and both Houses have previously passed, legislation to adopt such a mechanism. See 147 Cong. Rec. 4668 (2001) (S. Amend. 148, 107th Cong., 1st Sess. (2001) (§§ 503(c), 504(2), 505(b))); S. 3, 103d Cong., 1st Sess. § 101(a), sec. 503(b)-(d) (1993) (passed Senate); H.R. 3, 103d Cong., 1st Sess. § 121, secs. 601(d), 604(f) (1993) (passed House). In addition, other provisions of federal law have been the subject of claims like the plaintiffs' contention here that an alleged burden on First Amendent rights warrants strict scrutiny. The United States therefore has a significant interest in the resolution of the questions presented.

STATEMENT

Through the initiative process, Arizona's citizens have enacted the Citizens Clean Elections Act (Arizona Act or Act), Ariz. Rev. Stat. Ann. § 16-940 *et seq.* (West 2006 & Supp. 2010), a voluntary system of public financ-

ing in which candidates for state office may elect to participate. Petitioners argue that the Arizona Act's formula for allocating "matching funds" to publicly financed candidates, which considers the fundraising or spending of those candidates' opponents, violates the First Amendment. The district court permanently enjoined the matching-funds provision. Pet. App. 45-77.[1] The court of appeals reversed and held the matching-funds provision valid on its face. *Id.* at 1-44.

1. a. Any eligible candidate for Arizona state office may decide to participate in the Arizona Act's public-financing system. To be eligible, a candidate must raise a specified number of $5 contributions from eligible voters, see Ariz. Rev. Stat. Ann. §§ 16-946, 16-950 (West 2006 & Supp. 2010), and must agree to abide by certain limits that apply only to publicly financed candidates. A participating candidate must agree not to accept any campaign contributions (except for certain small contributions that may be raised during the qualifying period); not to spend more than $500 of his own money; and not to exceed the Arizona Act's spending limit for the relevant election. *Id.* § 16-941(A) (West Supp. 2010).

In return, the Act provides participating candidates with public funds to spend on their campaigns. The State disburses those funds in two steps. First, at the beginning of the election period, each candidate receives a lump sum that is the default spending limit for that election. Ariz. Rev. Stat. Ann. § 16-951(A)(1) and (C) (West 2006).[2] Second, during the election period, the

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[1] References to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 10-238.

[2] Candidates who are unopposed, or who run as independents and therefore do not compete in any primary election, receive lower amounts. Ariz. Rev. Stat. Ann. § 16-951(A)(2)-(3) and (D) (West 2006).

spending limit may be adjusted if candidates receive "matching funds." See *id.* § 16-952 (West Supp. 2010).

Matching funds are triggered when a privately financed candidate raises or spends more money on the election than the default sum allotted to publicly financed candidates.[3] Spending by independent groups may also trigger matching funds if it unambiguously supports or opposes a candidate. Once a privately financed candidate reaches the threshold, then for each additional $1 that he raises or spends (or that independent groups spend to support him or attack his opponents), the spending limit for publicly financed candidates is increased by $1 (minus a six-percent deduction corresponding to fundraising expenses) and each publicly financed candidate in the race receives an additional $1 in matching funds (minus six percent). Ariz. Rev. Stat. Ann. § 16-952(A)-(C) (West Supp. 2010).

Matching funds are also subject to an absolute cap. No matter how much money a privately financed candidate or independent group spends, matching funds cannot exceed two times the initial default spending limit for the relevant election. Ariz. Rev. Stat. Ann. § 16-952(E) (West Supp. 2010). Thus, the upper spending limit for any publicly financed candidate is three times the amount of the State's original lump-sum payment (*i.e.*, the original grant itself plus two times that amount in matching funds).

b. A candidate who does not wish to participate in the public financing system is not required to do so. A candidate who forgoes public financing may raise funds

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[3] In the primary election, matching funds are triggered by a privately financed candidate's expenditures; in the general election, by contributions he receives. Ariz. Rev. Stat. Ann. § 16-952(A)(3) (West Supp. 2010).

from individuals and political committees (subject to statutory limits on contributions from any single source, Ariz. Rev. Stat. Ann. § 16-905 (West Supp. 2010)); he may spend unlimited amounts of his own money on his campaign; and his total campaign expenditures are not limited by law.

2. Petitioners are past, present, and future candidates for state office and political committees that make independent expenditures in state elections. Petitioners in No. 10-239 brought this action, arguing that the matching-funds provision violates the First Amendment. Petitioners in No. 10-238 intervened as plaintiffs. See Pet. App. 13-14. All petitioners contended that the matching-funds provision prevented or discouraged them from spending as much as they otherwise would against publicly financed opponents. See *id.* at 14-15.

3. The district court granted summary judgment for petitioners and enjoined the operation of the matching-funds provision. Pet. App. 45-78.

The district court stated that petitioners had presented only "vague" evidence that the Arizona Act burdened their First Amendment rights. Pet. App. 52.[4] The court understood petitioners to argue that their rights were burdened because, if they "spend as much as they wish," Arizona will give a corresponding amount of money to their publicly financed opponents. *Id.* at 63. The court stated that, given the First Amendment's purpose "to 'secure the widest possible dissemination of

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[4] Petitioner Martin, then the state treasurer, made admissions in his deposition that led the district court to conclude that matching funds had not been a "serious concern" in his campaigns. Pet. App. 56. Nor did the political-committee petitioners persuade the district court that they had ever been dissuaded by matching funds from spending money; the court identified a factual dispute on that point. *Id.* at 58-59.

information from diverse and antagonistic sources,' it seems illogical to conclude that the Act creating more speech is a constitutionally prohibited 'burden' on [petitioners]." *Id.* at 64 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 49 (1976) (per curiam)).

The district court nevertheless held the matching-funds provision unconstitutional under *Davis* v. *FEC*, 554 U.S. 724 (2008). The Court in *Davis* invalidated the "Millionaire's Amendment," 2 U.S.C. 441a-1(a), under which a candidate's decision to self-finance his campaign allowed his opponents (but not the self-financing candidate himself) to invoke a different, more permissive set of rules, including trebled contribution limits and unlimited party coordinated spending. 554 U.S. at 736-744. The district court concluded that petitioners "face a choice very similar to that faced in *Davis*" because they must either "abide by a limit on personal expenditures" or face "negative consequences" in the form of "having [their] opponent[s] receive additional funds." Pet. App. 65. The court applied strict scrutiny, see *id.* at 67, and concluded that the matching-funds provision is not narrowly tailored to advance a compelling interest, *id.* at 67-70. The court further held that the matching funds provision was not severable, *id.* at 71-74, and it enjoined the implementation of the Arizona Act in its entirety.

4. The court of appeals reversed. Pet. App. 1-44.

The court of appeals held that *Davis* was "easily and properly distinguished" and that petitioners had shown only an "indirect or minimal" burden on their speech. Pet. App. 24, 27. The court observed that none of the petitioners had "pointed to any specific instance in which she or he has declined a contribution or failed to make an expenditure for fear of triggering matching funds." *Id.* at 29. The court concluded that the Arizona Act im-

posed no significant burden on petitioners' exercise of constitutional rights because "the First Amendment includes 'no right to speak free from response.'" *Id.* at 30 (quoting *Daggett v. Commission on Governmental Ethics & Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000)).

The court of appeals accordingly applied a form of intermediate scrutiny, and it rejected petitioners' constitutional challenge. Pet. App. 33-37. The court explained that "[t]he State has a sufficiently important interest in preventing corruption and the appearance of corruption," and that "Arizona has a long history of *quid pro quo* corruption." *Id.* at 33. The court concluded that the matching-funds provision bears a substantial relation to the State's anticorruption interest because "[i]n order to promote participation in the program, * * * the State must be able to ensure that participating candidates will be able to mount competitive campaigns, *no matter what the source of their opponent's funding*." *Id.* at 36. The court further explained that "if the Act were to raise the amount of its lump-sum grants and do away with matching funds altogether, it would make the Act prohibitively expensive and spell its doom." *Id.* at 37.

Judge Kleinfeld concurred. Pet. App. 38-44. He emphasized that providing public funds to participating candidates "imposes no contribution or spending limits" and therefore "does not restrict speech at all." *Id.* at 40. He explained that, although privately financed candidates may sometimes "make strategic decisions in response to the public funding scheme," that effect "is not a restriction on speech." *Ibid.*; see *id.* at 40-41 ("The kinds of strategic choices generated by the Arizona rules do not differ in kind from the choices presented to candidates by other election laws.").

SUMMARY OF ARGUMENT

I. The Arizona Act's matching-funds provision is not subject to strict scrutiny because that provision neither directly restricts, nor severely burdens, petitioners' own election-related expenditures. The government's discretion is at its height when it allocates its own funds. Petitioners contend that the matching funds provision creates a disincentive to speak because privately financed candidates and their supporters may sometimes forgo particular expenditures in order to limit the resources available to their publicly financed opponents. This Court's decisions make clear, however, that any such disincentive is not the sort of severe burden that can trigger strict scrutiny.

Petitioners also argue that the matching-funds provision burdens or penalizes their own speech by treating that speech as a trigger for additional outlays to petitioners' publicly financed opponents. Petitioners acknowledge, however, that the Arizona Act would be constitutional if the State simply provided each participating candidate the maximum amount (*i.e.*, three times the amount of the initial grants available under current law) at the outset, without regard to the sums raised or spent by participants' privately financed opponents. Using the matching-funds mechanism instead of that more profligate approach both conserves state resources and reduces the incidence of financial disparities between publicly and privately financed candidates, without in any way increasing the burdens on privately financed candidates or their supporters.

Petitioners' reliance on *Davis* is misplaced. Under the statute (known as the "Millionaire's Amendment") at issue in *Davis*, a self-financing candidate's expenditure of specified amounts of personal funds triggered a regu-

latory framework under which the self-financing candidate was subject to much more stringent contribution limits than his opponent. Characterizing that disparate treatment of competing candidates as "unprecedented" (554 U.S. at 739) and "discriminatory" (*id.* at 740), the Court held that the Millionaire's Amendment unconstitutionally burdened the self-financing candidate's exercise of First Amendment rights. Under the Arizona Act, by contrast, petitioners' campaign spending simply triggers increased monetary outlays that, under petitioners' own theory, the State could have provided from the outset. And far from being the beneficiaries of a "discriminatory" regulatory framework, publicly financed Arizona candidates are subject to much more severe spending and fundraising restrictions than their privately financed opponents.

The Arizona Act's matching-funds mechanism is not analogous to compelled-speech laws that this Court has invalidated. Petitioners are not required to pay for, to disseminate, or to identify themselves with their opponents' messages.

II. The Arizona Act's matching-funds provision satisfies exacting scrutiny. This Court has recognized that voluntary public-financing programs are a constitutionally permissible means of preventing actual and apparent corruption of office-holders. That Arizona also limits contributions does not negate the possibility of such corruption. And by obviating the need for candidates to solicit donations to amass adequate resources under applicable contribution limits, public financing serves a further important interest by freeing office-holders to focus on issues of public concern.

The matching-funds mechanism provides a constitutionally permissible formula for determining how much

money each publicly financed candidate will receive. The State's public-financing scheme can attract candidates to participate, and thereby serve its important purposes, only if candidates have reasonable confidence that it will provide sufficient sums to run competitive campaigns. Although Arizona could invite widespread participation by providing very large grants to all qualifying applicants, that approach would waste public funds in races where such largesse is unnecessary to run an effective campaign. And while the State cannot restrict petitioners' expression in order to provide equality of opportunity to their competitors, the Arizona Act does not restrict petitioners' speech. In determining in advance how to calculate the amounts to be paid to candidates who choose to participate, Arizona can seek to approximate the sums raised and spent by participants' privately financed opponents.

ARGUMENT

The matching-funds provision of the Arizona Act is consistent with the First Amendment because it does not "abridg[e] the freedom of speech." This Court's precedents make clear that Arizona's provision of public funds to participating candidates does not, in and of itself, violate the First Amendment rights of candidates who choose to finance their own campaigns. A necessary component of any public-financing scheme is a formula to determine the amount of funds that each participating candidate will receive. The matching-funds provision is designed to create adequate incentives for candidates to choose public financing, thereby allowing the Act to achieve its important purposes, without wasting scarce public resources.

I. BECAUSE THE ARIZONA ACT DOES NOT SUBSTANTIALLY BURDEN PETITIONERS' ABILITY TO SPEND MONEY ON ELECTIONS, THE ACT IS REVIEWED UNDER THE "EXACTING SCRUTINY" STANDARD

Petitioners and their amici contend that strict scrutiny should apply because the Arizona Act "penalizes,"[5] "restrict[s],"[6] or "limit[s]"[7] the speech of candidates and independent groups. That premise is incorrect. The challenged provision does not limit the contributions that privately financed candidates can receive or the total amounts that such candidates or their supporters can spend on campaign-related speech. Petitioners nevertheless contend that the Act should be reviewed under the same stringent standard as an outright prohibition on spending. Petitioners' theory is that the Act "burdens" their speech by creating incentives for petitioners to forgo campaign-related activity in order to prevent additional matching funds from flowing to their opponents. The existence of that sort of strategic choice, however, does not constitute the kind of severe burden on constitutional rights that would trigger strict scrutiny.

A. The Arizona Act Does Not Restrict The Right To Make Campaign Expenditures

Under the Arizona Act, privately financed candidates and their independent supporters face no restrictions on how much money they can spend, when they can spend it, or (in the case of independent groups) how they must

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[5] AFEC Br. 28, 36; see McConnell Amicus Br. 10; McComish Br. 57 ("similar to the threat of a fine").

[6] AFEC Br. 26, 27, 35, 42.

[7] AFEC Br. 58; McComish Br. 37, 57; see McConnell Amicus Br. 4-5.

organize their operations in order to spend money on advocacy. All they must do to comply with the Act is provide disclosure, Ariz. Rev. Stat. Ann. §§ 16-941(B)(2) and (D), 16-948 (West 2006 & Supp. 2010), a requirement petitioners do not challenge.

The absence of *any* direct restriction on petitioners' own campaign-related spending is enough, by itself, to distinguish nearly all of the strict-scrutiny cases on which petitioners and their amici rely. Almost every one of this Court's cases applying strict scrutiny in the electoral context has involved an outright restriction. See, *e.g.*, *Citizens United* v. *FEC*, 130 S. Ct. 876, 897 (2010) (describing the statute as "an outright ban, backed by criminal sanctions"); *id.* at 917 (Roberts, C.J., concurring); *Randall* v. *Sorrell*, 548 U.S. 230, 245 (2006) (plurality opinion) ("dollar cap imposed upon a candidate's expenditures"); *id.* at 264 (Kennedy, J., concurring in the judgment); *id.* at 267 (Thomas, J., concurring in the judgment); *Eu* v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223-225 (1989); *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *FEC* v. *National Conservative PAC*, 470 U.S. 480, 496 (1985) (*NCPAC*); *Brown* v. *Hartlage*, 456 U.S. 45, 53-54 (1982); *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 786 (1978); *Buckley* v. *Valeo*, 424 U.S. 1, 39-59 (1976) (per curiam).

In each of those cases, the challenged restriction was subject to strict scrutiny because the direct result of the restriction was less speech. The Arizona Act, by contrast, leaves speech unrestricted and instead provides funding for *more* speech in response. See *Buckley*, 424 U.S. at 93 n.127 (public financing is one way of "providing financial assistance to the exercise of free speech"); cf. *Citizens United*, 130 S. Ct. at 911 ("[I]t is our law and

our tradition that more speech, not less, is the governing rule."). The contrast between this case and *NCPAC*, on which several amici rely, is instructive. The statute struck down in *NCPAC*, a provision of the Presidential Fund Act, tightly restricted independent expenditures supporting a publicly financed candidate for President. The Court applied strict scrutiny to the expenditure limit "to assure [the] unfettered exchange of ideas" in the electoral arena. 470 U.S. at 493 (brackets in original) (quoting *Buckley*, 424 U.S. at 14). The Arizona Act does not restrict the exchange of ideas but rather facilitates it. The Act does not limit the right of either privately funded candidates or independent groups to attack publicly funded candidates, but merely makes it possible for those publicly funded candidates to respond.

B. To Invoke Strict Scrutiny, Petitioners Must Show That The Arizona Act Severely Burdens Their First Amendment Rights

This Court has also applied strict scrutiny to a handful of electoral regulations that do not formally restrict the exercise of any right protected by the First Amendment, but that impose such a significant practical burden on the exercise of such rights as to be tantamount to an outright restriction. In each of those cases, however, the Court has cautioned that it will apply strict scrutiny only to regulations that directly, tangibly, and significantly burden the exercise of First Amendment freedoms. A mere "disincentive" to speech does not constitute such a burden. Statutes that create such disincentives are subject to less demanding scrutiny because they pose "a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642 (1994).

Petitioners' evidence in this case shows, at most, that petitioners have sometimes refrained from raising or spending money in order to avoid triggering payments of matching funds to opposing candidates. Petitioners have made that tactical choice because they prefer the situation in which both they and their opponents spend *less* to a situation in which both they and their opponents spend *more*.[8] Petitioners would of course prefer a regime under which they could spend additional sums while their publicly financed opponents received only the initial lump-sum state payments. Nothing in the First Amendment, however, entitles them to the benefits of that disparity.

1. Only a "severe" burden on the exercise of a constitutional right can trigger strict scrutiny

As this Court has long emphasized, not *every* regulation of the political process creates the sort of burden on constitutional rights that warrants strict scrutiny. Rather, that standard applies only to the most *substantial* burdens, whether on the right to free speech, the right to free association, or the right to vote. See, *e.g.*, *Clingman* v. *Beaver*, 544 U.S. 581, 592 (2005) ("[S]trict scrutiny is appropriate only if the burden is severe.").

This Court has applied that principle in numerous First Amendment contexts. See, *e.g.*, *Clingman*, 544

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[8] Several petitioners are current state officeholders or held state office at the time suit was filed. As this Court has noted, incumbents have natural advantages (such as name recognition) over challengers, and challengers generally need more money to prevail than incumbents do. See *Randall*, 548 U.S. at 256 (plurality opinion) (citing Norman J. Ornstein et al., *Vital Statistics on Congress 2001-2002*, at 87-96 (11th ed. 2002)). An incumbent may well prefer that both sides spend small amounts rather than large amounts for reasons that have nothing to do with any First Amendment burden that the Arizona Act may pose.

U.S. at 592; *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 452 (2008) (explaining that "[i]f a statute imposes only modest burdens" on associational rights, strict scrutiny does not apply); *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358, 364 (1997). The few cases in which this Court has applied strict scrutiny based purely on a burden on First Amendment rights are those like *Davis* v. *FEC*, 554 U.S. 724 (2008), in which the burden was "unprecedented," "special," and "substantial" (see pp. 22-26, *infra*), or *California Democratic Party* v. *Jones*, 530 U.S. 567, 581-582 (2000), in which the Court "c[ould] think of no heavier burden" on associational rights than the law at issue.

Strict scrutiny is a demanding test, and this Court has recognized that it cannot be applied to *all* laws that affect the choices of voters, candidates, and parties. *Clingman*, 544 U.S. at 592. In particular, strict scrutiny is inappropriate if a burden, though direct and tangible, is merely an "ordinary" and "widespread" feature of the electoral system. *Id.* at 593. Thus, although a plaintiff may be concretely *affected* by rules that prevent him from voting in one party's primary while remaining registered with another party; giving his party's ballot line to another party's nominee; or casting his ballot for a write-in candidate, those regulations do not affect First Amendment rights to the severe degree that would warrant strict scrutiny. *Id.* at 592-593; *Timmons*, 520 U.S. at 358-359; *Burdick* v. *Takushi*, 504 U.S. 428, 432-434 (1992).

In *no* previous case, moreover, has this Court deemed the expenditure of public funds to be a constitutionally significant burden on someone who did not want government money for himself but opposed the provi-

sion of such funds to others. To the contrary, the government generally enjoys the *greatest* discretion when it exercises the power to spend its own funds as it sees fit. See, *e.g.*, *NEA* v. *Finley*, 524 U.S. 569, 587-588 (1998); *id.* at 599 (Scalia, J., concurring in the judgment) (characterizing "the distinction between 'abridging' speech and funding it as a fundamental divide"); *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991); *Regan* v. *Taxation with Representation*, 461 U.S. 540, 545-546 (1983); cf., *e.g.*, *NCPAC*, 470 U.S. at 496 (noting, in a case involving independent expenditures concerning a publicly financed candidate, that "[t]he restriction involved here is not merely an effort by the Government to regulate the use of its own property"). The Court's reluctance to subject commonplace and important government electoral regulation to the "compelling interest" and "narrow tailoring" requirements of strict scrutiny, see *Clingman*, 544 U.S. at 593, applies with all the more force in a case like this one, for two reasons: First, the allegedly burdensome state law does not regulate private conduct at all, but simply establishes a spending program in which participation is wholly voluntary. Second, petitioners do not challenge the denial (or potential denial) of public funds to themselves, see, *e.g.*, *Finley*, 524 U.S. at 577; *Rosenberger* v. *Rector*, 515 U.S. 819, 825-828 (1995), but instead claim injury from the government's provision of funds to others.

2. A state law does not impose a "severe" burden on constitutionally protected rights simply because it creates a reason not to exercise them

A plaintiff cannot show that a law imposes a "severe" burden merely by averring that he would prefer to refrain from exercising his rights altogether than to exer-

cise them subject to the law. This Court has long made that point clear, including twice just last Term.

a. In upholding the public-financing scheme that applies to presidential elections, the Court in *Buckley* stated that "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." 424 U.S. at 57 n.65. The Court reached that conclusion even though it held that *unwilling* candidates may not constitutionally be subjected to limits on total campaign spending. See *id.* at 54-58. The Court explained that "[j]ust as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding." *Id.* at 57 n.65. That analysis makes clear that a statutory disincentive to the exercise of First Amendment rights cannot properly be equated with a direct ban or restriction on such freedoms.

b. More recently, in *Citizens United*, the plaintiff and numerous amici—including several entities that advocate the application of strict scrutiny in this case—argued that disclosure requirements should be subject to strict scrutiny. They contended that requiring a person or group to disclose its identity when it funds an electioneering communication is a severe burden on the right to free speech. Appellant's Reply Br. at 28-30, *Citizens United*, *supra* (No. 08-205); Inst. for Justice Amicus Br. at 5-6, 8-12, 18-25, *Citizens United*, *supra* (No. 08-205); Cato Inst. Amicus Br. at 16-26, *Citizens United*, *supra* (No. 08-205).

This Court squarely rejected those arguments. It reiterated that if a challenged requirement "do[es] not prevent anyone from speaking," it is not ordinarily sub-

ject to the same level of scrutiny as an outright regulation of speech. 130 S. Ct. at 914 (quoting *McConnell* v. *FEC*, 540 U.S. 93, 201 (2003)). The Court also did not agree that the potential deterrent effect of the challenged disclosure requirement —*i.e.*, the possibility that some persons would forgo campaign-related speech altogether rather than divulge their identities to the public—warranted the application of strict scrutiny. Rather, the Court upheld the disclosure requirements under a less demanding standard of review, *id.* at 914, 916, and in so doing reaffirmed a line of cases extending back to *Buckley*, *supra*. In *Buckley* the Court recognized that "[i]t is undoubtedly true that public disclosure of contributions to campaigns and political parties will deter some individuals who otherwise might contribute," 424 U.S. at 68, or who otherwise might make expenditures, see *id.* at 75. The Court nonetheless applied the lower standard of "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66).

Similar arguments in favor of strict scrutiny were made in *Doe* v. *Reed*, 130 S. Ct. 2811 (2010), again by, *inter alia*, the same entities that urge strict scrutiny here. Those litigants contended that signing a petition to hold a popular referendum on a legislative enactment was protected First Amendment activity, and that a statute mandating disclosure of petition-signers' names imposed a severe burden warranting strict scrutiny. See Pet. Br. at 29-31, 40-48, *Doe*, *supra* (No. 09-559); Inst. for Justice Amicus Br. at 10-17, *Doe*, *supra* (No. 09-559); Cato Inst. Amicus Br. at 2, 6-10, *Doe*, *supra* (No. 09-559). In rejecting that contention, the Court reiterated

that disclosure requirements "may burden the ability to speak, but they . . . do not prevent anyone from speaking." 130 S. Ct. at 2818 (quoting *Citizens United*, 130 S. Ct. at 914). Because "only modest burdens attend the disclosure of a typical petition," the Court applied exacting scrutiny rather than strict scrutiny, and it upheld the disclosure statute against the plaintiffs' facial challenge. *Id.* at 2818, 2821.[9]

c. In other First Amendment contexts as well, the Court has recognized that a mere disincentive is not sufficient to create a constitutionally cognizable burden that warrants strict scrutiny. "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity [that is] consonant with legislative policy." *Rust*, 500 U.S. at 193 (quoting *Maher* v. *Roe*, 432 U.S. 464, 475 (1977)). By making public funds available, Arizona seeks to encourage candidates to abide by the fundraising and spending limits that apply to participating candidates. But neither the Arizona Act as a whole, nor its matching-funds provision in particular, restricts the speech of candidates who decline to participate.

C. The Arizona Act Does Not Impose Any Severe Burden On Petitioners

Under the foregoing principles, the Arizona Act does not impose any severe burden on petitioners' exercise of their First Amendment rights. Rather, petitioners remain free to exercise those rights to their fullest extent.

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[9] In both *Doe* and *Citizens United*, the Court left open the possibility that successful as-applied challenges might be brought by individuals or groups who would be susceptible to unusually severe harm ("threats, harassment, or reprisals") from disclosure. *Doe*, 130 S. Ct. at 2821 (citation omitted); *Citizens United*, 130 S. Ct. at 914, 916.

Under the Arizona Act, the only consequence of petitioners' expenditures is that a somewhat greater amount of state funds may be provided to petitioners' publicly financed opponents. Petitioners' own speech, however, is neither negated nor penalized by counter-speech from their opponents. Indeed, petitioners concede (McComish Br. 84-85) that the Arizona Act would be constitutional if *all* publicly financed candidates for state office were given three times the amount of the current default spending limits.

Petitioners' constitutional objection to the Arizona Act's matching-funds provision is that the amount of state money provided to any particular publicly financed candidate depends in part on the amounts raised and spent by the candidate's opponents. Petitioners contend that the matching-funds approach has a "punitive and deterrent effect" because their own exercise of First Amendment rights "help[s] disseminate hostile speech." McComish Br. 84. But Arizona does not take money or other resources from petitioners to fund or facilitate their opponents' speech; it does not require petitioners to include their opponents' messages alongside their own; and it does not give their opponents' messages any superior treatment. Rather, the State merely adjusts the amounts paid to publicly financed candidates to increase the likelihood that those sums will be sufficient to run a competitive campaign and, thus, to attract candidates to choose the public-financing system at the outset. And unlike the Millionaire's Amendment that was struck down in *Davis*, the Arizona Act does not subject privately financed candidates to a discriminatory regulatory regime. Because the result—more speech and more competition—is wholly consonant with First Amendment values, see *Buckley*, 424 U.S. at 92-93, the

matching-funds provision is not subject to strict scrutiny.

1. The Act does not burden petitioners by giving a "fundraising advantage" to their opponents

The *dollar amount* of matching funds that a publicly financed candidate receives does not burden that candidate's opponents. Petitioners concede (McComish Br. 84-85) that the State could constitutionally provide every publicly financed candidate the maximum amount of funding (*i.e.*, three times the amount of the initial lump-sum payment) that is available under current law. Accord Pet. App. 64 (district court recognizes that, "[i]f the Act provided for a single lump sum award, instead of incremental awards, the law would fall squarely within the regime blessed in *Buckley* and reaffirmed in *Davis*"). For example, the initial lump-sum payment to a publicly financed candidate in the Arizona gubernatorial election is approximately $1.06 million, and the maximum amount available is approximately $3.18 million. State Resps. Br. 6 n.3. The Arizona Act would not be subject to any colorable constitutional objection if every qualifying publicly financed gubernatorial candidate received $3.18 million for the general election, even if that amount were larger than a privately financed opponent was able to raise through contributions or self-funding.

Petitioners' repeated assertions that the Act gives "fundraising advantages" to their political opponents (AFEC Br. 27-32; McComish Br. 48-49, 88) are therefore doubly misconceived. This Court in *Buckley* upheld public financing even while recognizing that some publicly financed candidates would receive larger sums than some privately financed candidates could hope to raise.

424 U.S. at 94-95 & n.128, 98-99, 101-102. And the particular feature of the Arizona Act that petitioners challenge—*i.e.*, the matching-funds formula for calculating the payments that participating candidates will receive—is designed to *reduce* the incidence of disparities between privately and publicly financed candidates.

2. Matching funds do not impose any discriminatory burden on petitioners

In *Davis*, this Court held that the Millionaire's Amendment "substantially burden[ed]" the rights of a candidate who wished to spend a large sum of personal funds on his campaign because Davis's self-financing would trigger "discriminatory" contribution and party-coordination limits favoring his opponent. 554 U.S. at 740. The Arizona Act creates no such invidious discrimination between similarly situated candidates. Petitioners' reliance on *Davis* therefore is misplaced.

The Millionaire's Amendment did not involve public financing. Rather, it provided that if a candidate contributed a large amount of personal funds to his campaign, any competing candidate who had contributed no personal funds (or a much smaller amount) could benefit from a special set of campaign-finance rules.[10] The competing candidate could accept contributions of up to $6900 per individual donor; the self-financing candidate's limit was $2300 per individual donor. The com-

[10] The Millionaire's Amendment was triggered when the "opposition personal funds amount" (OPFA) exceeded $350,000. "The OPFA, in simple terms, [was] a statistic that compare[d] the expenditure of personal funds by competing candidates and also t[ook] into account to some degree certain other fundraising." *Davis*, 554 U.S. at 729; see *id.* at 729 n.5. Once the competing candidate had raised enough money under the Millionaire's Amendment to equal the OPFA, the special rules ceased to apply. *Id.* at 729.

peting candidate could accept contributions from individuals who had already made the maximum aggregate campaign contributions that federal law permits; the self-financing candidate could not. And the competing candidate could benefit from an unlimited amount of coordinated spending by his political party; the self-financing candidate could accept no more than $40,900 in such spending. See *Davis*, 554 U.S. at 728-729.

The plaintiff in *Davis* was a self-financing candidate whose campaign spending had triggered the Millionaire's Amendment. Although his opponent had chosen not to take advantage of the special contribution and coordinated-spending limits, this Court held that Davis had suffered a cognizable injury; that his injury constituted a "substantial burden" on his First Amendment rights; and that strict scrutiny therefore applied. 554 U.S. at 734, 740.

The injury the Court identified was not the mere fact that Davis's own self-financing triggered new contribution limits that allowed his opponent to raise more money. "If [the Millionaire's Amendment] simply raised the contribution limits for all candidates," the Court stated, "Davis' argument would plainly fail" because there is no constitutional right "to restrict an opponent's fundraising." 554 U.S. at 737. The Court thus recognized that Congress could permissibly have made Davis's electoral spending the trigger for modifications to the generally-applicable campaign-finance regime, even if Davis preferred to self-finance his campaign while leaving the lower contribution limits in place.

The defect in the Millionaire's Amendment, the Court explained, was that a candidate who "engage[s] in unfettered political speech" must face the "unprecedented penalty" of a "discriminatory" set of fundraising

limitations. 554 U.S. at 739. The Court emphasized that it had "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other." *Id.* at 738. The Court concluded that the Millionaire's Amendment impermissibly burdened Davis's exercise of the constitutional right to self-finance because Davis was required either to "abide by a limit on personal expenditures or" to suffer the "activation of a scheme of discriminatory contribution limits." *Id.* at 740.[11]

Thus, the thrust of the *Davis* Court's reasoning was that, given the constitutionally disfavored nature of any campaign-finance regime in which opposing candidates in the same election are subject to different contribution limits, Congress could not require candidates who otherwise would self-finance to forgo their exercise of constitutional rights in order to avoid that "discriminatory" regulatory framework. Under the Arizona Act, by contrast, petitioners' electoral spending simply triggers increased monetary outlays that, on petitioners' own theory, the State could have provided from the outset. The feature of the Millionaire's Amendment that the *Davis* Court found decisive—*i.e.*, its treatment of protected speech as the trigger for regulation that would

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[11] Similarly, in *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991), the Court applied strict scrutiny to New York's "Son of Sam" law because the law imposed "discriminatory," "content-based burdens." *Id.* at 116; see *id.* at 115-118. Petitioners rely (AFEC Br. 28) on *Simon & Schuster* for the proposition that a disincentive is a severe burden, but the Court in that case considered only a "*content based* financial disincentive[]" to engage in speech on a particular subject. 502 U.S. at 117 (emphasis added). By contrast, the Arizona Act is content-neutral because participation is based entirely on neutral criteria and even critics of public financing (such as petitioner Murphy, J.A. 674) may participate.

otherwise be constitutionally infirm—is thus absent here. And the State's decision to conserve scarce public resources, by mandating the higher outlays only in those races where they are most needed, does not render the Act unconstitutional. See p. 21, *supra*; p. 33, *infra*.

Far from being the beneficiaries of a "discriminatory" regulatory framework, publicly financed Arizona candidates are subject to much more severe spending and fundraising restrictions than their privately financed opponents. Cf. *Buckley*, 424 U.S. at 95 (presidential candidates who voluntarily accept the benefits of public financing must also "suffer a countervailing denial"). Privately financed Arizona candidates may spend as much as they can raise; publicly financed candidates may not spend more than the amount of the state grant. Privately financed candidates may spend freely from their personal funds; publicly financed candidates may spend only a very limited sum ($1000 for a statewide office). Privately financed candidates may accept private contributions throughout the campaign, in larger increments; publicly financed candidates may raise money only during a short window of time, only from individuals, and only in increments of $100 or less per person. Ariz. Rev. Stat. Ann. §§ 16-905(A)-(D), 16-941(A) and (B)(1), 16-945 (West 2006 & Supp. 2010).

In return for agreeing to this framework, publicly financed candidates receive a grant of government funds that spares them the need to raise money. But *Buckley* makes clear that neither the grant of government funds to a candidate, nor the prescribing of conditions (such as voluntary adherence to an expenditure ceiling) to be eligible for such funding, violates the First Amendment. 424 U.S. at 90, 92-93, 94-95; see *id.* at 57 n.65. And the Court in *Davis*, while distinguishing the Millionaire's

Amendment from the provisions that govern public financing of presidential campaigns, did not call that aspect of *Buckley* into question. See 554 U.S. at 739-740.

Thus, under the Arizona Act, publicly and privately financed candidates are simply subject to different sets of rules. Unlike Davis's opponent, who received "fundraising advantages" (554 U.S. at 739) in the form of discriminatory contribution and coordinated-expenditure limits *without* being subject to any countervailing disadvantage under the federal regulatory scheme, petitioners' publicly financed opponents must take the bitter with the sweet. As the Court emphasized in *Buckley*, "since any * * * candidate accepting public financing of a campaign voluntarily assents to a spending ceiling, [privately financed] candidates will be able to spend more in relation to the [publicly financed] candidates." 424 U.S. at 99. And although privately financed candidates must raise money in order to outstrip their opponents' spending, neither the Arizona Act as a whole nor the matching-funds provision in particular imposes any obstacle to that fundraising. See *id.* at 94-95 & n.128. Because other features of the Arizona Act work to petitioners' advantage, the formula used by the State to calculate its payments to petitioners' publicly financed opponents—*e.g.*, allowing a legislative candidate to spend $42,957 on a primary instead of $14,319, see State Resps. Br. 6 n.3—does not give those opponents the sort of discriminatory "fundraising advantage" that Davis's opponent could have received.

3. Arizona's use of a matching-funds approach to calculate the payments made to publicly financed candidates does not burden petitioners

Petitioners contend (AFEC Br. 32-35; McComish Br. 50-58) that the Arizona Act's matching-funds provision burdens their exercise of First Amendment rights because their own campaign spending (if it exceeds the amount of the State's initial grant) triggers additional state outlays to their opponents. That argument lacks merit. Providing additional funds to petitioners' opponents does not make petitioners' own speech any less effective; does not require petitioners themselves to fund or publicize their opponents' speech; and does not associate petitioners with their opponents' messages. The Act simply ensures that, when privately financed candidates raise the stakes, publicly financed candidates will be able to stay in the hand for at least a few more rounds.

a. Petitioners contend (*e.g.*, McComish Br. 55) that the Act "force[s] [them] to help disseminate [their opponents'] hostile views." Petitioners' analogy to compelled-speech cases is flawed because petitioners provide neither the money nor the medium for their opponents' message.

Some compelled-speech claims object to *funding* speech with which the plaintiff disagrees. See, *e.g.*, *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001) (cited in McComish Br. 52). Petitioners are not taxed to pay for matching funds, however, unless they voluntarily check a box on their tax returns. Ariz. Rev. Stat. Ann. § 16-954 (West 2006); cf. 26 U.S.C. 6096 (similar). And government appropriations, even from the general fund, would not constitute compelled speech in any event.

Johanns v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 559, 562-563 (2005).

In other such cases, the plaintiff is made to *convey* the speech with which he disagrees. See, *e.g.*, *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1, 11 n.7, 12-13 (1986) (plurality opinion) (utility forced to "carry" messages in its billing envelope, exclusively from "those who disagree with [utility's] views and who are hostile to [utility's] interests"); *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 257-258 (1974) (newspaper forced to print critical rejoinder contrary to its editorial judgment). This Court's decisions condemning such requirements are likewise inapposite here. "The compelled-speech violation in each of [the Court's] prior cases," including *Pacific Gas* and *Tornillo*, "resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld* v. *FAIR*, 547 U.S. 47, 63 (2006). Petitioners are not required to disseminate any opposing speech. Nor does the matching-funds procedure identify petitioners with their opponents' speech or otherwise obscure petitioners' message. Cf. *id.* at 65; *Johanns*, 544 U.S. at 564-566.

b. Petitioners also suggest (AFEC Br. 30) that the matching-funds provision cognizably injures them simply because the matching funds enable their opponents to engage in additional speech. That argument lacks merit.

Although petitioners' speech may be the but-for cause of their opponents' receipt of matching funds, that is always true when one speaker's words or actions prompt another to respond in kind. To treat additional speech as a First Amendment injury would contravene this Court's repeated admonitions that, where existing

speech is insufficient or potentially counter-productive, "the remedy [that should] be applied is more speech." *E.g.*, *Linmark Assocs., Inc.* v. *Township of Willingboro*, 431 U.S. 85, 97 (1977) (quoting *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)); *Meese* v. *Keene*, 481 U.S. 465, 481 (1987); see also *Republican Party* v. *White*, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring) ("democracy and free speech are their own correctives"). Indeed, this Court has suggested that it is preferable for the government itself to engage in its *own* counter-speech rather than restrict the speech it finds objectionable. *Linmark Assocs.*, 431 U.S. at 97; *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 507-508 (1996) (opinion of Stevens, J.). And here, Arizona does not speak itself, but simply makes funding available, on a content- and viewpoint-neutral basis, for candidates to engage in their own speech. See note 11, *supra*; cf. *Board of Regents* v. *Southworth*, 529 U.S. 217, 233-234 (2000) (viewpoint-neutral program to "stimulate * * * expression" was consistent with the First Amendment even though funded with mandatory exactions).

Although electoral politics may be a "zero-sum" endeavor (AFEC Br. 30), one candidate's advertisement does not become less effective simply because a competing candidate also engages in effective electoral advocacy. Two advertisements by opposing candidates may be directed to, reach, and persuade entirely different audiences. And from the standpoint of First Amendment values, two advertisements certainly are preferable to none. Electoral competition is not a cognizable burden under the First Amendment.

II. THE ARIZONA ACT IS VALID UNDER EXACTING SCRUTINY

Because petitioners have not established any "severe" burden on their speech, the Act is subject not to strict scrutiny, but to the more flexible standard that this Court has termed "exacting scrutiny." Under that standard, the Act is valid because it bears a "'substantial relation'" to a "'sufficiently important' governmental interest." *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66).[12]

A. Arizona's Public-Financing Scheme Furthers Important Government Interests

In *Buckley*, this Court recognized that public financing of candidate campaigns, by obviating the need for candidates to raise funds from private sources, combats both corruption and the appearance of corruption by "eliminating the improper influence of large private contributions." 424 U.S. at 96. This Court has repeatedly held that the government's interest in preventing actual and apparent corruption is not simply important, but compelling. See, *e.g.*, *NCPAC*, 470 U.S. at 496-497. Petitioners contend (AFEC Br. 55-56; McComish Br. 68-71), however, that the Arizona Act's matching-funds provisions are not substantially related to an important gov-

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[12] In *Buckley*, the Court suggested that a claim that a public-financing system invidiously discriminates might be reviewed under a more permissive standard because public financing "is not restrictive of voters' rights and [is] less restrictive of candidates'" rights than are ballot-access regulations that have been reviewed under exacting scrutiny. 424 U.S. at 94. The Court did not resolve that question, but upheld the Presidential Primary Act and Presidential Fund Act as furthering "sufficiently important governmental interests." *Id.* at 95. The Court can do the same here.

ernment interest because Arizona's contribution limits separately eliminate any meaningful danger of corruption. That argument lacks merit.

1. States are not free to set contribution limits as low as they may think necessary to combat corruption. A contribution limit may be struck down as unduly low if it "prevent[s] candidates from 'amassing the resources necessary for effective [campaign] advocacy.'" *Randall*, 548 U.S. at 248 (opinion of Breyer, J.) (second brackets in original); see *id.* at 248-249. That Arizona has limited contributions to a particular dollar amount does not mean that no continuing risk of corruption exists.

As petitioners note (McComish Br. 75-76), moreover, a single individual can "bundle" many contributions together. And an effective Arizona campaign may raise and spend significant sums. Petitioners presented in support of their stay application the declaration of a 2010 gubernatorial candidate that he planned to raise and spend more than $1 million, see J.A. 995; the amount of the initial grant to publicly funded gubernatorial candidates for the 2010 primary election was $707,447. State Resps. Br. 6 n.3. In the 2002 gubernatorial election, one candidate raised and spent more than $2 million. See Matt Salmon for Governor, *2002 Post-General Election Report* (Dec. 5, 2002), http://www.azsos.gov/cfs/PublicReports/2002/9439SCFF-CA9F-4BF0-B9C0-746A1E3D6D95.pdf. Petitioners cannot plausibly claim that the raising of such significant sums entails *no* possibility of a candidate's exchanging contributions for favors.

2. The Court in *Buckley* upheld *both* the limits on contributions to federal candidates, see 424 U.S. at 23-37, *and* the provisions that authorize public financing of presidential campaigns, see *id.* at 90-108. The Court

observed that, even under campaign-finance laws that limit the amount of money a candidate can receive from any single source, candidates still face "the burden of fundraising." *Id.* at 96. Indeed, contribution limits increase "the rigors of soliciting private contributions" by requiring candidates to raise funds from a greater number of donors. *Ibid.* In addition to reducing the danger of actual or apparent corruption, public financing relieves candidates of "the burden of fundraising," thereby freeing them to focus on issues of public concern. See *id.* at 95-96. *Buckley* makes clear that Arizona's adoption of contribution limits does not prevent it from also offering voluntary public financing, both to further reduce the danger of corruption and to obviate the need for participating candidates to spend time soliciting private donations.

B. The Matching-Funds Provision Is An Integral And Constitutionally Permissible Component Of The Arizona Act

Under exacting scrutiny, the State need not show that the matching-funds provision is the *only* way to effectuate its interest in preventing corruption, or that it is the *narrowest* way. Cf., *e.g.*, *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 556 (2001) (no least-restrictive-means test under intermediate scrutiny); *Ward* v. *Rock Against Racism*, 491 U.S. 781, 798 (1989) (same). Rather, it need only show that it is a *valid* way. As the court of appeals correctly held, the State has satisfied that requirement.

1. A necessary component of any public-financing scheme is a formula for determining the amount of money that each participating candidate will receive. In order for Arizona's voluntary public-financing regime to

attract participants, and thereby achieve the State's important purposes, those amounts must be high enough to give candidates reasonable confidence that they will be able to run competitive campaigns. See Pet. App. 36 ("A public financing system with no participants does nothing to reduce the existence or appearance of *quid pro quo* corruption."). Matching funds provide that assurance. See, *e.g.*, State Resps. Br. 54-55; Clean Elections Inst. Resp. Br. 47-48. Although the State could also provide the requisite assurance simply by paying out very large sums to all candidates who satisfy the statutory requirements, that approach would waste public funds in the many elections where such large grants are unnecessary either to enable candidates to run effective campaigns or to persuade them to elect public financing. See Pet. App. 37 ("[I]f the Act were to raise the amount of its lump-sum grants and do away with matching funds altogether, it would make the Act prohibitively expensive and spell its doom.").

The matching-funds provision is thus an appropriately tailored way of making the public-financing scheme attractive to candidates, thereby enabling the system to achieve its important purposes, without unnecessarily burdening the public fisc. Petitioners acknowledge (McComish Br. 84-85) that the State could constitutionally give participating candidates the maximum amount of funding in a single lump-sum payment at the outset, instead of one-third at the outset and the remaining two-thirds in matching funds, when triggered. But if the State can make the program just as effective and attractive, and encourage just as much participation, while spending less money on hopeless candidacies or uncompetitive races, that is *better* tailoring, not worse.

2. There is likewise no merit to petitioners' contention (AFEC Br. 35-43; McComish Br. 64) that the Arizona Act's matching-funds provision runs afoul of a perceived constitutional ban on state efforts to "equalize" political expression. To be sure, this Court has rejected the proposition "that a candidate's speech may be restricted in order to level electoral opportunities." *Davis*, 554 U.S. at 742 (internal quotation marks omitted); see *Buckley*, 424 U.S. at 48-49, 56-57. Arizona therefore could not limit a privately financed candidate's campaign expenditures in order to produce parity of resources as between that candidate and his publicly financed opponent. But neither the Act as a whole nor its matching-funds provision imposes any restriction on petitioners' own spending.

So long as the State does not restrict private speech, it is not foreclosed from all efforts to ensure that candidates who elect public financing can have approximately the same electoral opportunities as those who do not. In *Buckley*, for example, the Court upheld Congress's decision to provide equal funding to the presidential candidates of both major parties, regardless of the relative performances of the two parties in the most recent election. See 424 U.S. at 98 n.133. In particular, nothing in this Court's decisions supports the counter-intuitive proposition that a State, in calculating the amounts to be paid to candidates who have chosen to participate in the State's public-financing system, cannot use as a benchmark the sums raised and spent by participants' privately financed opponents.

In devising a payment formula, Arizona can reasonably seek to provide funding that is sufficient, but not greater than necessary, to allow participating candidates to run competitive campaigns. And the most obvi-

ous measure of the amount necessary to be competitive is the amount being spent by competitors. If Arizona had chosen to provide the same level of funding to all participating Senate candidates, it could surely have calculated the appropriate amount by reference to the *average* cost of prior privately financed Senate campaigns. The First Amendment does not prevent the State from using the more nuanced matching-fund mechanism, which recognizes that the cost of an effective campaign depends in part on the circumstances of a particular election.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

TONY WEST
Assistant Attorney General

MALCOLM L. STEWART
Deputy Solicitor General

WILLIAM M. JAY
Assistant to the Solicitor General

FEBRUARY 2011

AMICUS CURIAE BRIEF

Nos. 10-238 and 10-239

In The
Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

JOHN MCCOMISH, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* CAMPAIGN LEGAL CENTER, DEMOCRACY 21, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF ARIZONA, PUBLIC CITIZEN, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, NEW JERSEY APPLESEED PUBLIC INTEREST LAW CENTER AND SIERRA CLUB IN SUPPORT OF RESPONDENTS

DONALD J. SIMON
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, NW, Suite 600
Washington, D.C. 20005
(202) 682-0240

FRED WERTHEIMER
DEMOCRACY 21
2000 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 429-2008

J. GERALD HEBERT
Counsel of Record
TARA MALLOY
PAUL S. RYAN
THE CAMPAIGN LEGAL CENTER
215 E Street, NE
Washington, D.C. 20002
(202) 736-2200
ghebert@campaignlegalcenter.org

Counsel for Amici Curiae

February 2011

CAPITOL LAW BRIEF PRINTING CO. 1-800-255-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICI CURIAE*[1]

This brief is filed on behalf of eight public interest organizations that are interested in campaign finance reform and support public financing programs and other measures to protect the integrity of government.[2]

SUMMARY OF ARGUMENT

Over thirty years ago, in *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court rejected challenges brought under the First and Fifth Amendments to the presidential public financing system enacted as part of the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431, *et seq*. Any attempt to revisit the fundamental constitutionality of public financing would thus require the abandonment of this leading precedent. *See Randall v. Sorrell*, 548 U.S. 230, 243-44 (2006) (finding that principles of *stare decisis* commanded respect for *Buckley*).

The presidential system upheld in *Buckley* did not include any provisions comparable to the triggered

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[1] This brief is filed with the written consent of all parties. This brief was not authored in whole or in part by counsel for any party. No person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

[2] A description of the *amici curiae* is attached as Appendix A hereto.

matching funds provisions ("trigger provisions"), ARIZ. REV. STAT. § 16-952(A)-(C), challenged in this case. Nevertheless, the legal principles set forth in *Buckley* in its review of the presidential system govern this Court's review of the challenged provisions and compel the conclusion that the trigger provisions of Arizona's Citizens' Clean Elections Act ("Act") are constitutional.

First, like the presidential program reviewed in *Buckley*, the challenged trigger provisions provide a public subsidy to participating candidates, but do not restrict the expenditures made by non-participating candidates or their supporters. Thus, under *Buckley* and this Court's public subsidy jurisprudence, the Act "furthers, not abridges, pertinent First Amendment values." 424 U.S. at 93. Strict scrutiny is therefore not warranted.

Second, the challenged trigger provisions are supported by the same governmental interests that were found in *Buckley* to support the presidential system: "eliminating the improper influence of large private contributions" and "relieving . . . candidates from the rigors of soliciting private contributions." *Id.* at 96. The record below – undisputed by petitioners – demonstrates that trigger provisions encourage candidate participation in Arizona's public financing program. By increasing participation, the provisions in turn reduce state candidates' reliance on private contributions and thereby promote the compelling governmental interest in combating actual and apparent corruption.

Finally, contrary to petitioners' assertions, *Davis v. FEC*, 128 S. Ct. 2759 (2008), does not demand a different result. *See* Brief of Petitioners Arizona Free Enterprise Club's Freedom Club PAC, *et al.* ("PAC Br.") at 29-32; Brief for Petitioners McComish, *et al.* ("McComish Br.") at 25, 47-50. The "Millionaire's Amendment" at issue in *Davis* and the trigger provisions at issue here impose burdens on First Amendment activity that are radically different both in kind and in degree, and implicate wholly different governmental interests.

In short, *Buckley* endorsed the presidential public financing system as a speech-enhancing alternative to a system of potentially-corrupting privately-funded campaigns. Petitioners have presented no reason why this Court should not likewise approve Arizona's Act, and affirm the judgment of the Ninth Circuit Court of Appeals below.

ARGUMENT

I. The Presidential Public Financing System and Other Models of Public Financing Without "Trigger Provisions" Are Not at Issue in This Case.

Buckley unequivocally affirmed the constitutionality of public financing. Although the trigger provisions at issue here are also constitutional under the reasoning of *Buckley*, *see* Section II, *infra*, it is important to highlight that the presidential public

financing system upheld in *Buckley*, and the public financing systems used in a number of state and local jurisdictions, do not contain trigger provisions. Given these differences, *amici* urge this Court to rule in a manner consistent with the relatively narrow focus of this challenge, and to avoid consideration of the constitutionality of public financing programs that are not before the Court.

After *Buckley* broadly endorsed the constitutionality of public financing, numerous public funding programs were enacted at the state and local levels. Today, 23 states provide some manner of public financing in connection to state electoral campaigns. Center for Governmental Studies (CGS), *State Public Financing Charts* (May 2009), *available at* http://www.cgs.org/images/publications/cgs_state_pfc_050409.pdf. In addition, fifteen local jurisdictions, including New York City and Los Angeles, have enacted some form of public financing. CGS, *Local Public Financing Charts* (May 2009), *available at* http://www.cgs.org/images/publications/cgs_local_pfc_050409.pdf.

The proliferation of public financing programs has led to the creation of multiple models for providing public subsidies to electoral campaigns, ranging from tax credits for individuals who make political contributions, to full public financing for state political and judicial campaigns.

One early model for public financing was the presidential system. It is a voluntary program that combines a "matching funds" system for the financing

of presidential primary election campaigns and a "lump sum" grant system for the financing of presidential general election campaigns. *See* 26 U.S.C. § 9001, *et seq.*

In a presidential primary election, candidates who choose to participate qualify for public financing by raising a threshold amount of small contributions in each of twenty states, as well as by agreeing to abide by limits on their campaign expenditures and on their use of personal funds. 424 U.S. at 89-90; *see also* 26 U.S.C. § 9033(b). Once a candidate qualifies, she is eligible to have each private contribution of up to $250 per contributor "matched" on a 1:1 ratio with public funds, up to a maximum aggregate amount that equals half of the spending limit for the primary campaign. 424 U.S. at 89-90; 26 U.S.C. §§ 9034(a), (b). The amount of public funding received by participating candidates is thus based on the amount of matchable contributions they raise, and is wholly unconnected to campaign spending in the race by other candidates or by independent entities. 26 U.S.C. § 9034(a). In the general election, the presidential system provides a "lump sum" grant to each nominee of a major party who chooses to participate. *Id.* § 9004(a).[3] Candidates must agree to forgo private

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[3] Minor party or new party presidential nominees can qualify for a partial "lump sum" grant, provided that either their party received at least five percent of the vote in the previous presidential election, or that the nominee receives five percent in the present election. *See* 26 U.S.C. §§ 9004(a)(2)(A), 9004(a)(3).

fundraising and to comply with a spending limit and other restrictions. 424 U.S. at 88. *See also* 26 U.S.C. §§ 9003(b), 9004(d). Funds are released shortly after the party nominating conventions to candidates who meet all eligibility requirements, and again, the size of the grant is unconnected to campaign spending in the race by other candidates or by independent entities. *Id.* §§ 9005(a), 9006(b).

Various states and localities have enacted programs that track the presidential system in whole or part. A number of states, for instance, "match" the private contributions raised by qualifying primary election candidates in a manner analogous to the presidential primary election model. These jurisdictions include Maryland, Massachusetts, Michigan and New Jersey. M.D. CODE ANN., [ELECTIONS] § 15-106; MASS. GEN. LAWS ch. 55C, § 5; MICH. COMP. LAWS § 169.264; N.J. STAT. ANN. § 19:44A-33. Some jurisdictions provide "lump sum" grants to qualifying general election candidates in a manner analogous to the presidential general election model. Examples include Hawaii, Michigan, Minnesota and Wisconsin. HAW. REV. STAT. § 11-425, -428; MICH. COMP. LAWS § 169.265; MINN. STAT. § 10A.31; WIS. STAT. § 11.50. None of these programs includes trigger funds provisions like those challenged in this case.

In contrast to the presidential system, a number of other states have adopted a "Clean Elections" model that provides full public financing to both primary and general election campaigns in a manner analogous to the Act challenged here. Candidates

qualify for grants by initially raising a threshold number of small private contributions and agreeing to both forgo any additional private fundraising and comply with spending limits. Arizona, Connecticut, Maine, New Mexico and North Carolina have adopted such public financing systems for some or all of their state office elections. ARIZ. REV. STAT. §§ 16-940 to -961; CONN. GEN. STAT. §§ 9-700 to -741; 21-A ME. REV. STAT. §§ 1121-1128; N.M. STAT. ANN. §§ 1-19A-2 to -17; N.C. GEN. STAT. §§ 163-278.61 to -.70. In some cases, these systems include trigger provisions, like the Arizona provisions challenged here, that disburse to a participating candidate supplemental public funds in the event the participant faces large expenditures by a privately-financed opponent or an independent expenditure group. *See* ARIZ. REV. STAT. § 16-952.

Public financing systems thus vary in how funds are distributed (match *versus* grant), and in the types of grants made (lump sum grant *versus* grant supplemented by trigger funds). The type of trigger provision at issue here is not a component of all public financing systems. Any decision in this case must accordingly take heed of the broad variety of models that are used for the public financing of electoral campaigns, and make the necessary distinctions between public financing systems that use trigger grants, such as the Arizona law at issue here, and those that do not.

II. The Trigger Provisions of Arizona's Public Financing Program Are Constitutional.

In *Buckley*, this Court emphatically rejected a First Amendment challenge to the presidential public financing system.

Although a trigger provision was not reviewed in *Buckley*, the First Amendment principles set forth in *Buckley* govern this Court's review of the trigger provisions here. *Buckley* stands for two propositions. First, electoral subsidies do not "*abridge*" speech within the meaning of the First Amendment, but rather *enhance* speech. 424 U.S. at 92-93. Second, public financing serves the compelling governmental interest in preventing the political corruption often endemic to elections that rely on private financing. *Id.* at 96. Applied to this case, these foundational principles compel the conclusion that the Arizona trigger provisions are constitutional.[4]

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[4] This conclusion has also been the holding of many of the lower courts that have reviewed "triggered" subsidy schemes comparable to the law challenged here. *North Carolina Right to Life Comm. v. Leake*, 524 F.3d 427 (4th Cir. 2008), *cert. denied*, 129 S.Ct. 490 (2008); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000); *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997). *Cf. Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993). *But see Green Party of Conn. v. Garfield*, 616 F.3d 213 (2nd Cir. 2010); *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010).

A. The Constitutionality of Public Financing Was Affirmed in *Buckley v. Valeo* and *Republican National Committee v. FEC*.

In *Buckley*, this Court found that the presidential public financing system was consistent with both the First Amendment and with principles of equal protection. Four years later, this Court again affirmed the constitutionality of the presidential system in *Republican National Committee (RNC) v. FEC*, 487 F. Supp. 280 (S.D.N.Y. 1980), *aff'd*, 445 U.S. 955 (1980).

Buckley considered two interrelated challenges to Subtitle H of the Internal Revenue Code, 26 U.S.C. § 9001, *et seq.*: first, a claim that "public financing of election campaigns, however meritorious, violates the First Amendment," and second, an equal protection claim brought under the Fifth Amendment that the qualifying criteria for public financing discriminated against minor party candidates. 424 U.S. at 92, 93-104.

In its consideration of the First Amendment challenge, the Court first dismissed the allegation that the presidential system burdened rights protected by the First Amendment. It noted that the First Amendment provided that "Congress shall make no law . . . *abridging* the freedom of speech, or of the press," but found that the presidential system was a measure "*not to abridge*, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the

electoral process, goals vital to a self-governing people." *Id.* at 92-93 (emphasis added). The Court accordingly concluded that public financing did not impose *any* encumbrance on free speech. *Id.* at 93; *see also McComish v. Bennett*, 611 F.3d 510, 521 (9th Cir. 2010) ("[T]he public financing of elections itself does not create any burden on speech.").

Buckley also recognized that the presidential system represented but one example of a long-standing governmental policy to support First Amendment activities through public subsidies:

> [T]he central purpose of the Speech and Press Clauses was to assure a society in which "uninhibited, robust, and wide-open" public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish. Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, and preferential postal rates and antitrust exemptions for newspapers.

424 U.S. at 93 n.127 (internal citations omitted). The Court thus emphasized that governmental subsidies were presumptively constitutional because they "enhanced" speech instead of diminishing it.

In rejecting the separate claim that the qualifying criteria for public financing "invidiously discriminated" against minor party candidates, *id.* at 93, the Court found that the presidential system was enacted "in furtherance of sufficiently important governmental interests," *id.* at 95-96. It explained:

> It cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest. In addition, . . . Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions.

Id. at 96 (internal citations omitted). The Court concluded that the government's interest both in combating actual and apparent corruption and in protecting candidates from the pressures of fundraising outweighed any "discrimination" worked by the minor party candidate qualifying criteria. *Id.* at 99.

In *RNC*, the three-judge district court revisited *Buckley* and rejected the claim that the presidential system violated the First Amendment rights of either candidates or their supporters by conditioning eligibility for public funds upon candidates' compliance with expenditure limits. 487 F. Supp. at 283-84.

In its holding, the panel rejected the notion that public funding was burdensome, noting that "the conditions imposed by Congress upon receipt of public campaign financing do not infringe upon the First

Amendment rights of candidates." *Id.* at 285. It further explained that the presidential system "merely provides a presidential candidate with an additional funding alternative which he or she would not otherwise have and does not deprive the candidate of other methods of funding which may be thought to provide greater or more effective exercise of rights of communication or association than would public funding." *Id.* at 285.

Even if the public financing system did impose a burden on speech, the district court found that any burden was outweighed by the congressional plan "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Id.* (quoting *Buckley*, 424 U.S. at 91). The panel emphasized the anti-corruption effects of the program, recognizing that "[i]f the candidate chooses to accept public financing he or she is beholden unto no person and, if elected, should feel no post-election obligation toward any contributor of the type that might have existed as a result of a privately financed campaign." *Id.* at 284. The court also emphasized that Congress had found that public financing would "'eliminate reliance on large private contributions' and on the implicit obligations to private contributors that may arise from such reliance. . . ." *Id.* (quoting S. REP. NO. 93-689 (1974), at *5-6). This Court summarily affirmed. 445 U.S. 955 (1980).

Thus, both *Buckley* and *RNC* made clear that public financing does not constitute a burden on the First Amendment rights of either candidates or their supporters, and in any event, is justified by the "vital" governmental interests in combating actual and apparent corruption and freeing candidates from the pressures of private fundraising.

B. Reviewed Under the Standards Set Forth in *Buckley*, the Trigger Provisions Are Constitutional.

1. Because the Release of Trigger Funds Does Not Impose *Any* Cognizable Burden on Petitioners' Exercise of their First Amendment Rights, Strict Scrutiny Is Inapplicable.

The Court of Appeals recognized that the trigger provisions do not impose any direct restrictions on petitioners' fundraising or expenditures. 611 F.3d at 525 ("The matching funds provision does not actually prevent anyone from speaking in the first place or cap campaign expenditures."). Instead, according to the majority opinion, the trigger provisions at most create "*potential* chilling effects" on petitioners' campaign activities. *Id.* at 524 (emphasis added). Analogizing the potential effects of the trigger provisions to the incidental burdens imposed by campaign finance disclosure requirements, the majority accordingly reviewed the challenged provisions under "exacting," but not strict, scrutiny. Judge Kleinfeld, in his

concurrence, argued that not even heightened scrutiny should apply. 611 F.3d at 528 ("Because the challenged scheme imposes no contribution or spending limits, *it does not restrict speech at all*, so I cannot see why heightened scrutiny would apply.") (emphasis added).

The Ninth Circuit's rejection of strict scrutiny was correct. Indeed, the relevant legal authority suggests that the release of trigger funds does not constitute a cognizable burden on First Amendment rights at all. *Buckley* stressed that public financing for electoral campaigns simply does not "abridge" speech within the meaning of the First Amendment. And this Court's jurisprudence on public subsidies makes clear that a subsidy for First Amendment activities is subject to strict scrutiny only when it discriminates on the basis of content or viewpoint, neither of which the Arizona law does. *See* Section II.B.1.b, *infra*. There is thus no basis for petitioners' claim that strict scrutiny applies.

a. The Challenged Trigger Provisions Do Not Represent a Direct Restraint on Speech.

The challenged trigger provisions do not directly restrict, limit or regulate either the contributions raised or the expenditures made by petitioners. They instead function as a mechanism for determining when, and in what amounts, public funds are released to participating candidates.

The trigger provisions thus stand in stark contrast to the types of campaign finance regulations that have drawn strict scrutiny review from this Court in the past, namely *direct* restrictions on expenditures:

- *Buckley* applied strict scrutiny to strike down a $1,000 *limit* on independent expenditures "relative to a clearly identified candidate during a calendar year." 424 U.S. 42-45.
- *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985), applied strict scrutiny to strike down a $1,000 *limit* on the expenditures of political committees to support the campaign of a presidential candidate participating in the public financing system.
- *FEC v. Wisconsin Right to Life, Inc. (WRTL)*, 551 U.S. 449, 482 (2007), applied strict scrutiny to partially invalidate the federal *ban* on the expenditure of corporate and union treasury funds for "electioneering communications."
- *Citizens United v. FEC*, 130 S. Ct. 876 (2010), applied strict scrutiny to strike down the federal *ban* on the expenditure of corporate treasury funds for independent expenditures. *Id.* at 898.

In their attempt to characterize the challenged provisions as "de facto limits" on their expenditures, PAC Br. at 24, petitioners thus gloss over the fact that the only laws this Court has deemed "expenditure restrictions" subject to strict scrutiny have been *direct*

limits on an entity's spending. In this case, by contrast, there are no such direct restrictions on petitioners' spending. They are free to raise and spend as much as they want.

The application of strict scrutiny to the triggered subsidy here would therefore represent a major break from this Court's campaign finance jurisprudence, which has hitherto subjected only direct restrictions on campaign spending and fundraising to strict scrutiny review.[5]

b. The Indirect "Chilling Effect" of the Trigger Provisions Alleged by Petitioners Does Not Constitute a Cognizable Burden on Speech.

Petitioners concede that the challenged provisions impose no "overt restrictions" on the amount of

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[5] Indeed, in determining the applicable level of scrutiny, the Court of Appeals may have overstated the impact of the trigger provisions when it compared them to "the burden of disclosure and disclaimer requirements in *Buckley* and *Citizens United*." 611 F.3d at 525. Disclosure rules impose *direct* reporting, record-keeping and administrative burdens on regulated parties. *See, e.g., FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252-55 (1986) (discussing the administrative obligations entailed in disclosure); *see also* 2 U.S.C. §§ 434(c), (f); 441d. But the release of a subsidy to a participating candidate imposes no direct burdens on non-participating candidates, not even the relatively minimal obligations associated with reporting or disclaimer requirements. The Court of Appeals' application of exacting scrutiny is thus more stringent than this Court's past campaign finance precedents would require. *Compare Buckley*, 424 U.S. 92-93.

speech in which they can engage. PAC Br. 27-28. Nevertheless, petitioners maintain that the release of public funds to participating candidates on the basis of petitioners' expenditures creates an *indirect* chill on their speech so severe that strict scrutiny is warranted.

But the trigger provisions are no more than a release mechanism for a state subsidy. This Court has not previously held that the *indirect* effect of a public subsidy program on the speech of those persons who are not subsidized represents a cognizable burden under the First Amendment, at least absent content- or viewpoint-based discrimination or the imposition of an unconstitutional condition. *See, e.g., Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983); *National Endowment for the Arts (NEA) v. Finley*, 524 U.S. 569 (1998). *Cf. Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995). Certainly this Court has not held that a subsidy that was not content-based or viewpoint-based imposes such an onerous burden on speech as to require strict scrutiny.[6]

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[6] This Court has recognized that public financing is one example of a constitutional public subsidy scheme. *See Regan*, 461 U.S. at 549 (noting that *Buckley* upheld the presidential public financing system as a permissible subsidy without applying strict scrutiny); *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 241 (2000) (noting that *Buckley* "rejected a challenge to a congressional program providing viewpoint neutral subsidies to all Presidential candidates") (Souter, J., concurring).

As discussed above, *Buckley* emphasized that the public subsidies provided by the presidential public financing system "further[ ], not abridge[ ], pertinent First Amendment values." 424 U.S. at 93. The Court thus indicated that the presidential public financing system does not represent a burden on speech at all. Accordingly, the *Buckley* Court "rejected First Amendment and equal protection challenges to this [system] without applying strict scrutiny." *Regan*, 461 U.S. at 549 (citing *Buckley*, 424 U.S. at 93-108).

To apply strict scrutiny to the challenged provisions here would controvert not only *Buckley* but also a long line of this Court's precedents that have upheld a broad range of governmental subsidies of speech under the First Amendment. As noted by *Buckley*, "[o]ur statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, and preferential postal rates and antitrust exemptions for newspapers." 424 U.S. at 93 n.127 (internal citations omitted). And this Court has consistently granted the government more latitude when it *subsidizes* the First Amendment activities of private parties, than when it imposes affirmative *restrictions* on the speech of such parties. *See, e.g.*, *NEA*, 524 U.S. at 587-88 ("[A]lthough the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech . . . at stake."); *Regan*, 461 U.S. at 550

(contrasting restrictions on speech "when the State attempts to impose its will by force of law" with the "governmental provision of subsidies" where the state's "power to encourage actions deemed to be in the public interest is necessarily far broader") (internal quotations omitted). *Cf. Rust v. Sullivan*, 500 U.S. 173, 193 (1991) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.") (quotations omitted).

Further, this Court has not adopted the view that the government's failure to subsidize a person's speech, or alternatively, the government's decision to subsidize the speech of a person's competitors, constitutes an unconstitutional "chill" on that person's speech, absent viewpoint discrimination. *See, e.g., McComish*, 611 F.3d at 529 ("There is no First Amendment right to make one's opponent speak less nor is there a First Amendment right to prohibit the government from subsidizing one's opponent, especially when the same subsidy is available to the challenger if the challenger accepts the same terms as his opponent.") (Kleinfeld, J., concurring).

This principle is well illustrated by the *NEA* decision. There, the Court found that a statute requiring the NEA to take into consideration standards of "decency and respect for diverse beliefs and values of the American public" when judging grant applications was consistent with the First Amendment. 524 U.S. at 576. The statute had been passed in response to several controversial works of art that had been

funded by the NEA. As highlighted by the dissent, the fact that such decency standards had the "potential to chill individual thought and expression" of the "makers or exhibitors of potentially controversial art" did not render the subsidy scheme unconstitutional in the eyes of the majority. *See* 524 U.S. at 621 (Souter, J., dissenting). Indeed, two Justices believed that even a subsidy scheme that discriminated on the basis of viewpoint would not "abridge" speech within the meaning of the First Amendment. *Id.* at 595-96 (Scalia, J., and Thomas, J., concurring); *see also id.* at 599 ("I regard the distinction between 'abridging' speech and funding it as a fundamental divide, on this side of which *the First Amendment is inapplicable*. . . . The Government, I think, may allocate both competitive and noncompetitive funding ad libitum, insofar as the First Amendment is concerned.") (emphasis added).

Similarly, in *Regan*, this Court found no unconstitutional burden in the fact that Congress chose to selectively subsidize the lobbying of veteran's organizations by allowing them, but not section 501(c)(3) organizations, to accept tax-deductible contributions for lobbying. 461 U.S. at 550-51. Although this subsidy discriminated between different 501(c) organizations based on the interests they represented, the Court found that it did not warrant strict scrutiny review because it was viewpoint neutral, *i.e.*, it was "not intended to suppress any ideas," nor was there "any demonstration that it had that effect." *Id.* at 548. *See also Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (finding that Arkansas' exemption of print

media from general sales tax applicable to television cable and satellite media did not warrant heighted review as it did not "threaten[ ] to suppress the expression of particular ideas or viewpoints").

Arizona's subsidy scheme is not as restrictive as those considered in *NEA* and *Regan*. First, unlike the limited subsidy programs in those two cases, public funds in Arizona – and by extension, "trigger funds" – are equally available to all candidates. The petitioner candidates voluntarily chose not to join the public financing program. Their subsequent complaint that their opponents' receipt of public funds "chills" their own speech is therefore even less persuasive than the complaints asserted by the plaintiffs in *NEA* and *Regan*, because here, petitioners could have had full access to the state subsidy simply by choosing to accept it.

Furthermore, unlike the tax subsidy that was available only to veteran's groups in *Regan*, the Act does not in any way discriminate between different candidates on the basis of their identity or the interests they represent. And unlike *NEA*, the Act does not set any particular content standards for the speech that is eligible for subsidization: any candidate meeting the fundraising qualifying criteria is eligible for public financing in Arizona, regardless of the content or viewpoints of the candidate's intended speech.

To be sure, instead of issuing subsidies on the basis of content standards or other qualification criteria, the Arizona program releases trigger funds

based on the aggregate spending or fundraising by, or on behalf of, non-participating candidates. However, it is unclear why this release mechanism would be any more burdensome than the standards employed in *Regan* and *NEA*. The trigger provisions do not coerce any content or disfavor any viewpoint. They merely provide that petitioners' campaign activity, in certain circumstances, will give rise to a response.

Furthermore, the open structure of Arizona's program further undercuts any claim that the trigger provisions are somehow uniquely coercive. Even assuming *arguendo* that linking a subsidy to contributions or expenditures creates "potential chilling effects," *see* 611 F.3d at 524, here Arizona has made this "potentially chilling" subsidy available to all qualifying candidates. Unlike the plaintiffs in *Regan* or *NEA*, petitioner candidates had a *choice* regarding whether to accept the public subsidy. Their strategic decision to decline public funding reflects their assessment that any "chill" created by the trigger provisions would be outweighed by the benefits of private fundraising. It would be absurd to argue that Arizona's triggered subsidy scheme warrants stricter review than other subsidy schemes when the petitioner candidates, unlike the *Regan* or *NEA* plaintiffs, voluntarily chose to reject the offered subsidy because they determined it to be a competitive disadvantage.

Perhaps anticipating this argument, petitioners make the claim that the trigger provisions indeed discriminate on the basis of viewpoint because funds

are only released when independent expenditures *oppose* a participant or *support* a privately-financed candidate. McComish Br. at 59. But "opposition" to a participant does not express any "viewpoint" because there are no viewpoint-based criteria for participation in the Arizona program in the first place. Viewpoint-based discrimination is found "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction," *see Rosenberger*, 515 U.S. 829, or where "governmental provision of subsidies" is "aim[ed] at the suppression of dangerous ideas," *see Regan*, 461 U.S. 550 (internal quotations omitted). Here, the trigger provisions were not enacted in opposition to any particular "motivating ideology" or for the suppression of any "dangerous ideas." Trigger funds are made available regardless of the views expressed in campaign speech. A participating candidate could either be *for* or *against* gun control, and in either case, he would receive trigger funds if he faced independent spending that exceeded the statutory thresholds. The inverse is also true. An independent group could either be *for* or *against* gun control, and if its spending exceeded the applicable threshold in an election, trigger funds would be released to any affected participating candidates regardless of the group's substantive viewpoint.

Petitioners also complain that trigger funds are viewpoint-based because, by subsidizing only the speech of participants, the Act implies that "speech benefitting traditional candidates" is inferior or "dirty." McComish Br. at 61. In essence, petitioners

claim that the grant of a subsidy in itself conveys a governmental preference for the "viewpoint" of those who agree to accept the subsidy. But if the mere grant of a subsidy, without more, constituted viewpoint discrimination, then all public subsidy schemes would suffer from this constitutional defect. Clearly, this is not the case nor, under *Buckley* or this Court's public subsidy jurisprudence, could it be.

Petitioners have cited no case in which this Court has found that the subsidization of speech on a viewpoint-neutral basis constitutes an indirect burden on First Amendment activity so onerous that strict scrutiny is required. There is thus no basis for petitioners' contention that the grant of a subsidy to their political opponents demands strict scrutiny.

c. *Davis* Does Not Justify a Break From This Precedent.

Against the weight of this case law, petitioners counter that *Davis* nevertheless requires the application of strict scrutiny to the challenged provisions. It does not.

In *Davis*, the Supreme Court reviewed the Millionaire's Amendment, a "scheme of discriminatory contribution limits," that not only *directly* restricted the fundraising of self-financed congressional candidates, but did so on a *discriminatory* basis. *See* 128 S. Ct. at 2772; Bipartisan Campaign Reform Act (BCRA) § 319(a). If a congressional candidate spent over $350,000 of her personal funds to support her

campaign, the Millionaire's Amendment tripled the contribution limit for any candidates in her race who did not spend a comparable amount of personal wealth. Section 319(a) thus forced the self-financed candidate to operate under a contribution limit that was three times lower than that of her conventionally-financed opponents. *Id.* at 2766-67.

The *Davis* decision is distinguishable from the instant case in two respects. First, and most fundamentally, the Millionaire's Amendment enforced a *direct* limit on contributions to self-financed candidates. Here, by contrast, the trigger provisions did not directly restrict either the contributions to or the expenditures by petitioner candidates. *See McComish*, 611 F.3d at 530 ("*Davis* has to be distinguished because the scheme in that case affected contribution limits and this scheme does not.") (Kleinfeld, J., concurring). Instead, as discussed above, the challenged provisions merely release supplemental public funds to participating candidates. As a subsidy scheme instead of a direct restriction, the Act is subject to more deferential review.

Second, the Millionaire's Amendment not only retained a direct limit on the speech of self-financed candidates, but also created a scheme of contribution limits that was "asymmetric" and "discriminatory." The *Davis* Court repeatedly stressed that "if § 319(a)'s elevated contribution limits applied *across the board*," *i.e.*, if the contribution limit was symmetrical, then "[plaintiff] would not have any basis for challenging those limits." *Id.* at 2771 (emphasis

added); *see also id.* at 2770. Hence, it was only the asymmetrical nature of the regulation that gave rise to constitutional concerns. Here, by contrast, there is no comparable issue of discrimination.

The Millionaire's Amendment applied to congressional races in which the candidates were similarly situated from a regulatory perspective: all candidates were privately financed and operating under the same federal campaign finance regime. *See* 128 S. Ct. at 2765 ("Under the usual circumstances, the same restrictions apply to all the competitors for a seat."). When a candidate self-financed his campaign, the Millionaire's Amendment triggered "discriminatory fundraising limitations" and effectively superimposed an "asymmetrical regulatory scheme" onto an otherwise unitary regulatory regime. *Id.* at 2766, 2772.

Here, because publicly-funded and privately-financed candidates voluntarily elect different regulatory programs *ab initio*, they are not similarly situated. Indeed, participating candidates choose a far more restrictive campaign finance regime – one that includes spending limits and stringent limitations on private fundraising – than do candidates who choose to privately finance their campaigns. *See* ARIZ. REV. STAT. §§ 16-941, -945. That only participants receive trigger funds is therefore not "discrimination"; it is simply the result of the candidates' voluntary decisions to compete in different regulatory programs.

Buckley affirms the permissibility of creating two different financing regimes. The Court there found no

constitutional requirement that all candidates be treated identically in terms of voluntary public financing, recognizing that "the Constitution does not require Congress to treat all declared candidates the same for public financing purposes. . . . Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." 424 U.S. at 97-98. Thus, under *Buckley*, no constitutional burden arises from treating participating and non-participating candidates differently because the differential treatment is entirely due to the fact that the candidates are not similarly situated.

In sum, because the trigger provisions do not directly restrict petitioners nor discriminate between similarly-situated candidates, *Davis* does not govern here.

d. The "Compelled Access" Cases Cited by Petitioners Do Not Apply.

In their final attempt to find support for strict scrutiny, petitioners resort to this Court's decisions in *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986) and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Because both cases turned on "compelled access," however, neither is relevant to this case.

In *Pacific Gas*, the Court reviewed a state commission ruling that required a utility company to disseminate in its billing materials literature from certain outside groups that opposed the company in

commission proceedings. The Court held that the ruling violated the First Amendment because it created a government-enforced right of access to the utility company's billing envelope for certain speakers based on their viewpoint, and thereby forced the utility company "to associate with speech with which [the company] may disagree." 475 U.S. at 15. Similarly, in *Tornillo*, the Court struck down a "right-of-reply statute" that required a newspaper to provide a political candidate with free space *in its pages* to respond to any newspaper editorials criticizing the personal character of the candidate. 418 U.S. at 244-45.

Here, by contrast, the trigger provisions do not grant participating candidates any "right of access" to petitioners' property, funds or communications for the purpose of disseminating the participants' speech. Indeed, petitioners do not claim otherwise. Instead, they simply assert that "like the regulatory regime in *Pacific Gas & Elec. Co.*, Arizona's matching funds system compels traditional candidates and their supporters to *help* disseminate hostile speech through their exercise of First Amendment rights." McComish Br. at 54 (emphasis added).

But this argument misrepresents what the Court in *Pacific Gas* meant when it criticized the commission's order compelling the utility company to "*help* disseminate hostile views." 475 U.S. at 14 (emphasis added). The Court made clear that the constitutional violation was forcing the company "to *use its property*

– the billing envelopes – to distribute the message of another." *Id.* at 17-18 (emphasis added). Moreover, the *Pacific Gas* Court explicitly distinguished governmental subsidy programs – *including the presidential public financing system reviewed in Buckley* – that distributed governmental subsidies without the "help" of compelled access to the property of a private party. It noted that unlike "the fundamentally content-neutral subsidies that we sustained in *Buckley* and *Regan*," "the Commission's order identifies a favored speaker based on the identity of the interests that [the speaker] may represent and forces the speaker's opponent – not the taxpaying public – to assist in disseminating the speaker's message." *See id.* at 15-16 (citing *Buckley*, 424 U.S. at 97-105; *Regan*, 461 U.S. at 546-50) (internal quotations omitted). In making this distinction, the Court therefore affirmed that taxpayer-funded subsidy schemes that do not rely on a "right of access" to another speaker's property or communications do not raise First Amendment concerns.

2. Like the Public Financing System Upheld in *Buckley*, the Trigger Provisions Advance the Compelling Governmental Interest in Preventing Corruption and the Appearance of Corruption.

Because the challenged trigger provisions are viewpoint-neutral, and do not impose any constitutionally-cognizable burdens on speech, there is some

question as to whether the provisions should be subjected even to exacting scrutiny. But even if the provisions are reviewed under this standard, *see McComish*, 611 F.3d at 525, they nevertheless are constitutional because they bear a "substantial relation" to a "sufficiently important" governmental interest. *See Citizens United*, 130 S. Ct. at 914. *Buckley* affirms that the challenged trigger provisions further the compelling governmental interest in combating corruption and the appearance of corruption in state elections.

a. The Trigger Provisions Encourage Participation in the Arizona Public Financing Program and Thereby Prevent Actual and Apparent Corruption in State Elections.

Buckley made clear that public financing serves multiple "vital" interests, including "reduc[ing] the deleterious influence of large contributions on our political process," "facilitat[ing] communication by candidates with the electorate," and "free[ing] candidates from the rigors of fundraising." 424 U.S. at 91.

Prime among the interests served by public financing is the prevention of actual and apparent political corruption. The *Buckley* Court noted explicitly that public financing was "a means of eliminating the improper influence of large private contributions." *Id.* at 96. This principle has been reaffirmed by numerous lower courts in their review of federal or

state public financing programs. *See, e.g., Leake*, 524 F.3d at 440-41 (finding that state's public financing system "is designed to promote the state's anti-corruption goals"); *Daggett*, 205 F.3d at 471 (holding that public financing provides "the assurance that contributors will not have an opportunity to seek special access, and the avoidance of any appearance of corruption"); *RNC*, 487 F. Supp. at 284.

From *Buckley*'s holding that public financing furthers the prevention of corruption, it follows that those components of a public financing program that further the program's viability are substantially related to this compelling anti-corruption purpose. More specifically, "[b]ecause *Buckley* held that public financing of elections furthers First Amendment values," "states may structure [public financing programs] in a manner which will encourage candidate participation in them." *See McComish*, 611 F.3d at 526. The trigger provisions of Arizona's program do just this. They provide assurance to participating candidates that they will have the resources to respond to high spending by their privately-financed opponents or by outside groups. Without such assurance, candidates might be reluctant to participate in a system of public financing and spending limits because of a well-grounded concern that they would be competitively disadvantaged by doing so. By thus facilitating candidates' participation in Arizona's program, the trigger provisions reduce candidates' reliance on private contributions and thereby advance the compelling governmental interest in preventing

corruption or the appearance of corruption. At the very least, high participation rates in the program and the corresponding reduction in the number of campaigns reliant on private money reduces or eliminates the *appearance* that campaign contributions buy influence or increased access to elected officials.

Petitioners put forward various arguments in an effort to obscure the clear applicability of *Buckley* to this case, and by extension, the relevance of the government's anti-corruption interest. *See* PAC Br. at 35-43. None of these arguments have merit.

First, petitioners claim that unlike the presidential system in *Buckley*, the true intent of the Arizona program was to "level the playing field" and to "achieve equality among speakers." PAC Br. at 36. But petitioners' attempt to characterize the intent of the Act as primarily or exclusively related to "leveling the playing field" is factually inaccurate. The record makes clear that the anti-corruption goals of the Act were prominent in literature promoting the ballot initiative and that corruption concerns were paramount in the minds of the initiative voters. *See McComish*, 611 F.3d at 514-16; Brief of Respondent Clean Elections Institute at 3-5, 42-44. Indeed, the voter information pamphlet for the initiative, which petitioners concede is dispositive, *see* PAC Br. at 37 n.9, stated explicitly that the Act "would change Arizona's 'reputation [as] a state rife with corruption and the abuse of money in politics . . . [and] restore confidence in our political system.'" 611 F.3d at 515 (quoting Ballot Propositions Publicity Pamphlet for

1998 Arizona General Election, at *88). It was thus reasonable for the Court of Appeals to conclude that "one of the principal purposes of the Act was to reduce quid pro quo corruption." *Id.* at 516. Against the weight of this evidence, petitioners offer only a collection of out-of-context quotations from various activists for the initiative to demonstrate its purported "equalizing" purpose – and resort to highlighting a statement on the Citizens Clean Election Commission's website posted over a decade *after* passage of the voter initiative. PAC Br. at 9-11.

In any event, even if petitioners had compiled a more persuasive record regarding the primacy of the "equalizing" rationale, the premise upon which their legal argument relies is faulty: the possibility that the Act was perceived by some voters as advancing multiple governmental goals does not somehow nullify the anti-corruption purpose and effect of the Act. As the Court of Appeals noted, "[v]oters are motivated by varied and conflicting motivations" and the exact extent to which they were motivated by corruption concerns "cannot be precisely determined." 611 F.3d at 515-16. Even assuming that "leveling the playing field" was an ancillary motivation of some initiative voters, that does not obviate the clear anti-corruption purpose behind the Act. This purpose was explicit in the initiative literature and further reinforced by Arizona's history of corruption scandals against which the public debate was conducted. This Court has recognized that a majority vote for a campaign finance measure where there is public

awareness of political corruption is evidence that voters were motivated by their perception of corruption. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 394 (2000). Even if Arizona voters were exposed to multiple policy arguments for public financing, this does not undercut *Buckley*'s affirmation that public financing programs, like Arizona's system, are justified by compelling anti-corruption interests.

Second, petitioners attempt to distinguish *Buckley* by noting that the presidential system did not include trigger provisions, arguing that this distinction indicates that the triggers are an improper "prophylactic" measure. McComish Br. at 81-83; PAC Br. at 53-55. As discussed in Section I, the observation that the presidential public financing system does not have triggers is correct. But it does not follow that the trigger provisions are therefore merely prophylactic to the Act's anti-corruption objective.

The record is replete with testimony indicating that the trigger provisions encourage participation in Arizona's program. *See* Clean Elections Br. at 47-48 (citing Joint Appendix 386-88, 439-43, 540-44, 590-91). Petitioners neither dispute this point nor offer evidence to the contrary. And measures, such as the trigger provisions, to ensure participation in the program are directly related to the government's anti-corruption interest because, as the Court of Appeals found, "[a] public financing system with no participants does nothing to reduce the existence or appearance of quid pro quo corruption." 611 U.S. at 527.

Petitioners nonetheless assert that the connection between the triggers and the Act's anti-corruption goals is "indirect" and comparable to the "indirect connection between issue advocacy regulation and anticorruption purposes, which did not withstand strict scrutiny in *Wisconsin Right To Life*." McComish Br. at 81. But the problem with the corporate funding restriction rejected in *WRTL* as an impermissible "prophylaxis-upon-prophylaxis" measure was not that it was "indirect," but rather that it was overbroad – that it covered issue speech as well as express advocacy. *See* 551 U.S. at 479; *see also* 2 U.S.C. § 441b(b)(2). Here, however, the trigger provisions cannot be construed as "overbroad." They do not "restrict" a broader category of speech in an attempt to prevent circumvention of a narrower campaign finance restriction; they do not directly "restrict" speech at all. *See* Section II.B.1.a, *supra*. Nor does the Act with trigger provisions regulate any *more* speech than the Act would regulate if it lacked trigger provisions, or if it utilized another mechanism to release public funds to participating candidates, such as lump sum payments.

Lastly, this Court should also reject petitioners' novel theory that "within a system that already prohibits large campaign contributions and imposes extensive disclosure requirements," public financing "simply cannot further advance anticorruption purposes." McComish Br. at 68-69. This theory runs directly counter to the *Buckley* and *RNC* decisions. The presidential public financing system was also

enacted in a regulatory system that already included contribution limits and comprehensive disclosure, and yet this Court squarely held that public financing promoted the government's anti-corruption goals. 424 U.S. at 96-97.

Indeed, the *Buckley* Court recognized that there was always the potential for corruption "[u]nder a system of private financing of elections" because "a candidate lacking immense personal or family wealth *must* depend on financial contributions from others to provide the resources necessary to conduct a successful campaign." 424 U.S. at 26 (emphasis added). And "[t]o the extent that large contributions are given to secure a quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.* at 26-27. Public financing thus furthers compelling state interests precisely because it "eliminates the improper influence of large private contributions" that is often endemic to such a system. *Id.* at 96. This insight was also part of the legislative findings supporting the presidential system. Congress rejected the argument that "reporting and disclosure rules combined with limits on contributions provide sufficient reform," and instead found that "[t]he only way in which Congress can eliminate reliance on large private contributions and still ensure adequate presentation to the electorate of opposing viewpoints of competing candidates is through comprehensive public financing." S. REP. No. 93-689 (1974), at *4.

b. *Davis v. FEC* Is Inapplicable Because the Millionaire's Amendment Did Not Serve Anti-Corruption Goals.

The tenuous relevance of *Davis* to this case is further undercut by the fact that the Millionaire's Amendment and public financing programs have been found to implicate different governmental interests. The Millionaire's Amendment was found in *Davis* to advance no legitimate governmental interest, while public financing was found by the *Buckley* Court to advance the "vital" governmental interest in preventing political corruption.

In *Davis*, the government attempted to justify a "scheme of discriminatory contribution limits" on the twin grounds that the limits prevented corruption and "leveled the playing field" between self-financed and conventionally-financed congressional candidates. The Court first rejected the asserted anti-corruption goal: invoking *Buckley*, it reasoned that because a candidate's "reliance on personal funds *reduces* the threat of corruption," 128 S. Ct. at 2773, the Millionaire's Amendment, by discouraging the use of personal funds, undermines the anti-corruption interest. Indeed, by tripling the contribution limits for conventionally-financed candidates, the Millionaire's Amendment would allow yet larger contributions and increase the potential for *quid pro quo* arrangements. The Court also rejected the government's alternative argument that the Millionaire's Amendment limits "were justified because they 'level

electoral opportunities for candidates of different personal wealth,'" finding that the Court's prior decisions "provide no support for the proposition that this is a legitimate government objective." *Id.*

By contrast, *Buckley* makes clear that public financing serves to prevent corruption and the appearance of corruption, as well as to insulate candidates from the pressures of private fundraising. 424 U.S. at 93. Hence, whereas the Millionaire's Amendment, in the view of the Court, did not advance the governmental interest in preventing corruption because it increased the size of allowable private contributions for certain candidates and discouraged the non-corrupting expenditure of personal funds, public financing programs further the compelling governmental interest of "reduc[ing] the deleterious influence of large contributions on our political process." 424 U.S. at 93.

In an attempt to salvage the applicability of *Davis* to public financing, petitioners have labored to uncover a clandestine "equalizing rationale" behind the Act. *See* Section II.B.2.a, *supra*. But in so doing, they misapprehend the very nature of what the Court in the past has considered an impermissible attempt to "level the playing field." *See, e.g.*, McComish Br. at 63-64 (arguing that adjusting public funds grants to ensure that participants are "viable" is tantamount to "equalizing" electoral influence). In *Buckley*, the Court was concerned about expenditure restrictions and other state attempts to "equaliz[e] the relative ability of individuals and groups to influence the

outcome of elections" in an electoral system that relied entirely on private financing. 424 U.S. at 48. Here, however, by enacting trigger provisions, Arizona is not equalizing the resources of candidates competing in the same privately-financed electoral system; instead, the state is providing that candidates who have chosen to operate in a different type of electoral system – a publicly-financed system – have adequate funds to communicate with the electorate and respond to their political opponents. In short, Arizona is not leveling the playing field between similarly-situated privately-financed candidates, but rather is ensuring that candidates operating in two different systems are competitive and can engage in meaningful debate.

The permissibility of Arizona's dual campaign finance system is underscored by the fact that the constitutional concerns that informed this Court's rejection of past "equalizing" restrictions are not present here. In *Buckley*, the Court feared that in a system of privately-financed elections, expenditure limits or other attempts to equalize resources would by necessity discriminate against those with wealth or fundraising prowess. *See also Davis*, 128 S. Ct. at 2773 (finding that BCRA § 319(a) attempted "to reduce the natural advantage that wealthy individuals possess in campaigns for federal office"). As *Buckley* noted, "[t]he First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." 424 U.S. at 49.

But in a system of *mixed* private and public financing, calibrating public funds grants through trigger provisions does not discriminate against privately-financed candidates who, after all, were free to accept public funds themselves. Participating candidates and privately-financed candidates are not similarly-situated: they have voluntarily chosen two different funding systems.

Also inapplicable here is the *Buckley* Court's concern that equalizing measures, such as the $1,000 limit on independent expenditures invalidated there, would "necessarily reduce[ ] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. But far from constraining free speech, the trigger provisions *enhance* political speech and debate. By providing optional subsidies to all qualifying candidates regardless of their identity, beliefs or viewpoints, the Act "assure[s] a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest . . . thrive[s]." *Id.* at 93 n.127 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

February 2011

Respectfully submitted,

DONALD J. SIMON
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, NW
Suite 600
Washington, D.C. 20005
(202) 682-0240

FRED WERTHEIMER
DEMOCRACY 21
2000 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 429-2008

J. GERALD HEBERT
Counsel of Record
TARA MALLOY
PAUL S. RYAN
THE CAMPAIGN LEGAL CENTER
215 E Street, NE
Washington, D.C. 20002
(202) 736-2200

Counsel for Amici Curiae

APPENDIX A

The following groups constitute the *amici curiae* who submit the foregoing brief:

- **The Campaign Legal Center** (CLC) is a non-profit, non-partisan organization created to represent the public perspective in administrative and legal proceedings interpreting and enforcing campaign finance and other election laws throughout the nation. It participates in FEC rulemaking and advisory opinion proceedings and files complaints with the FEC to ensure that the agency is properly enforcing federal election laws. The CLC has participated as an *amicus curiae* in a broad range of campaign finance cases, including in the district court proceedings in the instant case.

- **Citizens for Responsibility and Ethics in Washington** (CREW) is a non-profit 501(c)(3) organization dedicated to promoting ethics and accountability in government and public life by targeting government officials – regardless of party affiliation – who sacrifice the common good to special interests. CREW advances its mission using a combination of research, litigation and media outreach.

- **Democracy 21** is a non-profit, non-partisan policy organization that works to ensure the integrity of our democracy. It supports campaign finance and other political reforms and conducts public education efforts to accomplish these goals, participates in litigation

involving the constitutionality and interpretation of campaign finance laws and works to ensure that campaign finance laws are effectively and properly enforced and implemented.

- **The League of Women Voters of the United States** is a non-partisan, community-based organization that encourages the informed and active participation of citizens in government, and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in more than 850 communities and in every state, with more than 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local, and national levels.

- **League of Women Voters of Arizona** is a non-partisan, community-based organization that encourages the informed and active participation of citizens in government, and influences public policy through education and advocacy. The League (Arizona) helped draft the ballot initiative connected to Arizona's Citizens' Clean Elections Act and advocated for its enactment by state voters. It

continues to advocate before the state legislature to protect and strengthen the Act.

- **New Jersey Appleseed Public Interest Law Center** ("NJ Appleseed") is a non-profit corporation established to provide legal advocacy on behalf of New Jersey residents in matters raising significant public policy issues. The Center was initially authorized by the faculty of Rutgers Law School-Newark to develop and expand the reach of public interest law and education in the State. Since 1998, the Center has been affiliated with Appleseed, a national public interest organizing project created by alumni of Harvard Law School. NJ Appleseed currently focuses its work on health care reform, election reform, government and corporate accountability issues, and environmental and public health issues. Pursuant to its election reform project, NJ Appleseed has worked with and has represented community groups that have sought to establish state and local clean campaign programs.

- **Public Citizen, Inc.**, a national government-reform and consumer-advocacy organization founded in 1971, appears on behalf of its approximately 225,000 members and supporters before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen works for enactment and enforcement of laws fostering an open, accountable and responsive government and protecting consumers, workers, and the public. Public Citizen has long advocated campaign finance

laws that combat the appearance and reality of corruption of public officials, including laws providing public financing for candidates on the national and state levels. Public Citizen lawyers often appear as counsel in litigation involving campaign finance issues, and Public Citizen itself frequently participates in such litigation as *amicus curiae*.

- **The Sierra Club** is a national non-profit organization of approximately 600,000 members and supporters dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Club's particular interest in this case and the issues which the case concerns stem from the Club's interests in improving the quality of publicly-elected officials by reducing the undue influence of money in elections and by reducing campaign solicitation efforts so that elected officials can better serve their constituents and the environment.

AMICUS CURIAE BRIEF

SUPREME COURT, U.S.
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Nos. 10-238, 10-239

IN THE

Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

JOHN MCCOMISH, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

JONATHAN F. COHN*
MATTHEW D. KRUEGER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jcohn@sidley.com

Counsel for Amicus Curiae

* Counsel of Record

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QUESTION PRESENTED

Whether Arizona may give a publicly funded candidate extra money because a privately funded opponent or his supporters have, in the State's judgment, spoken too much.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. The instant case concerns Cato because the law at issue significantly burdens political speech and activity, the constitutional protection of which lies at the very heart of the First Amendment.

INTRODUCTION

The Ninth Circuit's decision upholding Arizona's matching-fund statute disregarded long-established, fundamental First Amendment principles by upholding severe burdens on core political speech. The statute gives additional funding to a publicly financed candidate for political office when his opponent—or his opponent's supporters, even if they act independently—spend above a certain threshold amount. In effect, the law compels a privately

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no entity or person, aside from the *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* certifies that counsel of record for both parties have consented to the filing of this brief in letters on file with the Clerk's office.

financed candidate and his supporters to facilitate the speech of publicly financed opponents as a condition of exercising their First Amendment rights.

The Cato Institute endorses petitioners' arguments and will not belabor them here. This brief instead demonstrates just how badly the Ninth Circuit's decision offends the Court's well-established campaign finance jurisprudence, as well as broader First Amendment principles. The Arizona statute is indistinguishable from the law invalidated in *Davis v. FEC*, because both "impose[] an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right" by correlating "the vigorous exercise of the right" to spend in support of one's campaign with "fundraising advantages for opponents in the competitive context of electoral politics." 128 S. Ct. 2759, 2771-72 (2008). The decision, moreover, flies in the face of this Court's established precedents that have consistently found expenditures for political campaigns to be highly protected speech.

Perhaps most importantly, the decision below contradicts cardinal First Amendment principles regarding laws that unduly burden the exercise of free speech. Time and again, the Court has made clear that the government cannot, by conditioning the right to speak on the acceptance of burdensome consequences, indirectly deter speech that the government cannot ban directly. *E.g.*, *Speiser v. Randall*, 357 U.S. 513, 526 (1958). The Ninth Circuit disregarded volumes of U.S. Reports to reach the untenable, opposite conclusion. In short, the Ninth Circuit's decision is ill-reasoned, conflicts with decades of this Court's precedents, and must be reversed.

ARGUMENT

I. THE DECISION BELOW CANNOT BE SQUARED WITH THIS COURT'S CAMPAIGN FINANCE PRECEDENTS.

This Court has not minced words in describing the importance of campaign speech: "The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (quoting *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)) (internal quotation marks omitted). Nonetheless, the Arizona statute punishes candidates and their supporters for speaking too much. The Ninth Circuit's decision upholding the law clashes with this Court's campaign finance decisions, including, most pertinently, *Davis v. FEC*. This Court should reverse the decision below and vindicate the First Amendment's core protections.

A. The Arizona Statute Cannot Be Distinguished From The Law Struck Down In *Davis v. FEC*.

Davis v. FEC leaves no doubt that the Arizona statute transgresses the First Amendment. In *Davis*, the challenged Bipartisan Campaign Reform Act (BCRA) provisions allowed an opponent of a candidate who self-financed his own campaign with over $350,000 to "receive individual contributions at treble the normal limit," even "from individuals who ha[d] reached the normal aggregate contributions cap." *Davis*, 128 S. Ct. at 2766. The law also allowed such opponents to "accept coordinated party expenditures without limit." *Id.* The Court struck down the law, explaining that it "impose[d] an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right." *Id.*

at 2771. That penalty took the form of "fund-raising advantages for opponents" granted solely because a candidate engaged in the "vigorous exercise of the right" to spend and to speak in support of his campaign. *Id.* at 2772.

The Arizona statute suffers from the same fatal flaw. It similarly creates a more favorable funding regime for candidates when opponents (or their supporters) spend above a certain amount. In that scenario, the statute provides for the disbursal of additional funds to those publicly financed candidates. *See McComish v. Bennett*, 611 F.3d 510, 516 (9th Cir. 2010). By rewarding the publicly financed opponents of nonparticipating candidates who "vigorously exercise the right" to spend money on their campaigns, the Arizona statute substantially burdens free speech in violation of the First Amendment. And, because the disbursal of matching funds is also triggered by independent expenditures, the Arizona law burdens the free speech of ordinary citizens who support nonparticipating candidates.

The main difference between the Arizona statute and the BCRA provisions at issue in *Davis* makes the Arizona statute *more* burdensome. *Cf. Green Party v. Garfield*, 616 F.3d 213, 245 (2d Cir. 2010) (noting that Connecticut's matching-funds scheme imposed a "penalty" that was "*harsher* than the penalty in *Davis*"). Whereas the law in *Davis* merely gave opponents of candidates who spent above the threshold the opportunity to collect higher contributions (with time and effort), *see Davis*, 128 S. Ct. at 2766, the Arizona statute actually dispenses funds to opponents of such candidates, *see McComish*, 611 F.3d at 516, making the harsh consequences of speech more certain and therefore more chilling.

The Ninth Circuit's attempt to distinguish *Davis* is specious. The Ninth Circuit reasoned that the law in *Davis* "was unconstitutional because it specifically sought to disadvantage the rich" and thereby "singled out the speakers to whom it applied based on their identity." *Id.* at 522. Tested against that misreading, the Arizona statute was permissible, the Ninth Circuit held, because it did not distribute matching funds "specifically to the opponents of wealthy candidates" and thus did not make "identity-based distinctions." *Id.* But *Davis* did not create a novel equal protection rule or issue a narrow holding shielding only a wealthy candidate's expenditures from disfavored treatment. Instead, *Davis* enforced the well-established principle that "the First Amendment simply cannot tolerate" restrictions "upon the freedom of a candidate"—rich or poor—"to speak without legislative limit on behalf of his own candidacy." *Buckley v. Valeo*, 424 U.S. 1, 54 (1976) (per curiam); *see Davis*, 128 S. Ct. at 2771 (noting "*Buckley*'s emphasis on the fundamental nature of the right to spend personal funds for campaign speech").[2]

The Ninth Circuit majority deemed it a virtue that the Arizona statute "does not distinguish between

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[2] The Ninth Circuit's misjudgment is evident in what its reasoning would justify. By the Ninth Circuit's logic, a State seemingly could grant a publicly funded candidate *double* the funds (or more) spent by the opponent. After all, such a scheme would make no "identity-based distinctions" disfavoring wealthy candidates, *McComish*, 611 F.3d at 522, would simply "enable[]" more speech, *id.* at 524, and would advance the State's interest in "encourag[ing] participation in its public funding scheme." *Id.* at 526. Even though such massive state assistance to a publicly funded opponent would obviously punish a nonparticipating candidate's speech, absent evidence of "actual[] chill[ing]," *id.* at 522-23, the Ninth Circuit would sustain it.

different sources of nonparticipating candidates' financing"; it awards matching funds regardless of whether the trigger is pulled by independent expenditures, a candidate's expenditure of personal funds, or third-party contributions. *McComish*, 611 F.3d at 522. But, the Arizona statute is not saved by its breadth. The statute's wide scope means that it would chill even a modest spending of personal funds by a candidate if his overall campaign expenditures and independent expenditures approached the trigger point. And, given that matching funds are awarded when independent expenditures and third-party contributions reflect wide popular support, *see id.* at 516, 522, the statute impairs the ability of thousands of grassroots supporters to make their voices heard. Limits on independent expenditures and campaign expenditures, no less than limits on a candidate's personal expenditures, "impose . . . severe restrictions on protected freedoms of political expression and association," and therefore are subject to strict scrutiny. *Buckley*, 424 U.S. at 19-23; *see also id.* at 55-58 (striking down limits on campaign expenditures). The Court should reverse the decision below.

B. The Decision Below Conflicts With This Court's Broader Campaign Finance Jurisprudence.

The decision below also clashes with this Court's broader, well-established protections of core political speech. As this Court has made clear, "[s]peech is an essential mechanism of democracy," for "it is the means to hold officials accountable to the people." *Citizens United*, 130 S. Ct. at 898. "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means

to protect it." *Id.* Accordingly, "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Id.*

This Court has specifically protected campaign expenditures and independent expenditures as political speech. "The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer." *Id.* at 917 (Roberts, C.J., concurring). It also protects the political candidate and the expenditures needed to mount a campaign. *Id.* at 908-09. Indeed, the Court has indicated that "expenditure limitations 'impose significantly more severe restrictions on protected freedoms of political expression and association than' do contribution limitations." *Randall v. Sorrell*, 548 U.S. 230, 241 (2006) (plurality opinion) (quoting *Buckley*, 424 U.S. at 23). This reflects the reality that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression." *Buckley*, 424 U.S. at 19. Thus, the speech burdened by the Arizona statute is core political speech.

Appropriately, "[l]aws that burden" a right so vital to our system of government as "political speech are 'subject to strict scrutiny.'" *Citizens United*, 130 S. Ct. at 898 (quoting *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 464 (2007)). This most searching standard of review requires the government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* (quoting *Wisconsin Right to Life*, 551 U.S. at 464) (internal quotation marks omitted). This Court has never suggested that limits on expenditures are anything but severe burdens, and certainly has never suggested that they are comparable to mere disclosure requirements subject only to intermediate

scrutiny, as the Ninth Circuit held. *See McComish*, 611 F.3d at 525. Given that the Arizona statute severely burdens expenditures, it must be subjected to strict scrutiny. *See Davis*, 128 S. Ct. at 2772.

Under that exacting standard, the Arizona law must be struck down. Not only does it impose severe consequences on a non-participating candidate's own speech, it also burdens supporters' independent expenditures. No compelling state interest justifies those burdens. As this Court made clear in *Citizens United*, independent expenditures, like a candidate's personal expenditures, "do not give rise to corruption or the appearance of corruption." 130 S. Ct. at 909. Precisely because independent expenditures are not coordinated with the candidate, they do not create a risk of *quid pro quo* arrangements to influence the candidate's decisions in office. *Id.* at 908. To the contrary, the fact that a speaker "is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials." *Id.* at 910. Accordingly, the Arizona law cannot be justified as an anti-corruption measure.

Nonetheless, Arizona and the Ninth Circuit defend the law on anti-corruption grounds and thus run headlong into *Citizens United*. *McComish*, 611 F.3d at 525-26. It is no answer to say, as the lower courts did, that Arizona has an interest in promoting participation in its public funding system. *Id.* at 526. Promoting the system is not, standing alone, a compelling interest. Instead, as the Ninth Circuit later conceded, Arizona seeks to encourage candidates to take public funds on the theory that publicly funded candidates have "reduced opportunities and reduced incentives to trade legislative favors for financial favors"—*i.e.*, for supposed anti-corruption goals. *Id.* Regardless of

whether that theory is correct, it does not justify penalizing a candidate's or independent citizen's speech. *Citizens United*, 130 S. Ct. at 908-09.

The Court should clarify that matching-fund provisions like the Arizona statute, which substantially burden core speech and are not narrowly tailored to serve a compelling state interest, violate the First Amendment.

II. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT STRIKING DOWN LAWS THAT UNDULY BURDENED PROTECTED SPEECH BY CONDITIONING IT ON ACCEPTANCE OF ASSORTED PENALTIES.

Not only does the decision below run counter to established campaign finance case law, it also tramples principles that undergird this Court's wider First Amendment jurisprudence.

A basic tenet of our constitutional system is that the state may not, by cunning manipulation of the laws, circumvent rights guaranteed to the people. *See Elrod v. Burns*, 427 U.S. 347, 359 (1976) (plurality opinion) (forbidding state action in which "[t]he belief and association which government may not ordain directly are achieved by indirection"); *Speiser*, 357 U.S. at 526 (invalidating law because it "produce[d] a result which the State could not command directly").

This principle is particularly strong in the First Amendment context. The government cannot, using statutes that stop just short of prohibition, "deter[] . . . speech which the Constitution makes free." *Id.* Such a state of affairs would expose one of our most precious liberties to the power of any government clever enough to veil its commands in the

form of suggestions, encouragement, and threats. Thus, this Court has often struck down laws that impinge on the exercise of free speech by conditioning exercise of that right on acceptance of assorted penalties. While the laws the Court has invalidated vary greatly in the type and magnitude of the penalty imposed on speech, a single theme emerges from this Court's unconstitutional conditions cases: The state may not prevent through the threat of negative consequences the speech it cannot ban directly. And yet, this is precisely the operation of the Arizona statute approved by the decision below.

A. The State Cannot Condition Free Speech On The Promotion Of A Viewpoint Contrary To The Speaker's.

The Court has long made clear that conditioning the exercise of First Amendment rights on promotion of a viewpoint contrary to the speaker's position substantially burdens speech and cannot be tolerated. In *Miami Herald Publishing Co. v. Tornillo*, the Court struck down a "right to reply" law that provided that if a political candidate "is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges." 418 U.S. 241, 244 (1974). Noting that "[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers," the Court struck down the law because a "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" *Id.* at 256-57 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)).

The Court reached the same conclusion in *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986) (plurality opinion). In that case, a state agency required "a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagree[d]." *Id.* at 4. The Court found a First Amendment violation because the utility was forced to "contend with the fact that whenever it speaks out on a given issue, it may be forced . . . to help disseminate hostile views," and that the utility "'might well conclude' that . . . 'the safe course is to avoid controversy'" and remain silent. *Id.* at 14 (quoting *Tornillo*, 418 U.S. at 257).

The Arizona statute presents the very dangers that this Court warned of in *Tornillo* and *Pacific Gas*. A candidate and his supporters cannot spend over a certain amount without facilitating the opponent's promotion of a contrary viewpoint. The Arizona law, by affixing penalties to expenditures and contributions above the threshold amount, "operates as a command in the same sense as a statute or regulation forbidding [a candidate] to publish specified matter." *Tornillo*, 418 U.S. at 256. It forces a candidate and his supporters "to help disseminate hostile views," *Pacific Gas*, 475 U.S. at 14, as a condition of exercising their First Amendment rights. As a result of the penalties it imposes on speech, it "inescapably 'dampens the vigor . . . of public debate,'" *Tornillo*, 418 U.S. at 257 (quoting *New York Times*, 376 U.S. at 279).

In *Davis v. FEC*, the Court recognized the application of *Pacific Gas* to the campaign finance law at issue. *See* 128 S. Ct. at 2772. The Court should do the same here and affirm that provisions, like the Arizona statute, which condition free speech on the

promotion of a contrary viewpoint, violate the Constitution.

B. The Decision Contradicts The Court's Wider Unconstitutional Conditions Jurisprudence.

In numerous additional contexts, the Court has struck down laws that, while not limiting the freedom of speech directly, attached conditions that unduly burdened its exercise. The burdens at issue in these cases varied in kind and degree, but the cases make clear that even relatively insignificant conditions on speech can offend the Constitution. Judged against these cases, the substantial consequences imposed by the Arizona statute to punish expenditures for a non-participating candidate must be invalidated.

For example, the Court has expressed the unconstitutional conditions principle in public benefits cases. In *Perry v. Sindermann*, the Court declared that a State "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." 408 U.S. 593, 597 (1972). Likewise, in *Elrod v. Burns*, the Court explained that its "decisions have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, *however slight the inducement* to the individual to forsake those rights." 427 U.S. at 358 n.11 (plurality opinion) (emphasis added). Thus even conditions that "slight[ly]" chill the exercise of First Amendment rights can constitute impermissible burdens.

In *Perry*, a teacher who had been employed by a public college on a year-to-year basis alleged that the college's "decision not to rehire him was based on his

public criticism of the policies of the college administration and thus infringed his right to freedom of speech." 408 U.S. at 595. The Court declared that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Id.* at 597. Despite the fact that the teacher was not entitled to renewal of his contract, the Court held that "the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights." *Id.* at 598.

The Arizona statute likewise inhibits speech by tying it to a significant burden—increased funding to a candidate's political opponent. It thus conditions constitutionally protected speech on the speaker's acceptance of a hardship.

This limit on unconstitutional conditions applies with even greater force when the speech at issue "is 'indispensable to the discovery and spread of political truth.'" *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). In such cases, the Court has been "especially careful in weighing the interests that are asserted in support of th[e] restriction and in assessing the precision with which the ban is crafted." *Id.* Thus, in *League of Women Voters*, the Court invalidated a law that conditioned funding from the Corporation for Public Broadcasting on a television or radio stations' refusal to "engage in editorializing," *id.* at 366 (internal quotation marks omitted). The Court found that the law impermissibly "operate[d] to restrict the expression of editorial opinion on matters of public importance" by attaching negative consequences to

the stations' speech. *Id.* at 375. In that way, the Court found, the stations were not truly free to speak as they wished. *See id.* at 402. Accordingly, the law violated the First Amendment by infringing on core political speech.

Arizona's law commits the same offense. It attaches negative consequences to the expression of core political speech and thereby interferes with "the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Id.* at 381-82 (internal quotation marks omitted). Just as the law in *League of Women Voters* made it difficult for the stations to survive financially without curtailing their speech, the Arizona statute discourages candidates and their supporters from discussing pressing political issues to the extent they believe necessary. As in *League of Women Voters*, the Court should be highly skeptical of a law that imposes such burdens.

The Court's decision in *Speiser v. Randall* likewise demonstrates how even minimally burdensome conditions on speech can run afoul of the First Amendment. In that case, the Court invalidated a California law that denied a tax exemption to persons who could not carry the state-imposed burden to show they refrained from advocating the overthrow of the government. 357 U.S. at 515-17. The Court noted that the law burdened speech, since "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech." *Id.* at 519. Even assuming for the sake of argument that the law applied only to illegal (and therefore unprotected) speech, the Court nonetheless found a constitutional violation because California shifted the burden of proof to the taxpayer. *See id.* at 528-29.

Describing "[t]he vice of the [California] procedure," the Court explained, "[t]he man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." *Id.* at 526. Even though the California law required only proof that one's speech was lawful, and pertained only to the availability of a tax exemption, the Court held the statute unconstitutional.

In contrast, the Arizona statute poses a significantly greater burden on free speech. Whereas a speaker under the California law could avoid losing the tax exemption simply by proving that his speech was legal, the Arizona law provides no safe harbor: A candidate whose expenditures pass the threshold amount *will* trigger additional funding for the candidate's opponent. The Arizona statute fails to "provide any way in which a candidate can exercise [his free speech] right without abridgement." *See Davis*, 128 S. Ct. at 2772. Moreover, the nature of the Arizona statute's penalty strikes at the heart of the First Amendment. It affects not the speaker's tax bill, but his prospects in an election—a central institution in our republican form of government. Because the *Speiser* Court found the California statute imposed an unconstitutional condition, there can be no doubt that the Arizona statute does likewise and must be invalidated.

While the particular consequences attached to speech in these cases differed, a consistent rule runs throughout them: Tying burdensome consequences to protected speech is no more permissible than directly banning speech itself. This rule is strong; even consequences which result in mere "slight . . . inducement[s]" to curtail speech, *Elrod*, 427 U.S. at

358 n.11, can be impermissible under this Court's precedents. And the rule gains additional strength when the speech in question is political. *League of Women Voters*, 468 U.S. at 383.

The Arizona statute significantly impairs core political speech by attaching an inescapable condition to it. It therefore falls into the most forbidden category of unconstitutional conditions. Because the Ninth Circuit failed to recognize this vital part of First Amendment jurisprudence, the Court should reverse the decision below.

CONCLUSION

For these reasons, and those stated by petitioners, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

JONATHAN F. COHN*
MATTHEW D. KRUEGER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jcohn@sidley.com

Counsel for Amicus Curiae

* Counsel of Record

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IN THE

Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *et al.*,
Petitioners,

v.

KEN BENNETT, *et al.*,
Respondents.

JOHN MCCOMISH, *et al.*,
Petitioners,

v.

KEN BENNETT, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF PETITIONERS

ALLISON R. HAYWARD
Counsel of Record
CENTER FOR COMPETITIVE POLITICS
124 S. West Street, Suite 201
Alexandria, VA 22314
(703) 894-6800
ahayward@campaignfreedom.org

January 18, 2011 *Counsel for Amicus Curiae*

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INTEREST OF THE *AMICUS CURIAE* [1]

The Center for Competitive Politics (or CCP) is a non-profit 501(c)(3) organization that seeks to educate the public on the effects of money in politics. It does this through studies, legal briefs, historical and constitutional analysis, and media communications. CCP is interested in these cases because they challenge the selective governmental subsidy of political expression, which is part of a misguided effort to encourage participation in tax-funded political campaigns.

CCP believes government funding of campaigns does not serve the state's legitimate interests. Instead, these programs impede political activity and the flow of political information, and call for the state to intervene as a funder in campaigns.

SUMMARY OF ARGUMENT

CCP urges this Court to reverse the Ninth Circuit. That court held that the Arizona state subsidy at issue survived intermediate scrutiny. State subsidies, and in particular the state's "rescue funds," infringe on First Amendment rights and violate the long-accepted principle that the state must not interfere in campaigns on behalf of particular candidates. The state should be required to prove that it has a sufficient interest served by such laws.[2]

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, and no counsel or party funded its preparation or submission.

[2] Whether such interest must be "compelling" or something less depends on whether the law is subject to "strict" or "intermediate" scrutiny. We believe that strict scrutiny, requiring a compelling interest, is the correct answer. However, under

This Court should question the assumption that "clean elections" laws serve such an interest. We believe that when the Court considers neutral academic studies of clean elections laws, the lack of evidence that such laws benefit the political system or reduce corruption, and the larger context of state-subsidization of political activity, it will conclude that the State has not met that burden.

In this case, the court below *presumed* the state's interest, rather than requiring the state to show how any proper interest was served by the law. This disposition is remarkable given that Arizona's law assists some (but not all) candidates, by using public revenue to ensure that participating candidates will not be outspent. Arizona claims this is necessary to encourage candidates to participate in the public financing system, which in turn prevents corruption. But, the asserted anti-corruption effect of government financing is unsupported by scholarly reviews of the evidence. Furthermore, government funding means the state itself is funding the process by which nominees and officeholders are selected. Such state-imposed burdens on expression and association cannot pass any level of heightened scrutiny, and abrogate the constitutional separation of the incumbent government from the campaign process.

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either standard, the state cannot demonstrate a proper interest in Arizona's system of government financing. Thus we assume, for purposes of argument, that the Court will apply the lower standard of intermediate scrutiny, as did the Ninth Circuit.

ARGUMENT

Introduction

The Arizona Clean Elections Act, Ariz. Rev. Stat. § 16-940 *et seq.* provides government funding for campaigns for many Arizona state elective offices.[3] As an incentive to participate, the Act guarantees "equal" funding when participating candidates face a traditionally funded primary or general election challenger who spends (in the primary) or raises (in the general) an amount over the "initial disbursement" the state gave the subsidized candidate.[4] The Act also adds to the participating candidate's funding when independent groups spend enough to bring the total "in opposition" above the amount of the subsidy.[5] Arizona law thus conflates the spending of the candidate opposing a state-funded candidate with money spent – independently – by non-candidate individuals and groups.

Although the law is titled "Equal Funding for Candidates," it would be wrong to presume that "equal" funding is the result. Under Arizona's law, if only one of four primary or general election candidates enrolls in the program, and any one of the other

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[3] The Act funds races for Governor, Secretary of State, Attorney General, Treasurer, Superintendent of Public Instruction, Corporation Commissioner, Mine Inspector, State Senator, and State Representative.

[4] Ariz. Rev. Stat. § 16-952(A). The additional amount is determined by the amount spent that exceeds the initial disbursement, less 6%, which is intended to reflect fundraising costs otherwise incurred, and certain adjustments for early fundraising not relevant here. The threshold is triggered by opposition spending in the primary, but by fundraising in the general election.

[5] Ariz. Rev. Stat. § 16-952(C).

three spends over the amount of the public grant, the participating candidate alone can receive additional funding. If an outside interest group makes an independent expenditure on behalf of one of the opponents that brings the spending level over the participant's grant level, then the participating candidate (again, alone) can receive additional funding. Left behind in this bipolar system are the other traditionally funded candidates. The grant is not reduced if a non-participating candidate chooses to raise or spend less than the grant amount. And because traditionally funded candidates must incur the added costs of raising funds, each dollar of matching funds has a higher net value than each dollar of privately raised funds.[6] It is more accurate to say that the law's goal is to ensure equal *or better* funding for state-supported candidates.

Proponents of the Act, as well as the court below, contend that the additional "equal" funding is essential to motivate Arizona candidates to participate in the Clean Elections Act. *McComish v. Bennett*, 604 F.3d 720, 735-37 (9th Cir. 2010). That court assumed that "clean elections" laws that provide government funding to campaigns have a salutary effect in the states that adopt them.

We wish first to direct the Court's attention to the absence of any evidence that such benefits do appear in these states. This Court will recognize that *amicus curiae* made a similar argument in support of the petition for a writ of certiorari in this case. We wish to summarize and amplify our previous argument. As we noted before, despite decades of expe-

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[6] *See supra* note 4 (noting statute's assumption that 6% reduction would adequately account for fundraising costs).

rience with various forms of government-funded campaigns, the state cannot demonstrate that government financing of campaigns reduces corruption, or fosters indirect changes (such as increased competitiveness or incumbent turnover) that could be shown to reduce corruption in politics.

We also call the Court's attention to the larger dangers in such programs. These programs violate the important and long accepted principle of separation of campaigns and the state, an interest which is especially acute in the party nomination process. While the state may lawfully ensure a fair process for registering and voting, it does not have authority to intervene in financial support of a particular candidate in the furtherance of "fairness."

I. CLEAN ELECTIONS LAWS FAIL TO DELIVER PROMISED BENEFITS

A. Studies from federal and state governments show no real benefits in jurisdictions from "clean elections" laws

Federal and state governments have made only modest attempts to ascertain the benefits that states with tax-funded "clean elections" programs might experience. The *best* that can be said is that some governmental studies have possibly identified some modest correlating benefits, but no causal relationship between those improvements and the laws.

The federal Government Accountability Office ("GAO") has released two studies of "clean elections" laws at the direction of Congress. *See* Pub. L. No. 107-155, 116 Stat. 81 (2002). The GAO reported in 2003, with only two election cycles to examine, that it

was too soon to observe whether the "clean elections" systems furthered the intended goals of increasing competition, voter choice and participation, confidence in government, or reducing campaign spending and interest group influence. *See* GAO, *Campaign Finance Reform: Experiences in Two States That Offer Full Public Funding for Political Candidates* (GAO-10-390) (May 2010) (summarizing 2003 Report, GAO 03-453). In May 2010, GAO reported that it had found statistically significant changes in only one of the five goals of these government funding programs. GAO only observed a decrease in the winner's margin of victory in legislative races in both Maine and Arizona. *Id.* at 35-37. Yet in the end, the GAO could not resolve whether public funding served any of its articulated goals in either Arizona or Maine. *Id.* at 84.

State governments have also attempted to ascertain the effectiveness of "clean elections" laws. The Arizona Clean Elections Commission has never assessed the Arizona Act overall, but has instead commissioned a series of surveys. Maine, by contrast, has reviewed its program. Maine Commission on Governmental Ethics and Election Practices, *2007 Study Report*. The State of Maine observed some positive trends in increasing the number of candidates and reducing private money in politics, but admitted that these trends "might be difficult to attribute" to public financing. *Id.* at 1.[7] In 2008,

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[7] The state identifies a decrease in spending as a "benefit" of such systems. Yet this Court has long recognized that spending supports political speech. *Buckley v. Valeo*, 424 U.S. 1, 39 (1976). The presumption of the First Amendment is that speech, especially political speech, is a good thing. While some modest regulation is permitted to combat corruption or its appearance, this Court has never accepted the idea that the

New Jersey assessed its 2007 Clean Elections Pilot Project, which provided public funding in three legislative districts. New Jersey Election Law Enforcement Commission, *2007 Fair and Clean Elections Report* (Mar. 28, 2008), http://www.elec.state.nj.us/clean_elect/downloads/ce_report2007.pdf. The New Jersey Report observed that the Clean Elections Pilot Project did not improve turnout, *id.* at 35; did not reduce spending, *id.* at 41-42; and did not improve the public perception of politics, *id.* App. 1 at 8.

B. Academic studies have similarly been unable to establish the benefits, if any, of adopting government-funded "clean elections" programs.

In contrast with the scant number of government reports, scholars have released numerous studies of government funding for campaigns. Despite these efforts, scholars can still say little definitively about the effect of such funding on politics and elections. The United States has nearly 40 years of experience with direct government subsidies for candidates, with the first state systems taking effect with the elections of 1974, and the federal presidential system taking effect for the election of 1976.[8] Yet as an expert in this case for the Respondents conceded when assessing the literature on whether public financing in-

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state has an interest, compelling or otherwise, in reducing the amount of political speech. When the state identifies decreased private participation as a *per se* "benefit," it suggests that the state's real goal in adopting government funding is not to address corruption, but simply to reduce the amount of political speech.

[8] *See Buckley*, 424 U.S. at 85 (detailing legislative history of federal provisions).

creased diversity, made elections more competitive, or reduced private influence or costs: "Does public financing achieve any of these goals? The short answer is that nobody knows . . ." Kenneth Mayer, Timothy Werner and Amanda Williams, *Do Public Funding Programs Enhance Electoral Competition?*" in Michael P. McDonald and John Samples, eds., THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS 245, 246 (2006).

As detailed in our brief at the petition stage, that summarizing statement remains as accurate today as it was in 2006. Brief of *amicus curiae* the Center for Competitive Politics, No. 10-238 & 10-239 (Sept. 16, 2010) at 11-16. We acknowledge that some disagreements about the proper data and techniques will persist in academic circles. *See* Michael G. Miller, *After the GAO Report: What Do We Know About Public Election Financing* (working paper, July 23, 2010), http://sites.google.com/site/millerpolsci/research. However, the dearth of evidence goes beyond a simple dispute over social science techniques.

Many academic studies have evaluated who uses government funding, and whether new or different candidates are able to enter politics because of these programs. It appears that government funding goes to candidates who have already shown political skill in the traditionally funded system. Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 STATE POLITICS AND POL'Y QUARTERLY 263 (2008); Raymond J. La Raja, *Does Public Funding of Elections Encourage More Citizens to Run for Office?* (paper presented to the 2009 APSA meeting) http://ssrn.com/abstract=145095. When the focus moves more

directly to consider their effects on corruption, the picture becomes even bleaker for advocates of government campaign financing. *See, e.g.*, Beth Ann Rosenson, *The Effect of Political Reform Measures on Perceptions of Corruption*, 8 ELECTION L. J. 31, 41 (2009); Vincent G. Moscardelli, *Money, Participation and Deliberation in the Connecticut General Assembly*, (paper presented to the 2009 APSA meeting) http://ssrn.com/abstract+1452226.

Even in the most recent scholarship available, no favorable picture emerges about the effects of selective government funding on campaigns and elections. Studies performed using professional econometric analyses draw contradictory conclusions – if they detect any effect at all. *See* Brief of *amicus curiae* the Center for Competitive Politics, *supra*. The Court can surmise that each of these scholars is toiling in good faith, and that the benefits of government financing to a state seeking to reduce corruption have eluded observation thus far.

In short, the Court should not simply presume that the law serves some benefit, as the court below seems to have done. The government has a burden to demonstrate its legitimate interest. If public funding of campaigns serves no state interest, yet burdens protected speech and associational liberties, it follows that a governmental incentive payment – the law at issue here – lacks sufficient justification and is unconstitutional.

II. TAX FUNDING REGIMES VIOLATE THE IMPORTANT PRINCIPLE OF SEPARATION OF CAMPAIGNS AND STATE

Lost in the debate over government funding of political campaigns is concern for the structural

dangers posed by these systems. In the abstract, the threat could be described as the failure of a constitutionally implied separation of campaigns and the state. As Justice Douglas stated: "Under our Constitution, it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation." *U.S. v. United Auto Workers*, 352 U.S.567, 593 (1957) (Douglas, J., dissenting). The fundamental concept of popular sovereignty counsels against funding of select campaigns by the incumbent government. Candidate subsidies are different, and more dangerous, than the funding of the election machinery, the subsidization of expressive activity generally, or even the subsidy of selective viewpoints, any of which could be justified in the proper contexts. *See, e.g.*, Martin Redish, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 214-15 (2001).

This principle is especially powerful considering the effect of Arizona's matching subsidy in political party primaries. Parties, even in their relatively weaker modern form, provide the essential bridge between incumbent government power and popular accountability. The party nomination process is especially significant to popular sovereignty, and especially vulnerable to state interference.

A. The government should not selectively fund the process by which officeholders are chosen

Respect for popular sovereignty requires that this Court look closely at laws that allow an incumbent government to fund the process by which its successors in representation are elected. If state power

derives from the consent of the people, and the people retain the ability to alter or abolish that government, it follows that the government has no separate place in that process to influence that choice, unless there is some showing of a need for state action apart from campaigning. As Senator Howard Baker observed during the debate on the Federal Election Campaign Act amendments in 1974, "it is extraordinarily important that the Government not control the machinery by which the public expresses the range of its desires, demands and dissent." 120 Cong. Rec. S8202 (1974), cited in *Buckley* 424 U.S. at 248 (Burger, C.J., dissenting).

The Constitution refers to the power of the "People," that is, popular sovereignty, in the Preamble, and the Ninth and Tenth Amendments.[9] This is not to say that the government has no legitimate role in the political process. States are explicitly authorized to prescribe the time, place and manner of holding elections (including those for federal office) subject to preemption in the case of federal elections by acts of Congress. U.S. CONST. Art. 1, § 4. The government's contemporary role as election administrator was an appropriate remedy to the legacy of corruption in vote buying, fraud, and intimidation

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[9] Moreover, unless one insists on reading it entirely out of the text, the Guarantee Clause protects popular sovereignty. "[T]he subtle invocation of the people in the republican Government Clause of Article IV reaffirms basic principles of popular sovereignty – of the right of the people to ordain and establish government, of their right to alter or abolish it, and of the centrality of popular majority rule in these exercises of ultimate popular sovereignty." Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 UNIV. COLO. L. REV. 749, 762 (1994).

arising in many places from the private administration of elections. *See generally* Richard Franklin Bensel, THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY (2004).[10]

This historic role of election administrator is very different from the role Arizona plays. As Chief Justice Burger noted in dissent in *Buckley v. Valeo*, government financing of campaigns is not "simply to police the integrity of the electoral process" but is "the Government's actual financing, out of general revenues, a segment of the political debate itself." 424 U.S. at 248. Burger continued:

> [T]he inappropriateness of subsidizing, from general revenues, the actual political dialogue of the people – the process which begets the Government itself – is as basic to our national tradition as the separation of church and state . . . or the separation of civilian and military authority, neither of which is explicit in our Constitution but both of which have developed through case by case adjudication of express provisions . . .

Id. at 248-49 (citations omitted). Admittedly, Chief Justice Burger's argument did not carry the day, but he was addressing the constitutionality of a far more modest public financing regime than the one before this Court. The Court should weigh his points in light of the more intrusive and unbalanced program presented in this case. The Arizona matching subsidy,

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[10] There has been great debate, and a few wars fought, over which individuals get to exercise the power of popular sovereignty. *See generally*, Amar, *supra* note 8. Even in these most trying of circumstances, however, the power itself was not questioned, and all agreed that "government" was necessarily subordinate to, and created by, the people.

unlike the presidential system upheld in *Buckley v. Valeo*, has created a governmental role in campaign financing for the benefit of state-favored types of candidates.

The problems with using government resources to campaign do not arise because, as some have suggested, only "voters" or "people" should be able to participate in politics through the raising and spending of money. *See, e.g.*, Jamie Raskin, *Corporations Aren't People*, NPR (Sept. 10, 2009). The incumbent government as such has no place in subsidizing the debate about its own future suitability. The people, and their organizations, whom all live under the laws and police power of the incumbent government, do – whether or not they can cast a ballot.[11] When the government moves from ensuring an open, fair, organized method of voting and counting ballots, to using its vast resources to intervene in the debate itself, it fundamentally alters the relationship between the governed and the government.

Legal restrictions on the political use of government funds reflect the intuitive merit of this distinction. Federal incumbent officeholders who are candidates for office may not use official resources for campaign purposes. *See, e.g.*, 39 U.S.C. § 3210(a)(4) (prohibiting use of franked mail for political purposes); 18 U.S.C. § 607 (prohibiting political fundraising in federal offices). State laws similarly prohibit such use. *See* Rev. Code Wash. § 42.52.180; Neb. Rev. Stat. § 49-14,101.02; Iowa Code § 68A.505. Government contractors are similarly limited in how

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[11] Thus, minors and resident aliens may campaign and make contributions and expenditures, notwithstanding the fact that they may not vote. *See McConnell v. FEC*, 540 U.S. 93, 231-32 (2003) (minors); 2 U.S.C. § 441e (resident aliens).

public funds may be spent. *See* FAR § *31.205-22*. Congress and state legislatures have further restricted the political activities of public employees, in response to corruption and abuse. *See* 5 U.S.C. §§ 7321 et seq. (codifying the "Hatch Act").

B. Separation of campaign and state is especially important in party primaries

Although political parties are acknowledged nowhere in the Constitution, and were disfavored by many of its Framers, in modern American politics parties are essential organizations:

> Parties have proven to be reliable mediating institutions that connect citizens to their government. Through their widely understood labels, parties help voters identify and select among candidates and policies. By contesting elections, parties also bring accountability to governing elites . . . [and] parties help to unite various interests through the give-and-take of coalition building.

Raymond J. La Raja, SMALL CHANGE: MONEY POLITICAL PARTIES AND CAMPAIGN FINANCE REFORM 2 (2008).

The extent to which the state can direct political party activity has been a topic of frequent legal dispute. In general, even intra-party reform efforts have often invoked the power of the state, as in the legislative imposition of the direct primary during the Progessive Era. *See* Harold R. Bruce, AMERICAN PARTIES AND POLITICS 296-98 (1927). As state law increasingly set the rules for parties, "[t]hose who controlled the state thus gained the power to structure the system in their own behalf." Tracy

Campbell, DELIVER THE VOTE 97 (2005) (quoting historian Peter Argersinger).

When the government's intervention in party affairs has met with resistance, this Court has been called upon to assess the limits of government control of parties. In *California Democratic Party v. Jones*, this Court took the occasion to review those precedents, and noted "they do not stand for the proposition that party affairs are public affairs . . ." 530 U.S. 567, 573 (2000). The Court observed that "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee." *Id.* at 575. Accordingly, this Court has held that the state may not prohibit a state party committee from making pre-primary endorsements, *Eu v. San Francisco County Democratic Cen. Committee*, 489 U.S. 214 (1989); nor may it dictate to a party whether non-party independent voters can participate in party primaries. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). The party nomination process is "special," *see* 530 U.S. 575, and should only be subject to state intrusion when a compelling interest (such as stopping invidious burdens on voting rights) is in play. *See, e.g., Terry v. Adams*, 345 U.S. 461 (1953).

The Arizona subsidy program unconstitutionally intrudes into the primary selection process of Arizona's political parties. Any number of candidates may contend for a party's nomination (once they fulfill the state's ballot access requirements, which are not at issue here).[12] *See* Office of the Secretary of

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[12] It is commonplace in Arizona for contested legislative primaries to involve an abundance of candidates seeking their party's nomination. *See, e.g.*, State of Arizona Official Canvass,

State (Arizona), Handbook for Candidates and Political Committees at 15-18, http://www.azsos.gov/election/2010/Info/Candidates_and_Political_Committees/Candidates_and_political_committees.pdf. As observed above, the state program subsidizes only participating candidates, and matches rival candidates' (or groups supporting those candidates) expenditures. It provides nothing for traditionally funded rivals who are also "outspent."

No compelling state interest justifies this imposition. Admittedly, the state may constitutionally direct Arizona's parties to select nominees via a direct primary, *see American Party of Texas v. White*, 415 U.S. 767 (1974), to ensure that party contests are resolved democratically. The state may not reach into the antecedent campaign, and subsidize the candidacies of some potential nominees but not others, unless it can demonstrate a compelling interest. *See Jones*, 530 U.S. at 582. The nomination process has been protected from state incursions in a variety of contexts. *See Jones, supra, Eu, supra, Tashjian, supra, Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981). Yet if the Arizona regime is allowed to persist, a party could, after exercising its constitutional right to endorse a candidate for nomination, see its spending on behalf of that candidate matched by the state on behalf of disfavored, unendorsed candidates who decided on their own to participate in the state's funding system.

This interference is beyond any imposed in the other party-regulation disputes brought before this

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2010 Primary Election: August 24, 2010, http://www.azsos.gov/election/2010/Primary/Canvass2010PE.pdf.

Court, and strikes at the heart of party internal speech and associational liberties.[13] As Justice Kennedy stated in another context: "When the State seeks to direct changes in a political party's philosophy by forcing upon it unwanted candidates . . . the State's incursion on the party's associational freedom is subject to careful scrutiny under the First Amendment." *Jones*, 530 U.S. at 587. Once again, the state interest needed to justify Arizona's law is absent.

CONCLUSION

In the opinion below, the United States Court of Appeals for the Ninth Circuit concluded that Arizona's "clean elections" law, including its "Equal Funding of Candidates" provision, survived intermediate scrutiny because it bore a substantial relation to the State's important interest in reducing *quid pro quo* corruption. 604 F.3d at 732-33. This Court should reverse that ruling, and hold instead that the subsidy is unconstitutional.

At bottom, the advocates of governmental funding can only prevail if they can succeed in making an incoherent argument. They must convince the people (and the courts) that officeholders should not be trusted to raise and spend private campaign funds free of corrupting influences – hence the need for governmental subsidy. Yet, officeholders must necessarily be trustworthy enough to decide how the public fisc is spent in government-funded campaigns in which they are likely to be involved as candidates.

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[13] To the extent campaign finance policy should allow a greater role for parties than at present, these subsidies work against those goals. *See* Peter J. Wallison and Joel M. Gora, BETTER PARTIES, BETTER GOVERNMENT 121-23 (2009).

Arizona's "clean elections" corruption remedy is exactly backwards. The state law attempts to "improve" state governance by bringing campaigns within the funding and control of state officeholders, who will, over time, embrace protectionist policies. It does violence to the implicit constitutional separation of campaigns, during which the people debate the merits of their representatives, and the state, whose interest is limited to carrying out an orderly election. In doing so, Arizona's law confuses the political interest of the incumbent regime with legitimate state interests in orderly elections. It interferes with the important role parties play in the identification and nomination of future representation. Accordingly, this Court should reverse the decision below.

Respectfully submitted,

ALLISON R. HAYWARD
Counsel of Record
CENTER FOR COMPETITIVE POLITICS
124 S. West Street, Suite 201
Alexandria, VA 22314
(703) 894-6800
ahayward@campaignfreedom.org

Counsel for Amicus Curiae

January 18, 2011

AMICUS CURIAE BRIEF

Nos. 10-238 and 10-239

In The Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

JOHN MCCOMISH, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR GOVERNMENTAL STUDIES IN SUPPORT OF RESPONDENTS

FREDRIC D. WOOCHER*
STRUMWASSER & WOOCHER LLP
10940 Wilshire Blvd., Suite 2000
Los Angeles, CA 90024
fwoocher@strumwooch.com
(310) 576-1233

ROBERT M. STERN
JESSICA A. LEVINSON
MARGARET C. MILLIGAN
HILARY L. RAU
CENTER FOR GOVERNMENTAL STUDIES
10951 W. Pico Blvd., Suite 120
Los Angeles, CA 90064
jlevinson@cgs.org
(310) 470-6590 x 115

Counsel for Amicus Curiae Center for Governmental Studies

February 2011 **Counsel of Record*

(CICKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE *AMICUS CURIAE*[1]

The Center for Governmental Studies (CGS) is a non-profit organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. CGS' mission is to help civic organizations, decision-makers and the media strengthen democracy and improve governmental processes by providing rigorous research, non-partisan analysis, strategic consulting and innovative models of public information and civic engagement.

CGS is uniquely situated to present this brief. CGS has studied campaign finance laws, with a specific focus on public campaign financing, for over twenty-seven years. Since 1983, CGS has researched, analyzed and assessed the practical impacts of public campaign financing programs in twenty-three states and sixteen local jurisdictions throughout the nation. *See, e.g.*, CENTER FOR GOVERNMENTAL STUDIES, STATE PUBLIC FINANCING CHARTS (2009) and CENTER FOR GOVERNMENTAL STUDIES, LOCAL PUBLIC FINANCING CHARTS (2009). CGS has published its research in dozens of reports[2] and drafted several model campaign financing

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, and no counsel or party funded its preparation or submission.

[2] *See* MOLLY MILLIGAN, CENTER FOR GOVERNMENTAL STUDIES, PUBLIC CAMPAIGN FINANCING IN ALBUQUERQUE: CITIZENS WIN WITH CLEAN MONEY ELECTIONS (2011) [hereinafter MILLIGAN, CITIZENS WIN]; HILARY RAU, CENTER FOR GOVERNMENTAL STUDIES, PUBLIC CAMPAIGN FINANCING PORTLAND: SHOULD "VOTER-OWNED ELECTIONS" SURVIVE? (2010); JESSICA LEVINSON, CENTER FOR GOVERNMENTAL

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STUDIES, CAMPAIGN FINANCING IN NORTH CAROLINA JUDICIARY: BALANCING THE SCALES (2009) [hereinafter LEVINSON, BALANCING THE SCALES]; JESSICA LEVINSON, CENTER FOR GOVERNMENTAL STUDIES, PUBLIC CAMPAIGN FINANCING IN FLORIDA: A PROGRAM SOURS (2008) [hereinafter LEVINSON, A PROGRAM SOURS]; STEVEN M. LEVIN, CENTER FOR GOVERNMENTAL STUDIES, PUBLIC CAMPAIGN FINANCING: WISCONSIN – SHOWING ITS AGE (2008) [hereinafter LEVIN, WISCONSIN]; JESSICA LEVINSON, CENTER FOR GOVERNMENTAL STUDIES, PUBLIC CAMPAIGN FINANCING: NEW JERSEY GOVERNOR – WEEDING OUT BIG MONEY IN THE GARDEN STATE (2008) [hereinafter LEVINSON, NEW JERSEY GOVERNOR]; JESSICA LEVINSON, CENTER FOR GOVERNMENTAL STUDIES, PUBLIC CAMPAIGN FINANCING: NEW JERSEY LEGISLATURE – A PILOT PROJECT TAKES OFF (2008) [hereinafter LEVINSON, NEW JERSEY LEGISLATURE]; ANNA N. MEYER, CENTER FOR GOVERNMENTAL STUDIES, PUBLIC CAMPAIGN FINANCING: MINNESOTA – DAMMING BIG MONEY IN THE LAND OF 10,000 LAKES (2008); SASHA HOKWITZ, CENTER FOR GOVERNMENTAL STUDIES, PUBLIC CAMPAIGN FINANCING: MICHIGAN – DRIVING TOWARDS COLLAPSE? (2008); STEVEN M. LEVIN, CENTER FOR GOVERNMENTAL STUDIES, KEEPING IT CLEAN: PUBLIC FINANCING IN AMERICAN ELECTIONS (2006) [hereinafter LEVIN, KEEPING IT CLEAN]; PAUL RYAN, CENTER FOR GOVERNMENTAL STUDIES, POLITICAL REFORM THAT WORKS: PUBLIC CAMPAIGN FINANCING BLOOMS IN TUCSON (2003) [hereinafter RYAN, PUBLIC CAMPAIGN FINANCING BLOOMS IN TUCSON]; PAUL RYAN, CENTER FOR GOVERNMENTAL STUDIES, A STATUTE OF LIBERTY: HOW NEW YORK CITY'S CAMPAIGN FINANCE LAW IS CHANGING THE FACE OF LOCAL ELECTIONS (2003) [hereinafter RYAN, A STATUTE OF LIBERTY]; PAUL RYAN, CENTER FOR GOVERNMENTAL STUDIES, DEAD ON ARRIVAL? BREATHING LIFE INTO SUFFOLK COUNTY'S NEW CAMPAIGN FINANCE REFORMS (2003) [hereinafter RYAN, DEAD ON ARRIVAL]; PAUL RYAN, CENTER FOR GOVERNMENTAL STUDIES, ON THE BRINK OF CLEAN: LAUNCHING SAN FRANCISCO'S NEW CAMPAIGN FINANCE REFORMS (2002) [hereinafter RYAN, ON THE BRINK OF CLEAN]; and PAUL RYAN, CENTER FOR GOVERNMENTAL STUDIES, LOS ANGELES: ELEVEN YEARS OF REFORM: MANY SUCCESSES, MORE TO BE DONE (2001) [hereinafter RYAN, ELEVEN YEARS OF REFORM]. All publications by the Center for Governmental Studies are available online at http://publications.cgs.org.

laws.[3] CGS publishes an annually updated online chart of state and local public financing laws and provisions,[4] as well as an online map of jurisdictions with public campaign financing laws.[5] Based on its research, CGS has concluded that public campaign financing laws promote public dialogue and involvement in the electoral process.

The present case concerns the constitutionality of Arizona's public campaign financing law, and specifically the "trigger" clause in that law that provides additional matching funds under certain circumstances. Therefore, this case directly implicates the campaign finance interests and activities of the *amicus*. This brief is meant only to elucidate the

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[3] *See* MOLLY MILLIGAN, CENTER FOR GOVERNMENTAL STUDIES, LOOPHOLES, TRICKS AND END RUNS: EVASIONS OF CAMPAIGN FINANCE LAWS AND A MODEL LAW TO BLOCK THEM (2009); ROBERT M. STERN & MOLLY MILLIGAN, CENTER FOR GOVERNMENTAL STUDIES, MODEL LAW ON PAYMENTS INFLUENCING CANDIDATES AND ELECTED OFFICIALS (2008).

[4] CENTER FOR GOVERNMENTAL STUDIES, STATE PUBLIC FINANCING CHARTS (2009); CENTER FOR GOVERNMENTAL STUDIES, LOCAL PUBLIC FINANCING CHARTS (2009); CENTER FOR GOVERNMENTAL STUDIES, STATE PUBLIC FINANCING CHARTS (2007); CENTER FOR GOVERNMENTAL STUDIES, LOCAL PUBLIC FINANCING CHARTS (2007); CENTER FOR GOVERNMENTAL STUDIES, PUBLIC FINANCING LAWS IN LOCAL JURISDICTIONS – SUMMARY CHART (2005); and CENTER FOR GOVERNMENTAL STUDIES, STATE PUBLIC CAMPAIGN FINANCING LAWS – SUMMARY CHARTS (2005).

[5] CENTER FOR GOVERNMENTAL STUDIES, MAPPING PUBLIC FINANCING IN AMERICAN ELECTIONS (2009) and CENTER FOR GOVERNMENTAL STUDIES, MAPPING PUBLIC FINANCING IN AMERICAN ELECTIONS (2007).

practical benefits of public campaign financing laws in general. This *amicus* brief offers facts and arguments not likely to be advanced in either Party's filings, in an effort to assist the Court in its analysis and decision.

SUMMARY OF ARGUMENT

For three and a half decades, this Court has recognized the fundamental importance of public campaign financing programs to this nation's democracy. *Buckley v. Valeo*, 424 U.S. 1 (1976). Far from failing to serve the important governmental goals articulated in *Buckley*, as argued by *amicus* Center for Competitive Politics ("CCP"), voluntary public financing programs on every level of government directly serve those interests by: lessening the negative effects of private campaign contributions; promoting and enlarging public debate and participation in electoral processes; and reducing the burden of private fundraising. The claim of CCP that there is a "lack of evidence that [public campaign financing] laws benefit the political system or reduce corruption" (Brief of *Amicus Curiae* Center for Competitive Politics in Support of Petitioners, *McComish v. Bennett*, Nos. 10-238 and 10-239, at 2 ("CCP *Amicus*")) flies in the face of substantial evidence to the contrary.[*]

[*] CCP attempts to justify this sweeping claim based on a cursory discussion of only three jurisdictions: Arizona, Maine, and New Jersey. CCP fails to address the significant body of

(Continued on following page)

The purpose of this *amicus* brief is to highlight for the Court the constitutional, beneficial impacts that voluntary public campaign financing programs have had throughout the nation. This brief explains why public campaign financing laws with and without matching funds provisions have a significant history of serving governmental interests long found to be important by this Court.

ARGUMENT

Introduction

More than thirty years ago, this Court in *Buckley* upheld the constitutionality of public campaign financing programs. *Buckley* remains the Court's only thorough examination of the constitutionality of such programs.[7] In *Buckley*, this Court correctly identified important governmental interests served by voluntary public campaign financing programs.

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evidence regarding the positive effects of the public financing programs in these three jurisdictions or the dozens of other jurisdictions that have implemented public financing programs over the last forty years. CGS, on the other hand, bases its conclusions on over twenty-seven years of experience studying public campaign financing programs in thirty-nine jurisdictions.

[7] In 1980, this Court summarily affirmed an en banc decision of the Second Circuit upholding the constitutionality of the presidential public campaign financing program in *Republican National Committee v. FEC*, 487 F. Supp. 280 (S.D.N.Y. 1979) (three-judge court), 616 F.2d 1 (2d Cir.) (en banc) aff'd mem., 445 U.S. 955 (1980).

Over more than three decades, dozens of states and localities have followed the *Buckley* holding by enacting voluntary public campaign financing programs. Studies, academic research, and actual candidate experience demonstrate that voluntary public campaign financing programs serve the important governmental interests identified in *Buckley*: they reduce the deleterious impact of large campaign contributions on the political process; promote speech by facilitating discussions about candidate campaigns; increase public participation in the electoral process; and reduce the burdens of private fundraising.

I. This Court Has Found that Public Campaign Financing Programs Serve Vital Governmental Interests

In the Court's seminal decision in the area of campaign finance reform, this Court unequivocally upheld a series of statutes that created a voluntary public campaign financing program for Presidential election campaigns. *Buckley*, 424 U.S. at 85. The public campaign financing program at issue in *Buckley* provided taxpayer funds for party nominating conventions, as well as for primary and general election candidate campaigns. *Id.*

Buckley remains this Court's only thorough analysis of the constitutionality of public campaign financing programs. The Court emphatically stated that "Congress enacted [presidential public campaign financing] in furtherance of sufficiently important

governmental interests. . . ." *Id.* at 95. *Buckley* held that the voluntary Presidential public campaign financing program was "a congressional effort, not to abridge, restrict, or censor, but rather to *use public money to facilitate and enlarge public discussion and participation in the electoral process*, goals vital to a self-governing people." *Id.* at 92-93 (emphasis added). It concluded that the program "furthers, not abridges, pertinent First Amendment values." *Id.* at 93.

The *Buckley* Court noted that in enacting voluntary public campaign financing, "Congress was legislating for the 'general welfare' to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising."[8] *Id.* at 91. In the jurisdictions where these programs have been enacted, these principles have guided legislators and citizens, who have ratified voluntary public campaign financing programs with their votes.

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[8] This Court found that public campaign financing was a proper mechanism for reducing the burden on candidates that comes "from the rigors of soliciting private contributions." *Buckley*, 424 U.S. at 96.

II. Studies Demonstrate that Public Campaign Financing Programs Serve the Important Governmental Interests Recognized by this Court

Relying on this Court's decision in *Buckley*, dozens of jurisdictions have enacted voluntary public campaign financing programs. *See* CENTER FOR GOVERNMENTAL STUDIES, STATE PUBLIC FINANCING CHARTS (2009) and CENTER FOR GOVERNMENTAL STUDIES, LOCAL PUBLIC FINANCING CHARTS (2009). CGS has extensively studied and published detailed reports on the public campaign financing programs in many of these jurisdictions.[9] The evidence presented by CGS demonstrates that, in practice, these programs do serve the interests identified in *Buckley* as furthering the values of the First Amendment.

There are two types of public campaign financing programs: full public campaign financing programs (a.k.a. "clean money" programs) and partial public campaign financing programs. In both types of programs, candidates first qualify by raising a small number of initial qualifying contributions from private

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[9] *See* MILLIGAN, CITIZENS WIN, *supra* note 2; RAU, *supra* note 2; LEVINSON, BALANCING THE SCALES, *supra* note 2; LEVINSON, A PROGRAM SOURS, *supra* note 2; LEVIN, WISCONSIN, *supra* note 2; LEVINSON, NEW JERSEY GOVERNOR, *supra* note 2; LEVINSON, NEW JERSEY LEGISLATURE, *supra* note 2; MEYER, *supra* note 2; HORWITZ, *supra* note 2; RYAN, PUBLIC CAMPAIGN FINANCING BLOOMS IN TUCSON, *supra* note 2; RYAN, A STATUTE OF LIBERTY, *supra* note 2; RYAN, DEAD ON ARRIVAL?, *supra* note 2; RYAN, ON THE BRINK OF CLEAN, *supra* note 2; and RYAN, ELEVEN YEARS OF REFORM, *supra* note 2.

donors. In full public campaign financing programs, qualifying candidates then receive a lump sum of public funds to run their campaigns. In partial public campaign financing programs, qualifying candidates receive a match of public funds for the subsequent private contributions they raise. The ratio of that match varies by the jurisdiction. In both full and partial public campaign financing systems, the jurisdiction may provide participating candidates with additional funds based on expenditures by opponents or independent groups.

Amicus CCP claims that there is an "absence of any evidence" regarding the benefits of public campaign financing laws (CCP *Amicus* at 4), ignoring dozens of CGS reports and other academic research that demonstrate such programs do in fact serve important governmental interests. These studies, based on actual electoral experience over more than three decades, provide clear evidence that public campaign financing programs at all levels of government promote each of the important government interests specifically identified by this Court in *Buckley*. First, public campaign financing reduces the deleterious effects of large campaign contributions. Second, public campaign financing promotes and increases public discussion. Third, public campaign financing promotes public participation in elections. Fourth, public campaign financing frees candidates from the considerable burden of private fundraising. This *amicus* brief discusses each of these important governmental

interests and demonstrates how each is specifically served by public campaign financing.

A. Public Campaign Financing Reduces the Deleterious Influence of Large Contributions

Amicus CCP fails to credit evidence that public campaign financing systems reduce reliance on private contributions and increase the importance of small-dollar donors, thus providing a realistic alternative to the corrupting potential of large private contributions. Ciara Torres-Spelliscy and Ari Weisbard, *What Albany Could Learn from New York City: A Model of Meaningful Campaign Finance Reform in Action*, 1 ALB. GOV'T L. REV. 194, 243 (2008). "Only public funding can eliminate the special access afforded large donors by those who rely upon them for political survival." Theodore Lazarus, *The Maine Clean Election Act: Cleansing Public Institutions of Private Money*, 34 COLUM. J.L. & SOC. PROBS. 79, 128 (2000). Candidates and members of the electorate have both stated that public campaign financing programs can reduce the potentially corrupting influence of money on the political process, and that the programs have indeed reduced the pernicious influence of private campaign money on politics, notwithstanding the conclusory claims of CCP to the contrary. CCP *Amicus* at 2, 5.

In New Jersey, for instance, Assemblywoman Amy H. Handlin stated that without the public campaign financing program, "[s]ome politicians would go

back to trading favors and votes in the never-ending pursuit of campaign cash," and that the result would be that "ordinary voters would be marginalized again." LEVINSON, NEW JERSEY LEGISLATURE, *supra* note 2, at 17. Similarly, former New Jersey State Senator William Schluter stated that with public campaign financing, contributors are forced to influence politicians with their arguments, not their checks, and that New Jersey's system of public campaign financing was "a giant step in changing the stigma that New Jersey's political landscape has a 'For Sale' sign on it." *Id.*

In Los Angeles, Councilmember Jan Perry reported that the city's public campaign financing "reduced [her] need to appeal to a particular special interest group." Perry further stated that the public campaign financing program allowed her to rely more on individual donations that came "without the special interest strings." RYAN, ELEVEN YEARS OF REFORM, *supra* note 2, at 22.

In Maine, the public campaign financing program contributed to a decrease in the "aggregate levels of direct-to-candidate private contributions, one of the most powerful avenues of monetary influence in the political system." Jason B. Frasco, *Full Public Funding: An Effective and Legally Viable Model for Campaign Finance Reform in the States,* 92 CORNELL L. REV. 733, 746 (2007). Overall, the public campaign financing program "helped reduce Maine's elected officials' dependence on large campaign donors, resulting in a more effective and unencumbered democracy." *Id.*

Stated another way, "[b]y reducing the influence of large contributions, [Maine's] Act reduces the increasingly disproportionate influence of those able to make such contributions and is thus more consistent with the 'one person, one vote' ideal." Lazarus, *supra*, at 79.

In 2002, North Carolina adopted a system of full public campaign financing for Court of Appeals and Supreme Court candidates. The enactment of North Carolina's law was motivated by a fear that private contributions to judicial candidates would threaten the integrity and independence of the judiciary – a fear that this Court specifically recognized as a legitimate government concern in *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009). North Carolina's program reduced the influence of private contributions by making it unlawful for publicly funded candidates to raise more than 35 percent of their campaign funds in private contributions.[10] LEVINSON, BALANCING THE SCALES, *supra* note 2, at 26.

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[10] Notably, North Carolina's law contains a trigger similar to the one at issue in this case. That trigger provision was upheld by the Fourth Circuit in *North Carolina Right to Life v. Leake*, 523 F.3d 274 (4th Cir. 2008), *certiorari denied sub nom. Duke v. Leake*, 129 S.Ct. 490 (2008).

B. Public Campaign Financing Promotes First Amendment Values by Facilitating Public Discussion about Elections

Additionally ignored by *amicus* CCP is the extent to which voluntary public campaign financing promotes, facilitates and enlarges public discussion about the electoral process. Communication between candidates and the electorate, and public discussion of elections generally, is enhanced in jurisdictions that have enacted these programs. This Court has described the goal of enhancing public discussion about the elections as "vital to a self-governing people." *Buckley*, 424 U.S. 92-93. The evidence demonstrates that this goal is met in many jurisdictions after voluntary public campaign financing programs have been adopted. These are precisely the values the First Amendment was designed to protect.

1. Public Campaign Financing Programs Promote Communication between Candidates and the Electorate

Once candidates qualify for public campaign financing, the public funds they receive either free them from having to raise additional funds altogether (in full public campaign financing systems) or supplement the funds they raise from private contributors (in partial public campaign financing systems). Under either system, participating candidates consistently report that public campaign financing enables them to spend less time fundraising and more time directly interacting with all of their constituents, not

merely the narrow band of individuals (inside and outside of the district) who can provide significant financial support.

CGS research shows that the 1985 partial public campaign financing program enacted in Tucson, Arizona, for instance, facilitated increased contact and discourse with the electorate. RYAN, CAMPAIGN FINANCING BLOOMS IN TUCSON, *supra* note 2, at 14-16. Kathleen Detrick, former City Clerk of Tucson, stated that "[Candidates] find that they [have to] go out there pounding the streets and talking to people about issues in order to get them to [give a small-dollar qualifying contribution]." *Id.* at 15. Echoing that sentiment, Councilman Steve Leal reported that the program "forces the candidate to have to talk to a whole lot more people." *Id.*

Candidates also reported increased discussion with members of the electorate in New Jersey, which experimented with a full public campaign financing program in selected legislative districts for general elections in 2005 and 2007. Former New Jersey State Assemblyman Bill Baroni, who ran as a publicly financed candidate, said the program was "the single best thing [he had ever] participated in in politics." LEVINSON, NEW JERSEY LEGISLATURE, *supra* note 2, at 17. Baroni highlighted that public campaign financing gave him the freedom to interact fully with voters. *Id.* at 17. Assemblywoman Amy H. Handlin, who participated in the 2005 program, echoed Baroni's

sentiment, saying that the program put an emphasis on face-to-face contact. *Id.* at 19-20.[11]

The public campaign financing program in Portland, Oregon is yet another example of a program that facilitated candidate communication with the electorate. In 2006, the Portland City Council decided to experiment with a full public campaign financing program for candidates for citywide office. In 2008, all six candidates who participated in Portland's Campaign Finance Fund reported that their participation increased their opportunities to communicate directly with voters. CITIZEN CAMPAIGN COMMISSION, SECOND BIENNIAL REPORT TO THE CITY COUNCIL AND CITIZENS OF PORTLAND (2009) [hereinafter SECOND BIENNIAL REPORT] at 16-17. Commissioner Amanda Fritz, for instance, told the Portland Citizens Campaign Commission, "Because I didn't have to dial for dollars, I had more time to try to meet as many Portlanders as possible." *Id.* at 16. City Council candidate Jeff

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[11] Despite (or perhaps ignoring) this evidence, CCP explicitly cites New Jersey's pilot program as a failure. CCP *Amicus* at 6-7. CCP's incorrect assertions about New Jersey's program have been rebutted by Yale Professor Don Green, who served as an expert witness for Respondent. Professor Green, who has spent decades studying American politics and the election system in particular, has testified that the two studies cited by CCP in their Ninth Circuit Court of Appeals *Amicus* Brief were "fundamentally flawed and cannot support the purported conclusions." Declaration of Donald Green in Support of Defendant-Intervenor Clean Elections Institute, Inc's Opposition to Plaintiffs' and Plaintiff-Intervenors' Motion for Summary Judgment, *McComish v. Bennett*, No. 08-1550, (9th Cir. July 17, 2009).

Bissonette reported that the process of gathering small qualifying contributions led to "some pretty serious conversations [with voters]." Bissonette emphasized that, because of the public campaign financing program, his communication with voters "[was not] about the money. It was about the issues. It was about the policies and the politics." *Id.* at 17.[12]

CGS also found that the public campaign financing program in Albuquerque, New Mexico, increased interaction between participating candidates and the electorate. Matt Brix, Policy Director of the Center for Civic Policy, noted that in the 2009 city election, Albuquerque's second election with public campaign financing, "[t]he campaign consisted more of retail politics – meet and greets, mailers, town hall meetings with groups of voters, radio spots." MILLIGAN, CITIZENS WIN, *supra* note 2, at 26. Councilor M. Debbie O'Malley, an incumbent who ran as a publicly funded candidate in 2007, echoed that sentiment, stating that with public funding, "you do a lot more outreach and the voters have a lot more ownership of the election process, because many of them have given $5 to help get a candidate qualified." *Id.* at 23.

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[12] The Portland City Council adopted a public campaign financing program in 2005 on a short-term basis; it was scheduled to sunset in 2010. In 2010, during the midst of the recession, Portland voters narrowly declined to renew the program.

2. Public Campaign Financing Programs Promote Public Discussion and Awareness of Political Campaigns

In addition to increasing the discourse between candidates and the electorate, public campaign financing programs facilitate and enlarge public discussion more generally by increasing public discussion and awareness of electoral campaigns and specific candidates.

According to a 2007 poll by the Eagleton Institute of Politics, voters in districts in New Jersey that offered public campaign financing received more information about the elections from a greater variety of sources, including campaign literature, radio and television ads, and news articles than voters statewide.[13] PETER WOOLLEY AND TIM VERCELLOTTI, RUTGERS EAGLETON INSTITUTE OF POLITICS, PUBLIC ATTITUDES TOWARD THE CLEAN ELECTIONS INITIATIVE: MONITORING STUDY OF THE 2007 NEW JERSEY CLEAN ELECTIONS PILOT PROJECT (2007) at 17-21. Seventy percent of voters in "clean elections districts" reported that they

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[13] The Eagleton Institute poll found that among likely voters in New Jersey "clean elections" districts, 82 percent received campaign materials in the mail, 55 percent received information about legislative races from radio or television advertisements, and 74 percent received information about the legislative races from news articles. Among likely voters statewide, 49 percent received campaign materials in the mail, 43 percent received information from radio or television ads, and 56 percent received information from news articles.

had heard either "quite a lot" or "some" about the legislative races in their districts compared with only 37 percent of voters statewide. *Id.*

CGS found similar results in Portland. City Council candidate Jim Middaugh explained that "[public campaign financing] generated a lot of conversation in the community . . . [T]here isn't anything else in our civic fabric that gets people talking to one another about City issues." SECOND BIENNIAL REPORT, *supra*, at 17.

Some public campaign financing programs also help foster a larger discussion about elections and candidates by requiring candidates to debate each other as a condition for accepting public funding.[14] Debates give voters additional opportunities to learn about their local candidates' political views and qualifications.

C. Public Campaign Financing Facilitates and Enlarges Public Participation in the Electoral Process

Public campaign financing programs help to increase public participation in two other fundamental ways. First, public campaign financing promotes citizen involvement in political campaigns by increasing

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[14] The public financing programs in Arizona, New Jersey, Austin, Los Angeles, New Haven, New York City, and San Francisco, for example, include provisions for candidate debates.

the number and diversity of contributors. Second, public campaign financing increases the number and diversity of candidates who seek public office. This impact has been repeatedly shown in various studies that *amicus* CCP does not – because it cannot – rebut.

1. Public Campaign Financing Encourages More Citizens to Get Involved in Political Campaigns

Giving campaign contributions is one way for members of the electorate to get involved in the electoral process. In localities and states with public campaign financing programs, there has typically been an increase in the number and diversity of small donations by candidates' constituents.

For instance, Arizona adopted public campaign financing in 2000, and the number of contributors to Arizona gubernatorial campaigns more than tripled from 1998 to 2002. LEVIN, KEEPING IT CLEAN, *supra* note 2, at 11. New York City's public campaign financing program, in existence since 1988, has also encouraged new donors to become involved in political campaigns: in each of the last three city election cycles, over half of the individuals who contributed to city campaigns were first-time donors. NEW YORK CITY CAMPAIGN FINANCE BOARD, NEW YORKERS MAKE THEIR VOICE HEARD – A REPORT ON THE 2009 ELECTIONS (2009) at 104-105. After Portland implemented a public campaign financing program in 2005, participating candidates reported an increase in the number of

individuals who made donations to their campaigns. CITIZEN CAMPAIGN COMMISSION, FIRST REPORT TO THE CITY COUNCIL AND CITIZENS OF PORTLAND (2007) [hereinafter FIRST REPORT] at 19-20. Publicly funded candidate Chris Iverson described Portland's public campaign financing program as a "tool of inspiration to get people re-involved with politics," explaining that the implementation of public campaign financing brought "people into the political process . . . " *Id.* at 20-21.

Public campaign financing programs not only lead to an increase in the number of small campaign contributors, they also encourage political participation in the form of political donations across a more geographically diverse cross-section of the electorate. Publicly financed candidates in Portland's 2006 election, for example, relied on much broader and more geographically diverse donor bases than their privately funded opponents. Privately financed candidates received most of their donations from downtown Portland and a few other wealthy neighborhoods, while publicly financed candidates relied on donations from all different areas of the city. FIRST REPORT, *supra*, at 19-20.

New York City's public campaign financing program has had similar effects on the geographic distribution of campaign contributions. Historically, a majority of contributions to New York City campaigns have come from Manhattan donors, despite the fact that Manhattan residents make up less than a quarter of the city's total population. However, since New

York City implemented its partial public campaign financing program, it has seen a trend toward greater geographical balance. Between 2001 and 2009, Manhattan's share of contributions dropped from 68 percent to 53 percent. By contrast, Brooklyn's and Queens' combined share of contributions rose from 25 percent in 2001 to 43 percent in 2009. Donor activity increased almost six-fold in Flushing, a heavily Asian-American neighborhood that is home to Queens' Chinatown. NEW YORK CITY CAMPAIGN FINANCE BOARD, *supra*, at 109-110.

2. Public Campaign Financing Increases the Number and Diversity of Candidates Who Seek Office

Public campaign financing programs are also specifically designed to facilitate public participation in the electoral process by encouraging more individuals to run for public office, thus adding more speech to the public discourse. "Public funding encourages more candidates to seek public office by providing them with the necessary means to communicate their messages effectively." Lazarus, *supra*, at 79.

In Arizona, for instance, there was a 24 percent increase in the number of candidates participating in the primary when one compares the first full election after the implementation of public campaign financing with the last year prior to the implementation. Michael Clyburn, *Public Campaign Financing: The Path from Plutocracy to Pluralism*, 7 SEATTLE J.

FOR SOC. JUST. 285, 302 (2008), *citing* THE CLEAN ELECTIONS INSTITUTE, THE ROAD TO VICTORY: CLEAN ELECTIONS SHAPE 2002 ARIZONA ELECTIONS (2002). In New York City, the combination of making additional public funds available to run electoral campaigns and implementing term limits drew record numbers of candidates for city office in 2001. RYAN, A STATUTE OF LIBERTY, *supra* note 2, at 21. In Arizona, the public campaign financing system "encouraged some candidates who would not have otherwise run for office, particularly women, to run." Frasco, *supra*, at 758. In addition, a report by the U.S. General Accounting Office (now known as the Government Accountability Office) on the public campaign financing programs in Arizona and Maine found that 55 percent of participating candidates considered public campaign financing a "great" or "very great" factor in their decision to run for office in 2000. U.S. GAO, CAMPAIGN FINANCE REFORM: EARLY EXPERIENCES OF TWO STATES THAT OFFER FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES (2003) at 4.

In addition to attracting a greater number of candidates, public campaign financing also encourages a broader, more representative range of candidates to seek public office. With the aid of public campaign financing, candidates who do not have an existing network of private contributors have an opportunity to effectively convey their message to members of the electorate. For example, Los Angeles City Councilmember Ed Reyes stated that the city's public campaign financing was crucial to his successful run for

office in 2001. RYAN, ELEVEN YEARS OF REFORM, *supra* note 2, at 23. "[As a first generation American,] I don't have the traditional ties to the power groups or the power structure. I literally came from the neighborhood. Without public financing, I knew that I wouldn't have been able to throw a stone like in the David and Goliath story. I probably would have been throwing a pebble. With public financing, I knew I had a shot." *Id.* Similarly, Portland Commissioner Amanda Fritz reported that the burden of fundraising would have dissuaded her from running for office in 2008 had public financing not been available. Fritz said, "I am not very good at asking for money . . . and I don't think that being good at asking for money should be a prerequisite for serving on the City Council." RAU, *supra* note 2, at 12.

According to a 2006 survey by the Maine Commission on Governmental Ethics and Election Practices, 87 percent of first-time candidates who participated in the state's public financing program reported that the availability of public funding was "very important to their decision to run for office." MAINE COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES, 2007 STUDY REPORT: HAS PUBLIC FUNDING IMPROVED MAINE ELECTIONS? (2007) at 1. Such evidence directly contradicts the contention that "government funding goes to candidates who have already shown political skill in the traditionally funded system." CCP *Amicus* at 8.

Public campaign financing programs also allow more female and minority candidates to competitively

run for office. In Arizona, the number of Native American and Latino candidates nearly tripled between 2000 and 2002 with the implementation of public campaign financing. RYAN, KEEPING IT CLEAN, *supra* note 2, at 7. Arizona's public campaign financing system also encouraged more women to run for office. Frasco, *supra*, at 758, *citing* MARC BRESLOW ET AL., MONEY & POLITICS IMPLEMENTATION PROJECT, REVITALIZING DEMOCRACY: CLEAN ELECTION REFORM SHOWS THE WAY FORWARD (2002) at 25. In New York City, minority representation on the City Council has increased steadily since public campaign financing was implemented in 1989. Torres-Spelliscy and Weisbard, *supra*, at 226. In 2001, the combination of increased public funding and term limits resulted in "an even more diverse group of candidates [for City Council] than has typically been seen in the city, including the emergence of new immigrant voices from the Asian-American and Russian-American communities, among others." LEVIN, KEEPING IT CLEAN, *supra* note 2, at 7. In 2009, New York voters for the first time elected a majority of minority candidates to the City Council. NEW YORK CITY CAMPAIGN FINANCE BOARD, *supra*, at 142. In Maine, 71 percent of female candidates who participated in the state's public campaign financing program said that the availability of public funding was "very important" to their decision to run for office. MAINE COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES, *supra*, at 1.

D. Public Campaign Financing Frees Candidates from the Rigors of Fundraising

"The 'money chase' is perhaps the most severe public harm inflicted by [our current] campaign finance regime. . . ." Lazarus, *supra*, at 128. "When candidates and elected officials spend the overwhelming majority of their time on fundraising activities, they inevitably spend the majority of their time addressing the concerns of donors." *Id.* at 129. Accordingly, state and local governments have an important government interest in freeing candidates from the rigors of fundraising.

Evidence from academic studies and CGS reports clearly shows that public campaign financing programs further an important governmental interest by freeing candidates from the burden of "dialing for dollars." "By freeing candidates from the time-consuming rigor of fundraising, any public campaign financing program will leave more time available for public campaign financing-funded candidates to debate the issues and interact with voters." Clyburn, *supra*, at 303. CCP, however, does not reference and gives no weight to the experiences of publicly funded candidates, even though actual candidate experiences provide ample evidence that public financing programs serve this important goal.

In Maine, for instance, as a result of its voluntary public campaign financing program, "candidates and elected officials report that they are now able to spend significantly more time reaching a larger number of

constituents instead of focusing on potential large donors." Frasco, *supra*, at 747; *see also* BRESLOW ET AL., *supra*, at 26; MAINE COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES, *supra*, at 1. Similarly, publicly financed candidates in Arizona spent more time with voters and less time fundraising. Clyburn, *supra*, at 313.

The same phenomenon occurred in Portland, Oregon. City Council candidate John Branam reported that "[voters] appreciated the fact that [public campaign financing] afforded me the opportunity to spend more time talking about the issues as compared to dialing for dollars." SECOND BIENNIAL REPORT, *supra*, at 16-17. City Council candidate Charles Lewis likewise stated that the public campaign financing program "allowed me to spend more time reaching out directly to voters and not to big money interests. I was able to spend the vast majority of my time meeting and talking with the people of Portland, not seeking large donations." *Id.*

CGS found that as a result of Albuquerque's 2005 public campaign financing law, candidates in that city sang the praises of a system that allowed them to spend more time meeting with all constituents, not just those who could give campaign contributions. Incumbent Councilor Isaac Benton commented that "there was a big difference [running as a participating candidate]. Not having to fundraise – I had more time to focus on the issues." MILLIGAN, CITIZENS WIN, *supra* note 2, at 32. Further, Councilor Dan Lewis, who successfully ran as a publicly funded challenger

in 2009, stated, "I like that the election was issue oriented and there was no added pressure of fundraising. . . . I was able to focus on the message and the issues rather than the fundraising." *Id.* at 32.

CGS research shows that voluntary public campaign financing helped to alleviate the burden of private fundraising in other jurisdictions, as well, including New York City and Tucson. RYAN, A STATUTE OF LIBERTY, *supra* note 2, at 20; RYAN, PUBLIC CAMPAIGN FINANCING BLOOMS IN TUCSON, *supra* note 2, at 19. As in other jurisdictions, the Tucson program allowed incumbents more time to legislate because less time was spent fundraising. *Id.*

CONCLUSION

The experience of the many jurisdictions that have implemented public campaign financing programs demonstrates that such programs further the values of the First Amendment. This powerful evidence supports the constitutionality of such programs, just as the Court found the program at issue in *Buckley* to be constitutional. For the foregoing reasons, we urge this Court to reaffirm the legislative purposes, importance and constitutionality of public campaign financing programs, and to affirm the holding of the Ninth Circuit Court of Appeals.

Respectfully submitted,

FREDRIC D. WOOCHER
STRUMWASSER & WOOCHER LLP

ROBERT M. STERN
JESSICA A. LEVINSON
MARGARET C. MILLIGAN
HILARY L. RAU
CENTER FOR GOVERNMENTAL STUDIES

AMICUS CURIAE BRIEF

Nos. 10-238, 10-239

IN THE
Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, et al.,
Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, et al.,
Respondents.

JOHN MCCOMISH, et al.,
Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE COMMITTEE FOR ECONOMIC DEVELOPMENT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

PAUL M. SMITH
Counsel of Record
MICHAEL B. DESANCTIS
KATHERINE A. FALLOW
JAMES C. COX
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

Attorneys for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

The Committee for Economic Development ("CED") is a nonprofit, nonpartisan, and nonpolitical public policy organization directed by approximately 200 senior corporate executives and university leaders. Since its inception in 1942, its mission has been to engage the leadership of the corporate community to support policies that will promote economic growth. CED is a leading advocate for business interests on issues ranging from health care to corporate governance.

The business leaders who serve as CED's trustees consistently have supported research, analysis, and advocacy regarding the ground rules for political elections. In addition to producing reports and organizing surveys, CED has filed *amicus curiae* briefs in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), *Caperton v. A.T. Massey Coal, Inc.*, 129 S. Ct. 2252 (2009), and *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010). CED's involvement stems from the conviction that competitive executive and legislative elections, along with an independent judiciary, further the interests of American business.

In this *amicus curiae* brief, CED seeks to counteract the allegation that public finance triggers, like those in Arizona's Citizens Clean Elections Act,

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

burden corporate and other donors by compelling them to subsidize "competing" speech. Arizona's public finance trigger does not limit the expenditures by private individuals or corporations, nor does it compel their speech. Instead, it encourages *more* speech and *more* political competition, results that are entirely consistent with the First Amendment. CED's trustees believe that the real danger here would be a decision invalidating Arizona's use of triggers, which would harm corporate interests by reducing genuine electoral competition, promoting an "arms race" mentality in electoral fundraising, and restoring the damaging perception of corruption between politicians and businesses that grew out of the AzScam scandal.

Because this issue is critically important to businesses in Arizona and around the country, CED respectfully urges this Court not to disturb the carefully crafted public financing system Arizona has developed based on this Court's prior decisions in this area.

SUMMARY OF ARGUMENT

The interests of the business community are best served not only through robust economic competition but also through open competition in elections for executive and legislative offices. Elections should reflect a capitalist market where the best ideas win, an ideal best realized if more than one candidate can remain truly competitive. The trigger mechanism used in Arizona's Citizens Clean Elections Act, Ariz. Rev. Stat. § 16-940 *et seq.*, promotes competition in public elections by providing a meaningful

opportunity to compete for candidates who opt to receive public campaign financing in lieu of private funding. The result is a welcome increase in speech, not a limitation on speech.

The Act does not limit the speech of any candidate, or discriminate against candidates based on their identity. Nor does it discourage corporations from spending money to express their genuine electoral preferences. To the contrary, the funding trigger counteracts significant concerns about the role of corporations in elections that have only increased since this Court's decision in *Citizens United*. The American business community suffers from the negative perception that corporate spending corrupts the political process. This problem is exacerbated by the prevailing perception that donations are made in furtherance of a company's arms race with competitors to secure political access, rather than to further a genuinely expressive objective. A successful public financing model like Arizona's creates a compelling alternative to this type of arms race.

ARGUMENT

1. ARIZONA'S LAW FOSTERS MORE, NOT LESS, COMPETITION IN THE MARKETPLACE OF IDEAS.

The Citizens Clean Elections Act encourages the development and discussion of new ideas by inviting new voices to engage in the political dialogue in Arizona. In so doing, the Act accomplishes the First Amendment's aspiration to "secure the widest possible dissemination of information from diverse and antagonistic sources." *Buckley v. Valeo*, 424

U.S. 1, 49 (1976). As the Court remarked in *Buckley*, an effort "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process" furthers First Amendment values that are vital to a self-governing people. *Id.* at 92-93.

A. Competition in Executive and Legislative Elections, Like Competition in the Marketplace, Leads to Better Outcomes.

This Court's First Amendment jurisprudence is rightfully focused on promoting an "'uninhibited marketplace of ideas.'" *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 896 (2010) (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)). "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail" and in which that marketplace is not monopolized. *See Red Lion Broad. v. Fed. Commc'ns Comm'n*, 395 U.S. 367, 390 (1969). As business leaders, CED's trustees appreciate the importance of an uninhibited marketplace; it is the freedom of the marketplace that drives American ingenuity and success in the business sector.

Competition is the basis of our system of commerce. Competition produces innovation and motivation—it fosters new ideas and advances in technology. It creates wealth. Simply put, business competition is the backbone of our economy. As business leaders, CED's trustees understand that sometimes the free market fails, and the government must step in to ensure competition. Not too long ago,

the Supreme Court explained one such important government regulation—the Sherman Antitrust Act. "The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive; even severely so, but against conduct which unfairly tends to destroy competition itself." *Spectrun Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). It is this unique American approach—a free market system where the government works to *promote* competition—that has led to unmatched ingenuity and commerce in our country.

Like any marketplace, the political marketplace must foster competition if it is to thrive. Arizona voters passed the Citizens Clean Elections Act in order to revive its political marketplace by encouraging participation in the political process and thereby decreasing the opportunities for corruption. *See McComish v. Brewer*, 2010 WL 2292213, at *1 (D. Ariz. Jan. 20, 2010). The trigger system fosters political competition and political speech in a uniquely efficient manner. In some races, a public financing system in which a candidate receives only a fixed initial distribution fails to provide a realistic alternative to a privately financed campaign, because the fixed distribution will be too low to allow a publicly financed candidate to compete; in other races, such a system will unnecessarily drain the public treasury by giving candidates who opt in more money than they would need to accomplish the Act's goals. Arizona's public financing trigger avoids this inefficiency through a careful calibration that allows candidates who do not wish to participate in the

public system to spend as much as they want, while at the same time providing a defined and limited amount of additional funding to candidates accepting public financing to ensure that those candidates are not prevented from participating in the political marketplace by an opponent's monopolization of the airwaves.

The reality of our modern political system is that financial resources determine a candidate's ability to communicate a message to the public. But no one has a First Amendment right to have his or her ideas unchallenged. Our political discourse must be an "open marketplace." *Citizens United*, 130 S. Ct. at 884. When only one candidate has sufficient financial resources to transmit his or her message broadly, there can be no open marketplace. As they are in the business markets, monopolies are a cancer on political markets. The trigger mechanism provided by the Citizens Clean Elections Act responds in a narrowly drawn way to this problem, consistent with the core goal of the First Amendment. From a corporate perspective, such an agile and cost-effective mechanism is an obviously sound approach. By placing no limit on one's ability to spend, the law fosters competition while encouraging more speech about competing ideas and policies.

B. The Act Allows Merit, Not Money, to Determine Outcomes by Increasing Political Speech Overall.

Public finance laws enable a wider array of individuals to enter into, and compete in, executive

and legislative elections and the open political dialogue surrounding them. Individuals who would be limited by comparatively low personal wealth, or relatively small donor networks, are able to become viable candidates, reaching many more voters with their message than they could without the aid of public financing. *See* L. SANDY MAISEL, RETHINKING POLITICAL REFORM: BEYOND SPENDING AND TERM LIMITS 37 (1994) (finding that financial obstacles are "the key factor" limiting potential candidates' entry decisions); Janet M. Box-Steffensmeier, *A Dynamic Analysis of the Role of War Chests in Campaign Strategy*, 40 AM. J. POL. SCI. 352 (1996) (presenting evidence that incumbent campaign "war chests" deter quality candidates from running against incumbents). In Arizona, it is working: more candidates have entered political races there since the advent of public funding. In 2006, there were 14 percent more House candidates and 16 percent more Senate candidates than there were in 1998, the last election before the Act went into effect. MEGAN MOORE, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, CLEAN ELECTIONS, ARIZONA 2006 2 (2008), *available at* http://www.followthemoney.org/press/ReportView.phtml?r=371&ext=1.

Furthermore, even candidates with the ability to run viable privately funded campaigns may opt into public funding programs in order to free themselves from the pressure to tailor their messages to what donors and prospective donors want to hear. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-390, CAMPAIGN FINANCE REFORM: EXPERIENCES OF TWO STATES THAT OFFERED FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES 27 (2010) (citing, among the

most common reasons candidates stated for participating in public financing program, "You did not want to feel obligated to special interest groups or lobbyists," "Receiving public funds allowed you to spend more time discussing issues," and "You believe the public financing program promotes the accountability of legislators to the public."). The percentage of legislative candidates participating in Arizona's public financing system has steadily increased since the Act's passage, from 26 percent in general elections in 2000 to 64 percent in 2008. *Id.* at 26. Whatever the purpose for opting into a public finance program, the result is more, rather than less, speech.

Arizona's Citizens Clean Elections Act provides those candidates choosing to opt into the public financing system a more meaningful opportunity to compete in the political arena than they would otherwise have. Campaign spending is on the rise in Arizona, as it is across the country. Danielle Kurtzleben, "2010 Set Campaign Spending Records," U.S. NEWS & WORLD REPORT, Jan. 7, 2011. Even after the implementation of the Citizens Clean Elections Act, total campaign spending has continued to increase. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-390, at 24. By providing publicly financed candidates with additional resources as needed based on the political field, more information becomes available to a broader audience—allowing the merits of each candidate's positions to drive the debate.

As this Court recently noted, the ability to speak freely "is an essential mechanism of democracy, for it is the means to hold officials accountable to the

people." *Citizens United*, 130 S. Ct. at 898. Arizona's public funding trigger system ensures that entrenched public officials—with whose donor networks few could compete—are subject to competitive races and thus ultimately held accountable for their policy decisions and political stands. Incumbents generally enjoy a large advantage in campaign fundraising due to established fundraising and communication networks, and as such tend to be capable of outspending their opponents by substantial margins. This combination is a nearly impossible barrier for political challengers to overcome. In the 2007-2008 state legislative election cycle, for example, incumbents across the country enjoyed a 94 percent success rate; candidates who enjoyed the dual advantages of incumbency and fundraising dominance produced a success rate of 96 percent. PETER QUIST, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, THE ROLE OF MONEY AND INCUMBENCY IN 2007-2008 STATE ELECTIONS (2010), *available at* http://www.followthemoney.org/press/ReportView.phtml?r=423.

Publicly financed challengers in Arizona, on the other hand, have won between 23 percent and 40 percent of legislative elections in each election year since 2000. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 10-390, at 30. That is because an effective public financing regime significantly mitigates incumbency advantages by reducing barriers to challenger entry and therefore promoting genuine competition among ideas and among candidates. *See generally* ROBERT K. GOIDEL ET AL., MONEY MATTERS: CONSEQUENCES OF CAMPAIGN FINANCE REFORM IN

U.S. HOUSE ELECTIONS 70-71, 74-76 (1999); *see also* Candice J. Nelson, *Money Matters*, 95 AM. POL. SCI. REV. 213, 213 (2001) (book review) (noting that simulations by Goidel and his co-authors establish "that some form of public funding," including "through matching funds," "would help candidates of the minority party, except at the very lowest levels of funding"). Thus, the Act serves the First Amendment's fundamental purpose of public official accountability by providing a meaningful opportunity for new political voices and ideas to penetrate the dialogue.

II. ARIZONA'S LAW SERVES A COMPELLING ANTI-CORRUPTION PURPOSE.

Beyond promoting open elections and the open exchange of ideas, the Act also provides an important constraint on real and perceived corruption. As this Court recognized in *McConnell*, "many corporate contributions [are] motivated by a desire for access to candidates and a fear of being placed at a disadvantage in the legislative process relative to other contributors, rather than by ideological support for the candidates and parties." 540 U.S. at 124-25. In order to remain competitive in the marketplace, business leaders are forced into a veritable arms race of political spending. That arms race harms business in two ways. Directly, the pressure to donate drains corporate treasuries to fund candidates they may or may not support. Indirectly, the perceived *quid pro quo* with politicians damages corporate standing among the American people. Arizona's law supports corporate interests, and the public interest, by

breaking the pernicious cycle of reliance on private funding.

A. The Act Reduces Corporations' Incentive to Fund Candidates to Obtain Political Access.

In order to ensure access regardless of the political climate, corporations must contribute to both parties. The competitive need to maintain access to and avoid retribution from elected officials of both parties forces businesses to allocate valuable resources toward the political process. Such coercion is inconsistent with the genuine expression of ideas, and reinforces the perception and often the unfortunate reality—that corporate donations are themselves ultimately business transactions. In this environment, corporate campaign donations amount to nothing more than an admission fee.

Politicians openly acknowledge the connection between money and access. Senator Carl Levin (D-Mich.) states: "The parties advertise access. It's blatant. Both parties do it." 147 CONG. REC. S3,248 (Apr. 2, 2001). To ensure access regardless of the political climate, corporations must contribute to both parties. In the 2000 election cycle, 35 of the 50 largest soft-money donors gave to both parties, and 28 of the 50 gave more than $100,000 to both parties. *See McConnell*, 540 U.S. at 124 n.12. Another notable trend is how corporate political spending tracks changes in the partisan makeup of legislatures. For example, in 2006, business PAC's gave sixty-six percent of their political donations to Republicans. *See* Richard S. Dunham, *As Power*

Shifts, So Do the Dollars, BUSINESSWEEK, Apr. 23, 2007. But Democrats gained control of Congress that year, and during the next campaign cycle, for the first time in two decades, corporate political donations were split evenly between the parties. *See Writing Cheques, Hedging Bets: A Surge in Corporate Money for the Democrats*, THE ECONOMIST, Sept. 18, 2008. "Darrell West, a vice-president of the Brookings Institution, a think-tank, says that because many corporations anticipate a victory for Mr. Obama, they consider their gifts to Democrats an investment in their company's future." *Id.*

As the *McConnell* Court recognized, this pattern is inconsistent with the genuine expression of ideas. The record in *McConnell* was replete with examples of cash for access. *See, e.g., McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 555-60 (D.D.C. 2003), *aff'd in part*, 540 U.S. 93 (2003); Declaration of Gerald Greenwald, Chairman Emeritus of United Airlines and CED trustee, ¶ 12, *McConnell*, 540 U.S. 93 (No. 02-1674) ("Greenwald Decl.") ("[B]usiness leaders believe—based on experience and with good reason—that . . . access [to politicians] gives them an opportunity to shape and affect governmental decision."); Press Release, CED, *Senior Business Executives Back Campaign Finance Reform* (Oct. 18, 2000) (showing that 75% of business leaders believe political contributions give them an advantage in shaping legislation).

The *McConnell* record also showed the danger of retribution for corporations that do not participate. One Fortune 500 lobbyist described corporate spending on political campaigns in one simple word:

"protection." Burt Solomon, *Forever Unclean*, NAT'L J., Mar. 18, 2000, at 858 ("If you decline to give, you're taking a risk of legislative retribution. . . . Companies are scared that on some critical issue, they'll get hosed. It'll happen quickly, in the dead of night."). This Court also approvingly quoted Mr. Greenwald's statement that "[b]usiness and labor leaders believe, based on their experience, that disappointed Members, and their party colleagues, may shun or disfavor them because they have not contributed." *McConnell*, 540 U.S. at 125 n.13 (quoting Greenwald Decl.).

The relationship between contributions and political access has had a profound effect on how corporations view political contributions. A recent poll of 301 business opinion leaders confirmed that most believed contributions served a non-ideological function:

> *Which of the following comes closest to your own opinion about why corporate America contributes to political campaigns?*
>
> To gain access to influence the legislative process – 55%
>
> To avoid adverse legislative consequences – 17%
>
> To promote a certain ideological position – 16%

Cheryl Korn, Zogby International, Committee for Economic Development: October Business Leader Study (Oct. 2010) (poll results), *available at*

http://www.ced.org/images/content/issues/moneyinpolitics/2010/zogbypoll2010.pdf, at 8. The volume of corporate political spending proves the point—for-profit organizations would hardly allocate scarce resources without some anticipated return. The history of political corruption in Arizona offers a particularly glaring example of the potential for corruption when political contributions turn into business transactions.

B. The Act Promotes Public Confidence in Both Elections and Corporations.

The perception that corporate donations are made primarily to gain political favor or favoritism undermines the public's faith in their government and in their local and state businesses. In a 2010 Gallup poll, only 12 percent of respondents rated the honesty and ethical standards of state officeholders high or very high. For business executives, that number was only 15 percent. Both groups barely eclipsed the approval rating of car salespeople (seven percent). Gallup Poll, Nov. 19-21, 2010, *available at* http://www.pollingreport.com/values.htm. The record in this case amply demonstrates why. Before the passage of the Act, Arizona citizens experienced a string of political corruption scandals, including the 1991 AzScam controversy that saw legislators stuffing bribes in gym bags and taking quid pro quo donations to support gambling legislation. *McComish*, 611 F.3d 510, 514. Later, then-Governor Symington was forced to resign after being indicted for extorting a pension fund. As the Ninth Circuit

stated below, "the State's interest in eradicating the appearance of *quid pro quo* corruption to restore the electorate's confidence in its system of government is not 'illusory,' it is substantial and compelling." *Id.* at 525 (quoting *Buckley*, 424 U.S. at 26-27). Given the history of *quid pro quo* corruption in Arizona, and the appearance of corruption that noncompetitive, unmatched political donations creates, Arizona had a most compelling interest in enacting public finance triggers.

The pervasive belief that there is a "corporate stranglehold on American Democracy" has only increased since this Court's decision in *Citizens United*. Bob Herbert, "When Democracy Weakens," N.Y. TIMES, Feb. 12, 2011 (*Citizens United* "greatly enhanced the already overwhelming power of corporations in politics. . . . When the game is rigged in your favor, you win."); *see also, e.g.*, "Campaign Finance Reform," BUFFALO NEWS, Feb. 7, 2011 (describing the "infamous *Citizens United* case that made it even easier for unions and corporations to bribe politicians"); "City, Chamber Must Clear Air, Rebuild Trust," ARIZONA REPUBLIC, Feb. 3, 2011 (asserting that increased spending permitted by *Citizens United* has spread "distrust" and "suspicion" between Scottsdale, Arizona residents and the Chamber of Commerce); Ian Lovett & Eric Lichtblau, "Political Retreat Draws Anger," INT'L HERALD TRIB., Feb. 1, 2011 (describing an anti-business protest in which the organizers depicted the target business leaders "as symbols of the 'unbridled corporate power' that they maintain was loosed by a Supreme Court ruling last year . . . .").

American business leaders understand that the perception of corruption hurts their companies' bottom lines. In a recent poll conducted for CED, two-thirds of business leaders said that the lack of transparency and oversight in corporate political activity puts corporations at legal risk and endangers corporate reputations. *See* Committee for Economic Development: October Business Leader Study, at 16. This Court has recognized the importance of combating those problems, and the value of effective public financing systems in doing so: "It cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributors furthers a significant governmental interest." *Buckley*, 424 U.S. at 96.

Public finance triggers counteract this erosion of public confidence in business. By creating a means to compete without relying on private contributions, such triggers ease both the perception that business interests control the political process and the coercive pressure on corporations to donate. Second, they create a realm free of coercive corporate political donations. The "sleaze ball" perception is bad for the political system, and as leaders of the business community, the CED trustees believe this perception is harmful to American businesses. By fostering competition while permitting unlimited donations outside the public financing program, the triggers in the Arizona law provide a cost-effective way to ensure competitive, free, and fair elections where public confidence in the political system and in corporations is bolstered.

Moreover, when public policy decisions appear to be made on the basis of political contributions,

business planning becomes less effective, leading to a less efficient and productive economy. *See* Committee for Economic Development: October Business Leader Study (poll results) at 8-9 (48% of business leaders state that the level of pressure placed on them to make political contributions has increased since 2008, with 28% saying it has "increased a lot"; 29% describe the amount of money solicited as "excessive" and another 22% say it is "high, but not excessive"). Especially in these economic times, such "high" or "excessive" pressure to contribute is an unwelcome drain on corporate resources.

As past and present executives of some of the nation's largest companies, CED's trustees have direct experience with solicitations for financial support from party leaders, elected officials, and the officials' influential backers. Their experience teaches a simple lesson: without innovative regulatory systems, corporate participation in elections is more transactional than ideological. The trigger component of Arizona's public finance law gives corporations an alternative to a forced pressure to donate. If they truly wish to engage in political speech through campaign donations or independent expenditures, they may do so. But the incentive to coerce corporate political donations is greatly decreased. *Free* speech, *free* of coercion is the ultimate First Amendment goal.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to affirm the decision of the Ninth Circuit and, in any event, not to restrict the ability of Arizona and other states to adopt practical measures designed to promote both open discourse and competition in executive and legislative elections.

Respectfully submitted,

PAUL M. SMITH
Counsel of Record
MICHAEL B. DESANCTIS
KATHERINE A. FALLOW
JAMES C. COX
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

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Attorneys for Amicus Curiae

AMICUS CURIAE BRIEF

Nos. 10-238 and 10-239

In The
Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ET AL.,
Petitioners,

v.

KEN BENNETT, ET AL.,
Respondents.

JOHN MCCOMISH, ET AL.,
Petitioners,

v.

KEN BENNETT, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CONSTITUTIONAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Douglas T. Kendall
Elizabeth B. Wydra*
David H. Gans
Neil Weare
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street, NW, Suite 1002
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amici Curiae *Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTEREST OF *AMICI CURIAE*[1]

Bruce Ackerman is Sterling Professor of Law and Political Science at Yale, where he teaches constitutional law, philosophy and history. He is the author of fifteen books that have had a broad influence in political philosophy, constitutional law, and public policy, including *Voting with Dollars* (with Ian Ayres) (2002), which explores innovative campaign financing reforms.

Lawrence Lessig is Professor of Law at Harvard Law School and Director of the Edmond J. Safra Foundation Center for Ethics. He teaches constitutional law and institutional ethics, and his scholarship has analyzed corruption, the Constitution, and Court precedent. Professor Lessig is the author of a forthcoming book on institutional, "dependency" corruption in government.

Professor Zephyr Teachout teaches law at Fordham University School of Law. She has engaged in original scholarship on corruption and its constitutional history, and is the author of a forthcoming book on corruption, the Constitution, and the courts.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the brief's preparation or submission.

Professor Adam Winkler teaches at UCLA Law School and is a specialist in American constitutional law. He has written extensively on constitutional issues related to voting, corporate political speech rights, campaign finance law, and the First Amendment.

SUMMARY OF ARGUMENT

In November 1998, following a string of public corruption scandals that rocked their state and the Nation, Arizona voters approved an initiative establishing a public campaign-financing program to "improve the integrity of Arizona state government," "encourage citizen participation in the political process," and "promote freedom of speech under the U.S. and Arizona Constitutions." ARIZ. REV. STAT. § 16-940(A). Arizonans were concerned about corruption and the abuse of money in politics and viewed the Citizens Clean Elections Act as a necessary reform to help restore confidence in their political system and free candidates from the corrupting dependency on private money. ARIZONA SECRETARY OF STATE, 1998 BALLOT PROPOSITIONS 85-89 (1998).

The people's interest in establishing political systems designed to combat corruption and improve integrity in government lies at the foundation of our constitutional democracy. When patriotic Americans gathered together in Philadelphia in the summer of 1787, anti-corruption measures were considered essential to creating an enduring system of government. The Framers, not unlike the citizens of Arizona, viewed

corruption as one of the greatest threats to government. As George Mason warned his fellow delegates at the Constitutional Convention, "if we do not provide against corruption, our government will soon be at an end." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 392 (Max Farrand ed. 1966).

Because the Framers understood that corruption is insidious and could be "expected to make [its] approach[] from more than one quarter," THE FEDERALIST No. 68 (Alexander Hamilton) 411 (Clinton Rossiter ed. 2003), they designed the Constitution to include as many protections against corruption as possible. Part of the genius of the Constitution is the way the Framers crafted innovative, overlapping provisions designed to combat corruption and the appearance of corruption, by closing off avenues where corruption might creep in. These anti-corruption measures were aimed at two general types of corruption: individual, *quid pro quo* corruption, and institutional, "independence corruption," which threatens to draw representatives away from the interests of the people and make them dependent instead on other forces—such as foreign patrons, financial contributors, or other branches of government. *Accord Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 389 (2000) (explaining that Court precedent recognizes "a concern not confined to the bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors").

For example, specific restrictions like the Foreign Gifts Clause were designed to limit temptations and opportunities for corruption, and, by reaching more broadly than simply outlawing bribery, these restrictions served as prophylactic measures that also targeted the appearance of corruption. (Surely no one thought Benjamin Franklin had been bribed when he received a gold snuff box encrusted with jewels from the King of France in 1785, but the Framers nonetheless thought it best to prohibit such gifts in the future, when the public might not have such trust in their leaders as they did in Franklin.) In addition, the Framers established governmental structures and political systems, such as "check and balances" and election procedures, that were designed to help government withstand corruption and remain appropriately independent. The First Amendment, of course, was also intended to serve as a bulwark against corruption, "reaffirm[ing] the structural role of free speech and a free press in a working democracy." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 21 (1998). These provisions and structures help shield American government from *quid pro quo* corruption and corrupt dependence on improper forces, as well as the appearance thereof.

The Founding-era protections against corruption were enhanced by succeeding generations of Americans, who further amended the Constitution to tackle corruption in the Senate through the Seventeenth Amendment and address congressional self-dealing through the Twenty-seventh Amendment. Thus, from the Founding to

the present, the Constitution's text, history, and structure demonstrate that individual and institutional corruption are core constitutional concerns and that there are a variety of options available to the people and their representatives to effectuate the American anti-corruption ideal.

Arizona's public-financing program is part of a proud tradition of Americans coming together to design political systems based on anti-corruption principles, and fits within the range of options this Court has indicated withstand First Amendment challenge. Like the anti-corruption provisions in the Constitution, Arizona's public campaign-financing system is a well-thought out effort to deter the appearance and reality of corruption while enhancing political speech and encouraging meaningful political participation. *See Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (finding that voluntary campaign public financing "furthers, not abridges, pertinent First Amendment values").

Constitutional history strongly supports Arizona's assertion that it has a "sufficiently important, even compelling, anticorruption interest that is served by its public-financing system." Br. of Ariz. at 52-53. While the limited burden on speech—if any—in this case counsels intermediate scrutiny at most, any level of First Amendment scrutiny should take into account that Arizona's interest in combating real and apparent corruption is deeply rooted in the Constitution's text, history, and structure. *Amici* respectfully submit that Arizona's pragmatic, tailored public-financing system serves this long-established, broad anti-

corruption interest by diminishing candidates' dependence on private contributors, reducing opportunities for individual corruption, and restoring public trust in government.

ARGUMENT

I. THE CONSTITUTION'S TEXT, HISTORY, AND STRUCTURE REFLECT THE FRAMERS' BROAD INTEREST IN PREVENTING THE APPEARANCE AND REALITY OF CORRUPTION AND SUPPORT ARIZONA'S ANTI-CORRUPTION INTEREST IN PUBLIC CAMPAIGN FINANCING.

To the extent that Arizona's public financing system burdens speech at all,[2] under either intermediate or strict scrutiny the State's interest in preventing the appearance and reality of corruption is properly implemented by the system's matching funds provision. *See* Br. of Ariz. at 42-59 (explaining how the Clean Election Act's matching funds provision is tailored to further anti-corruption interests). The text, history, and structure of the Constitution provide strong support for a broad, state anti-corruption interest, like the interest Arizona has in ensuring clean elections, and show that the Framers' efforts, like

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[2] The State does not concede any such burden. Br. of Ariz. at 36, 55. Indeed, Judge Kleinfeld, in his concurrence below, reasoned that Arizona's public financing system imposed "no limitations whatsoever on a [nonparticipating] candidate's speech," McComish Pet. App. 39, and thus heightened scrutiny should not apply at all.

Arizona's, sought to combat both real and apparent corruption.

A. In Drafting The Constitution, The Framers Were Keenly Concerned With Preventing Individual, *Quid Pro Quo* Corruption, As Well As Institutional, "Independence Corruption."

Corruption was a core concern that informed much of the Framers' design of the Constitution. Alexander Hamilton explained that in drafting the Constitution, "[n]othing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption." THE FEDERALIST No. 68, 411 (Clinton Rossiter ed. 2003). "[T]here was near unanimous agreement [among the delegates at the convention] that corruption was to be avoided, that its presence in the political system produced a degenerative effect, and that the new Constitution was designed in part to insulate the political system from corruption." James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. POL. 174, 181 (1994).

The Framers viewed the American Revolution as a fresh start from the corruption they saw as endemic to politics and government. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 380 (Max Farrand ed. 1966) ("FARRAND'S RECORDS") (Mason) ("I admire many parts of the British constitution and government, but I detest their corruption.") Indeed, the decision to hold a Constitutional Convention separate from the

ordinary processes established under the Articles of Confederation was in part a reaction to the perceived corruption of state legislatures. *See* 2 FARRAND'S RECORDS 288 (Mercer) ("What led to the appointment of this Convention? The corruption & mutability of the Legislative Councils of the States.").

James Madison's notes of the Constitutional Convention record that 15 delegates used the term "corruption" no less than 54 times, the vast majority by seven of the most prominent delegates, including Madison, Governeur Morris, George Mason, and James Wilson. Savage, 56 J. POL. at 177. Corruption was an express topic of concern on almost a quarter of the days that the members convened. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 352 (2009). Scholars have commented that corruption was a "crucial term" during the Convention and that it was a key facet of "political science" for the Framers. *See* J. Peter Euben, *Corruption*, *in* POLITICAL INNOVATION AND CONCEPTUAL CHANGE 220, 221, 242-43 (Terrence Ball et al., eds. 1989); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 32 (1969). At the Founding, concern over corruption was "the common grammar of politics." John M. Murrin, *Escaping Perfidious Albion: Federalism, Fear of Aristocracy, and the Democratization of Corruption in Postrevolutionary America*, *in* VIRTUE, CORRUPTION, AND SELF-INTEREST: POLITICAL VALUES IN THE EIGHTEENTH CENTURY 103, 104 (Richard K. Matthews ed. 1994).

The corruption the Framers sought to avoid can be described in two general categories. First, the Framers were concerned about personal, *quid pro quo* corruption in which a government official receives something of value to act in a certain manner not necessarily in the public interest. Second, a careful reading of the text of the Constitution and the arguments made in support of it makes clear that personal, *quid pro quo* corruption was not the only "corruption" that the Framers sought to avoid: they also aimed to prevent institutional, "independence corruption." *See* Lawrence Lessig, *Democracy After Citizens United*, BOSTON REV., Sept.-Oct. 2010. This second corruption concern focused on the need to protect the three proposed departments of government from becoming dependent on anything other than the people alone. *See id.* at 14 (describing this type of institutional corruption as "at odds with the democratic process- with the exclusive dependence on the people intended by the framers").

The Framers were not detached from the rough and tumble world of politics, and they approached the problems of corruption with a real-world understanding of political systems and their potential to either foster or restrain corruption. "When the delegates spoke of corruption at the convention they did so in a manner that reflected classical republican concerns about dependency, cabals, patronage, unwarranted influence, and bribery." Savage, 56 J. POL. at 181. They were also concerned that even the appearance of corruption posed a risk to civic virtue and the integrity of the fledgling American government. As Professor

Samuel Issacharoff explains, "[t]he Framers appear to have conceptualized corruption as a derogation of the public trust." Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 129 (2010). Corruption could be introduced into government through gifts or inducements, or dependence upon anything other than the people themselves.

As explained below, the Framers' concern over corruption resulted in several distinct constitutional restrictions designed to reduce temptations and opportunities for corruption among public officials and block influences that would tend to compromise the government's intended "dependen[cy] on the people alone." THE FEDERALIST No. 52, 323 (Madison). In addition, the Framers kept in mind their goal of discouraging corruption when designing the structure of the three branches of the federal government and election provisions.

B. The Text Of The Constitution Provides Specific Restrictions Designed To Limit Temptations And Opportunities For Corruption In Government.

Whether or not a public official or an institution of government was actually tainted by a corrupting force, the public might reasonably question whether their representatives' loyalty remained with the public interest. Accordingly, the Framers did more than simply seek to criminalize bribery of public officials—they wrote into the

Constitution specific provisions that would prevent instances of what can generally be termed individual *quid pro quo* corruption and institutional "independence corruption," as well as remove the appearance of either form of corruption.

The Ineligibility and Emoluments Clause. The Constitution provides that "[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time." U.S. CONST. art. I, § 6, cl. 2. This constitutional restriction on Members of Congress reflects the Framers' deep anxiety that legislators' temptation to secure future employment might cloud their duty to act in the public interest. At the Convention, the delegates explained that this provision would "preserv[e] the Legislature as pure as possible, by shutting the door against appointments of its own members to offices, which was one source of its corruption." 1 FARRAND'S RECORDS 386 (Rutlidge).

The delegates' decision that an express constitutional "precaution ag[ainst] intrigue was necessary" stemmed from their observations of the British experience, "where men got into Parl[iament] that they might get offices for themselves or their friends. This was the source of the corruption that ruined their Gov[ernment]." 1 FARRAND'S RECORDS 376 (Butler). George Mason supported the exclusion "as a corner stone in the fabric" of the Constitution and was "for shutting the door at all events ag[ainst] corruption."

particularly in light of the "venality and abuses" that took place in this regard in Great Britain. 1 FARRAND'S RECORDS 376. During the debates over ratification of the Constitution, James McHenry explained that the purpose of the provision was "to avoid as much as possible every motive for Corruption." James McHenry, *Speech before the Maryland House of Delegates* (Nov. 29, 1787), *in* 3 FARRAND'S RECORDS 148.

The Foreign Gifts Clause. The Constitution also mandates that "no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. CONST. art. I, § 9, cl. 8. This constitutional restriction was a reaction to several instances between the Revolution and the Convention when American diplomats received valuable gifts from foreign dignitaries.[4]

Describing these foreign gifts and the public debate that followed, Edmund Randolph explained during the debates over ratification in Virginia that "[i]t was thought proper, in order to exclude

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[4] In 1780, U.S. Ambassador to France Arthur Lee received from King Louis XVI of France a portrait of the king set in diamonds atop a gold snuff box. *See* 18 Op. Off. Legal Counsel 13, 16 n.4 (1994). Lee turned the gift over to Congress, which resolved that he could keep it. *Id.* In 1785, as noted above, Benjamin Franklin received a similar gift from the King of France, which Congress also allowed him to keep. *Id.* At the same time, Congress also allowed Secretary of Foreign Affairs John Jay to keep a gift of a horse from the King of Spain. *Id.*

corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states." DAVID ROBERTSON, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 330 (2d ed. 1805) (1788). Unlike the scandal over blatant bribery that occurred in Arizona in the 1990s, these foreign gifts to prominent Americans in the 1780s were not considered *quid pro quo* corruption—Congress would surely not have allowed the diplomats to retain the gifts otherwise—but the gifts nonetheless sent the wrong message to the American people. In addition, the Framers wanted to exclude "foreign influence" that could compromise the government's independence (or, more precisely, the government's intended dependence on the American people).

Eligibility Requirements for Elected Office. The Constitution's restrictions on candidates for elected office were also designed to serve a gate-keeping function against possible sources of corruption. Beginning with Congress, the Constitution requires that a Representative or Senator must "be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2; *id.* at § 3, cl. 3. This residency requirement was a response to the fear that wealthy non-residents would purchase elected office. George Mason explained that "[i]f residence be not required, Rich men of neighbouring States, may employ with success the means of corruption in some particular district and thereby get into the public Councils after having failed in their own State." 2 FARRAND'S RECORDS 218. Representatives

were also required to be "seven Years a Citizen," U.S. CONST. art. I, § 2, cl. 2, and Senators "nine Years a Citizen," U.S. CONST. art. I, § 3, cl. 3, because of concern over foreign intrigue.

The Constitution's eligibility requirements for President are even more stringent, reflecting the Framers' concern that this office was particularly susceptible to corruption, foreign and otherwise. James Madison thought that because the Presidency "was to be administered by a single man . . . corruption was more within the compass of probable events." 2 FARRAND'S RECORDS 66. Building on this concern, the Constitution requires that the President be "a natural born Citizen," and have "been fourteen Years a Resident within the United States." U.S. CONST. art. II, § 1, cl. 5. These restrictions were viewed by Madison as necessary because, unlike a monarch who had "that weight of property, that personal interest ag[ainst] betraying the National interest, . . . [the President] would not possess . . . that permanent stake in the public interest which [would] place him out of the reach of foreign corruption." 1 FARRAND'S RECORDS 138.

For all of the provisions described above, the Framers went beyond merely prohibiting bribery and treason, and instead created rules designed to prevent even the appearance of corruption that could potentially arise from foreign gifts, a plum administrative position, or a foreign-born President. Even without any direct evidence of corruption in the fledgling national government, the Framers determined that these broad

prophylactic measures were sufficiently important to include in our Nation's charter.

C. The Constitution Provides Overlapping Structures and Systems Designed to Erect "Every Practicable Obstacle" Against Corruption.

While the structure of American constitutional democracy was obviously inspired by more than just anti-corruption ideals, many of the central features of our republican government were, in fact, significant anti-corruption measures. These measures sought to ensure that the people's representatives remained as independent from corrupting forces as possible—"dependent on the people alone." THE FEDERALIST No. 52 (Madison), 323.

For example, the Framers devised an innovative system of checks and balances to prevent the appearance and reality of corruption as well as to establish separation of powers and enhance policy outcomes. *See generally* THE FEDERALIST No. 51 (Madison) (explaining the need for checks and balances); Teachout, 94 CORNELL L. REV. at 359. Responding to the fear that it would be possible to "purchase the guardians of the people," James Madison explained that "[t]he improbability of such a mercenary and perfidious combination of the several members of government, standing on as different foundations as republican principles will well admit, and at the same time accountable to the society over which they are

placed, ought alone to quiet this apprehension." THE FEDERALIST No. 55 at 342-43. The delegates' belief that multiple, overlapping structures were necessary to cabin possible corruption was particularly evident in their discussion of the appointment power,[4] the veto power,[5] and the treaty power.[6]

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[4] To provide a check against presidential abuse of the appointment power, which could lead to corruption, "[t]he power of appointing to office was brought down by placing a part of it in the Legislature." Annals of Cong. 905 (statement of Rep. Findley, Jan. 23, 1798). Thus, the Constitution gives the President the power to "nominate . . . [and] appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States," U.S. CONST. art. II, § 2, cl. 2, but requires that the President's nominations receive "the Advice and Consent of the Senate." *Id.*

[5] James Madison believed that the power of the veto would allow the President to check "the Great & the wealthy who in the course of things will necessarily compose []the Legislative body." 2 FARRAND'S RECORDS 52. But even as the veto could serve as a check against corruption in coordinate branches, the delegates understood that a legislative override was also necessary to keep the veto power from itself becoming a tool of corruption. The delegates thus reduced the number of Senators needed to override a veto from three-quarters to two-thirds, for "[i]f be required, a few Senators having hopes from the nomination of the President to offices, will combine with him and impede proper laws." *Id.* at 586.

[6] The Constitution provides that the President "shall have Power . . . to make Treaties," but limits this power by requiring that the President obtain "the Advice and Consent of the Senate." U.S. CONST. art. II, § 2, cl. 2. Even with this check in place, the delegates recognized "the danger of putting the essential rights of the Union in the hands of so small a number as a majority of the Senate, representing perhaps, not one fifth of the people." 2 FARRAND'S RECORDS 548 (Gerry). Fearing that "[t]he Senate will be corrupted by foreign influence," *id.*, the delegates increased the ratification

In addition, in the process of determining the best way to structure a representative democracy, the delegates were careful to notice the way that the structure of the legislative branch and the provision of regular, fair elections could also serve to deter individual and institutional corruption in the federal government.

The delegates believed that whether Congress would "be governed by intrigue & corruption" depended in part on the size of its membership. 2 FARRAND'S RECORDS 31 (Mason). In fact, the delegates made a final, last-minute revision to the Constitution following George Washington's appeal—his only substantive advice of the Convention—that "[t]he smallness of the proportion of Representatives" was "an insufficient security for the . . . interests of the people." 2 FARRAND'S RECORDS 644. To allow the House to grow at a quicker rate following the first census, the original requirement that "[t]he Number of Representatives shall not exceed one for every forty Thousand" was changed to be "one for every thirty Thousand." U.S. CONST. art. I, § 2, cl. 3.

Elections were also a central part of the Framers' anti-corruption constitutional design. Drawing on the experience of England, where "the electors [we]re so corrupted by the representatives, and the representatives so corrupted by the Crown," THE FEDERALIST No. 41 (Madison) at 256,

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threshold from a simple majority to "two thirds of the Senators present." U.S. CONST. art. II, § 2, cl. 2.

the Framers wanted to avoid financial dependency of one branch of government upon another and make them more accountable to the people. *See* Teachout, 94 CORNELL L. REV. at 362-63. As Madison explained, the problem was that the British House of Commons was elected for seven years, and only a small number of people participated in the election. THE FEDERALIST No. 41 at 256. Without more regular elections, "[t]hese longer terms strengthened the bonds with the Executive and weakened them with the people." Teachout, 94 CORNELL L. REV. at 363.

Under the proposed Constitution, as James Madison explained, even if corruption were to creep in, regular elections would "regenerate the whole body," and "speedily restore all things to their pristine order." THE FEDERALIST No. 63 at 386. While the Framers had concerns that too frequent elections could adversely affect the quality of candidates, *see* 2 FARRAND'S RECORDS 59 (Williamson), they also wanted to have sufficiently regular elections to serve as a check against corruption "if the proofs of that corruption should be satisfactory." THE FEDERALIST No. 66 (Hamilton) at 405.

Finally, the Framers' decision to select the President through the Electoral College was expressly intended to limit "the danger of cabal and corruption." 2 FARRAND'S RECORDS 500 (Mason). Alexander Hamilton explained that if the President was "appointed by the Legislature" the executive "would be tempted to make use of corrupt influence to be continued in office." *Id.* at 524. *See also* 2

FARRAND'S RECORDS 31, 404 (Morris). Hamilton later added that "the executive should be independent for his continuance in office on all but the people themselves," otherwise he might "be tempted to sacrifice his duty to his complaisance for those whose favor was necessary to" obtain reelection. THE FEDERALIST No. 68 at 412. The delegates' solution was to select the President though the Electoral College, which, James Wilson explained, was "as nearly home to the people as is practicable." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 512 (ELLIOT'S DEBATES) (Jonathan Elliot ed.) (1888).

In sum, the Framers of the Constitution created a constitutional system that reflects a broad interest in combating actual and apparent political corruption. The Framers' strong anti-corruption interest bolsters Arizona's argument that its public-financing system serves a sufficiently important government interest under any level of scrutiny. *See* Br. of Ariz. at 52-58. *Accord Buckley v. Valeo*, 424 U.S. 1, 92-93, 96 (1976) (recognizing that public campaign funding serves the purpose of combating real and apparent corruption).

II. AMENDMENTS HAVE PROVIDED EXPANDED PROTECTIONS AGAINST CORRUPTION BY ADDING TO EXISTING CONSTITUTIONAL RESTRICTIONS AND STRUCTURES.

Just as states such as Arizona have attempted to create new political safeguards against ever-evolving threats to the integrity of elections and government, generations of Americans have added to existing constitutional protections against corruption through the amendment process.

The most obvious example of an anti-corruption amendment is the First Amendment, which shields the voice of the people and the pen of the press from government censorship, allowing for healthy criticism and transparency in politics. U.S. CONST. amend. I. In addition, the Seventeenth Amendment provides for direct election of Senators in order to avoid corruption in state legislatures, and the Twenty-seventh Amendment, which responded to allegations of congressional self-dealing, requires that congressional pay raises only take effect following the next election. U.S. CONST. amends. XVII, XXVII.

First Amendment. The First Amendment has "populist roots." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 23 (1998). In adding the Amendment to the Constitution, the Framers were mindful of the "special structural role of freedom of speech in a

representative democracy." *Id.* at 25. As this Court recognized in *New York Times v. Sullivan*, the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." 376 U.S. 254, 269 (1964) (internal quotation omitted). "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931). Accordingly, while the First Amendment protects crucial individual rights, it also serves as a bulwark against corruption and self-dealing incumbents. *See* AMAR, THE BILL OF RIGHTS, at 23 (discussing how the elections of 1800 and 1816 demonstrated the important roles freedom of speech and press play in alerting the people to congressional self-dealing).

Given the First Amendment's historic role in enabling Americans to stand up to corrupt and wrongheaded officials and policies, it is important that Arizona's campaign public-financing plan not encroach upon the anti-corruption principles of the First Amendment in an attempt to root out real and apparent corruption in the State's political system. Significantly, however, there is nothing in the record to support Petitioners' assertion that Arizona's program chills speech. *See* Br. of Ariz. at 39-41; Br. of Clean Elections Inst. at 6-8, 18. Arizona's public-financing program places no limits

on the amount of money privately funded candidates or their supporters can spend. In fact, both sides agree that candidate spending has increased since the public-financing program was established. McComish Pet. App. 53. Also, there has been a twenty percent increase in the number of contested state Senate races and a 300 percent increase in the percentage of incumbents facing competitive challengers in state Senate races. Br. of Clean Elections Inst. at 21.[7] In terms of fulfilling the anti-corruption aspects of the First Amendment, Arizona's public-financing program appears to have enhanced political speech and competition in the State.

Seventeenth Amendment. More than a century after the First Amendment was added to the Constitution, the Seventeenth Amendment was ratified in 1913 following a number of public corruption scandals in the Senate that shook the confidence of the Nation. In perhaps the most infamous case, U.S. Senator William A. Clark of Montana confessed to making a "personal disbursement" of over $140,000 to Montana state legislators. He was forced to resign his seat in 1899 after a unanimous Senate committee report called for his expulsion. Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, The Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 707 (1999). Senator William Lorimer of Illinois was actually expelled by the Senate in 1912 after reports that four state

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[7] To the extent there is any "theoretical" chilling effect on speech—given the record's lack of support for any real impact on speech—it is discussed below in Section III.

legislators had been bribed to change their vote on his behalf. *Id.* Between 1866 and 1900, there were nine Senate investigations of alleged bribery in Senate elections. *Id.* During the 58th Congress (1903-05), fully ten percent of the Senate was either on trial or subjected to legislative investigation. *Id.* Public outrage over corruption in the Senate and state legislatures came to a peak following a series of articles by David Graham Phillips entitled "Treason of the Senate," which exposed big-money corruption and widespread bribery of state legislators.

While the Constitution already did much to combat corruption and ensure independence in the Senate, many believed that more was necessary. In 1911, in response to these scandals, Senator Joseph Bristow of Kansas proposed an amendment to the Constitution requiring that Senators be "elected by the people."[8] His focus was reining in the corruption of the Senate by corporate interests:

> With the development during recent times of the great corporate interests of the country, and the increased importance of legislation relating to their affairs, they have tenaciously sought to control the election of Senators friendly to their interests. The power of these great financial and industrial institutions can be very effectively used in the election of Senators by legislatures, and they

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[8] Sen. Joseph Bristow, *The Direct Election of Senators*, in CONGRESSIONAL SERIAL SET ISSUE 6177 (U.S. G.P.O. 1912).

> have many times during recent years used that power in a most reprehensible and scandalous manner. They have spent enormous amounts of money in corrupting legislatures to elect to the Senate men of their own choosing.[9]

The concerns of the Framers of the Seventeenth Amendment over small-group corruption and dependence on forces other than the people themselves were similar to many of the concerns held by the delegates at the Constitutional Convention. *See, e.g.*, THE FEDERALIST No. 63 at 386 (Madison).

Twenty-seventh Amendment. The Twenty-seventh Amendment began its constitutional journey as the Second Amendment proposed by the First Congress. AMAR, BILL OF RIGHTS, at 17-19. According to Professor Amar, the proposal was designed "to limit the ability of Congressmen to line their own pockets at public expense." *Id.* at 18. While the measure failed to garner enough state support in the 1790s when it was first introduced, it was finally ratified in 1992 as the Twenty-seventh Amendment—another example of constitutional design seeking to restrain self-dealing and corruption.

These three Amendments demonstrate that a broad government interest in combating actual and apparent corruption is a thread that runs through American democracy from the Founding to

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[9] *Id.*

the present. This anti-corruption interest is plainly and legitimately reflected in Arizona's public campaign-financing system, which was adopted to "improve the integrity of Arizona state government . . . , encourage citizen participation in the political process, and . . . promote freedom of speech under the U.S. and Arizona Constitutions." ARIZ. REV. STAT. § 16-940(A) (2010).

III. ARIZONA'S CLEAN ELECTIONS LAW DRAWS FROM COURT PRECEDENT REFLECTING THE FRAMERS' UNDERSTANDING THAT THERE IS A MENU OF OPTIONS AVILABLE TO COMBAT CORRUPTION.

Consistent with the constitutional text, history, and structure discussed above, the Supreme Court has long recognized the compelling nature of the government's interest in preventing corruption and its appearance. Over a century ago, the Court observed that "[i]n a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptation to control these elections . . . by corruption is a constant source of danger." *Ex Parte Yarbrough*, 110 U.S. 651, 666 (1884). This Court has expressly acknowledged that "the prevention of corruption and the appearance of corruption" is an "important" governmental interest. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 901 (2010) (quoting *Buckley*, 424 U.S. at 25-26). *Accord Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518

U.S. 604, 641 (1996) (Thomas, J. concurring) (noting that in "the context of campaign finance reform, the only governmental interest that we have accepted as compelling is the prevention of corruption or the appearance of corruption"). In describing the type of corruption that legitimately concerns government, the Court has explained that it has recognized "a concern not confined to the bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 389 (2000) (citing *Buckley*).

While the Court has rarely explicitly situated its understanding of corruption in the text and history of the Constitution,[10] many of the anti-corruption principles articulated by our Constitution's Framers are nonetheless reflected in the Court's acceptance of a strong government interest in combating corruption and the appearance thereof. *E.g.*, *Citizens United*, 130 S. Ct. at 901; *Buckley*, 424 U.S. at 25-26.

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[10] *See* Teachout, 94 CORNELL L. REV. at 397-400. For examples of the Court's use of constitutional history in examining the idea of corruption, *see Randall v. Sorrell*, 548 U.S. 230, 280 (2006) (Stevens, J., dissenting) ("[T]he Framers would have been appalled by the impact of modern fundraising practices on the ability of elected officials to perform their public responsibilities."); *Freytag v. Comm'r*, 501 U.S. 868, 904 (1991) (Scalia, J., concurring in part) ("The Framers' experience with post revolutionary self-government had taught them that combining the power to create offices with the power to appoint officers was a recipe for legislative corruption."); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 869 n.11 (1995) (Thomas, J., dissenting) ("The Ineligibility Clause was intended to guard against corruption.")

For example, the Court's description of corruption as "a subversion of the political process," *Fed. Election Comm'n v. Nat'l Conservative PAC*, 470 U.S. 480, 497 (1985), maps closely to the concerns expressed by the delegates at the Constitutional Convention. In particular, the Court's explanation that corruption occurs when "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns," *id.*, reflects concerns similar to those expressed by the Framers that public officials might be influenced to betray the interests of the state. Temptation and dependency, of constant concern to the Framers as sources of possible corruption, have also influenced the Court's thinking about corruption. In *Buckley*, the Court recognized "the danger of candidate dependence" on private contributions, explaining that "dependence on outside contributions" may lead to "coercive pressures and attendant risks of abuse." 424 U.S. at 53, 55. These concerns also motivated the passage of Arizona's public campaign financing system, after findings suggested that the purely private "election-financing system . . . [u]ndermine[d] public confidence in the integrity of public officials." ARIZ. REV. STAT. § 16-940(B) (2010).

The Court also shares the Framers' understanding that combating even the appearance of corruption is important to maintaining integrity in government: "avoidance of the appearance of improper influence 'is also critical . . . if confidence

in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley*, 424 U.S. at 27 (quoting *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)). In *Buckley*, the Court expressed concern over "the impact of the appearance of corruption" that is "inherent in a regime of' private contributions. *Id.*; *see also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 298 (2003) (Kennedy, J., dissenting). And the Court has explained that "the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Buckley*, 424 U.S. at 30. *See also Shrink Missouri*, 528 U.S. at 390 ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.")

In line with the Framers' understanding that political systems should be designed to combat corruption, the Court has recognized that government "may engage in public financing of election campaigns." *Buckley*, 424 U.S. at 57, n.65. In *Buckley*, the Court upheld the presidential public-financing program as "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93. In doing so, it recognized the purpose of the presidential public-financing program was "to reduce the deleterious influence of large contributions on our political process, to facilitate

communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Id.* at 91. The Court also recognized "Congress' interest in not funding hopeless candidacies with large sums of public money," concluding that Congress was "justifie[d] [in] withholding [] public assistance from candidates without significant public support." *Id.* at 96. In sum, this Court in *Buckley* emphasized that "[i]t cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest." *Id.* at 96.

Arizona's Citizens Clean Elections Act follows these *Buckley* principles exactly. Under any level of scrutiny, Arizona's public campaign-financing program must be upheld as constitutional if this Court's blessing of public financing as an appropriate anti-corruption measure is to have any real meaning. Only with a mechanism like Arizona's matching funds provision can a state attract enough candidates to opt into the system to serve the public-financing program's anti-corruption interest, while protecting public money by ensuring that races are not overfunded. This case is not *Davis v. Federal Election Commission*, 554 U.S. 724 (2008), in which discriminatory contribution limits were applied to two privately financed candidates, competing against one another in the same race, in a campaign system that was entirely privately financed. This case is about whether a state can implement a pragmatic, workable, public-financing system to deter corruption in politics, ensuring that Arizona's

elected officials are dependent upon the people alone.

Like the presidential public-financing program, Arizona's public-financing system "furthers, not abridges, pertinent First Amendment values." *Buckley*, 424 U.S. at 93. *See* Br. of Ariz. at 24-42; Br. of Clean Elections Inst. at 55-62. It does not "deprive" anyone "of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Citizens United*, 130 S. Ct. at 899. It does not erect a "ban on speech," nor does it "repress speech by silencing certain voices." *Id.* at 898-99. *See generally* Br. of Ariz. at 3-12; Br. of Clean Elections Inst. at 5-6. All anecdotal and statistical evidence in the record points to the conclusion that speech has only been increased and supported by Arizona's system of public financing and matching funds.

To the extent Arizona's public-financing system threatens even a "theoretical chilling effect," as the court below phrased it, McComish Pet. App. 34, intermediate scrutiny would likely apply based on the "minimal" burden on political expenditures. *See* Br. of Ariz. at 24-42 (arguing that intermediate scrutiny should apply); Br. of Clean Elections Inst. at 13-40 (same). Particularly when supported by the powerful text and history explaining the importance of specific and structural anti-corruption measures in the Constitution, Arizona unquestionably has a strong and important interest in preventing corruption in its political system. As recognized by *Buckley*, public financing

is an anti-corruption measure substantially related to this interest. 424 U.S. at 96.

Even if the Court were to apply strict scrutiny to Arizona's public-financing program, the matching funds provision is narrowly tailored to the State's anti-corruption interest, given the practical need for any system of public financing to be able to avoid under-funding competitive races — which would discourage candidate participation, lessening the program's anti-corruption impact– or over-funding other races, which would waste public money. *See* Br. of Ariz. at 52-58.

* * *

The Founding generation and generations of Americans since have come together around the principle that political systems should be designed to combat corruption and the appearance of corruption. Anti-corruption principles serve as a core element of the Constitution's text, history, and structure, with overlapping constitutional provisions designed to serve as a bulwark against the insidious nature of corruption. These principles translate into a strong state interest in combating real and apparent corruption in politics and government. Arizona's innovative campaign-financing program is an appropriate state effort to prevent corruption, representing the strengths of federalism and America's proud history of combating corruption through new political systems and structures. Consistent with the anti-corruption principles that shaped the design of the Constitution, the Court should uphold the ability of

the people of Arizona to combat corruption through the Citizens Clean Elections Act.

CONCLUSION

For the foregoing reasons, the Court should affirm the ruling of the lower court.

Respectfully submitted,

Douglas T. Kendall
Elizabeth B. Wydra*
*Counsel of Record
David H. Gans
Neil Weare
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street, NW, Suite 1002
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amici Curiae

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AMICUS CURIAE BRIEF

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Nos. 10-238 & 10-239

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On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE ANTHONY CORRADO, THOMAS MANN AND NORMAN ORNSTEIN IN SUPPORT OF RESPONDENTS

IRA M. FEINBERG*
KAREN L. COURTHEOUX
JANOS D. MARTON
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
(212) 918-3000
ira.feinberg@hoganlovells.com

Counsel for Amici Curiae
*Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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BRIEF FOR AMICI CURIAE ANTHONY CORRADO, THOMAS MANN AND NORMAN ORNSTEIN IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

Amici curiae are three political scientists who have dedicated much of their careers to studying, analyzing and writing extensively on Congress, federal elections, campaign finance, and American politics.[1]

[1] Pursuant to Supreme Court Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no

Anthony Corrado is a Professor of Government at Colby College and Chair of the Board of Trustees of the Campaign Finance Institute. He was a member of the Campaign Finance Institute's Task Force on Presidential Nomination Financing from 2002 to 2004. As a member of the Task Force, Corrado participated in producing the reports, *So the Voters May Choose . . . Reviving the Presidential Matching Fund System* (2005), and *Participation, Competition, Engagement: How to Revive and Improve Public Funding for Presidential Nomination Politics* (2003). He serves as a Special Advisor to the American Bar Association's Advisory Commission on Election Law, and has served as an expert consultant in several federal election law cases, including *McConnell v. FEC*, 540 U.S. 93 (2003). He served as an expert witness in *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001), and this Court cited and quoted his expert statement in its opinion in that case. *See id.* at 449, 451. His publications include *Financing Presidential Nominations under the BCRA*, *in* THE MAKING OF PRESIDENTIAL CANDIDATES (William G. Mayer ed., 2004), and BEYOND THE BASICS: CAMPAIGN FINANCE REFORM (2000), and he was co-editor, with fellow *amicus* Thomas Mann and others, of THE NEW CAMPAIGN FINANCE SOURCEBOOK (2005).

Thomas E. Mann is the W. Averell Harriman Chair and Senior Fellow in Governance Studies at the Brookings Institution. In addition to being co-editor of THE NEW CAMPAIGN FINANCE SOURCEBOOK (2005),

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person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of the brief.

he has written many other articles on campaign finance reform, including *Lessons for Reformers*, *in* FINANCING THE 2008 ELECTIONS (Anthony Corrado and David Magleby eds., 2010) and *Linking Knowledge and Action: Political Science and Campaign Finance Reform*, PERSPECTIVES ON POLITICS (2003). He served as an expert witness in *McConnell* v. *FEC*, 251 F. Supp. 2d 176 (D.D.C.), *aff'd in part & rev'd in part*, 540 U.S. 93 (2003), and this Court cited and quoted his expert report in its opinion. *See* 540 U.S. at 124 nn.8, 9, 11 & 12; *id.* at 148 & 155.

Norman J. Ornstein is a Resident Scholar at the American Enterprise Institute for Public Policy Research, and the Co-Director of the AEI-Brookings Election Reform Project. He is the founder and director of the Campaign Finance Working Group, a group of scholars and practitioners that helped craft the McCain-Feingold legislation. His publications include THE PERMANENT CAMPAIGN AND ITS FUTURE (2000).

All three *amici* are co-authors, with Michael J. Malbin, of a recent joint study for the Campaign Finance Institute, the American Enterprise Institute and the Brookings Institution, entitled REFORM IN AN AGE OF NETWORKED CAMPAIGNS (2010). The study urges, among other reforms, increased public funding of federal and state election campaigns, particularly through matching grants of small contributions, *see id.* at 36-46.

Stemming from their expertise and interest in federal elections and campaign finance reform, Professor Corrado, Dr. Ornstein, and Dr. Mann have filed

amici briefs in previous cases before this Court involving election-law issues.[2]

Amici have studied public financing systems in depth, and have played a leading role in the public policy debate concerning public financing systems, their efficacy and needed reforms. *Amici* therefore have a great interest in defending the validity of public financing systems, and in keeping the door open for further reforms which they believe may be necessary to promote greater public participation in our democracy, including greater public financing of state and federal election campaigns.

Amici therefore respectfully offer their views to aid the Court in this case. This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 37.3(a); the requisite consent letters have been filed with the Clerk.

SUMMARY OF ARGUMENT

The matching grant provisions of Arizona's public financing system are constitutional. They serve the important state interest in encouraging participation in the state's public financing system, which is intended to reduce the risk of *quid pro quo* corruption and the appearance of corruption in campaign fundraising. And the record shows that these match-

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[2] *See Citizens United* v. *FEC*, 130 S. Ct. 876 (2010) (Corrado, Mann & Ornstein); *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (Corrado, Mann & Ornstein); *Wisconsin Right to Life, Inc.* v. *FEC*, 546 U.S. 410 (2006) (per curiam) (Corrado, Mann & Ornstein); *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004) (Mann & Ornstein); *McConnell*, 540 U.S. 93 (Ornstein); *Colorado Republican*, 533 U.S. 431 (Mann); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (Mann).

ing grants do not in fact significantly burden the First Amendment rights of either non-participating candidates or independent spenders. The powerful arguments in support of the state's matching grant provisions are set out in detail in the briefs of the respondent Arizona state officials and the Clean Elections Institute, and will not be repeated here. We submit this brief instead to defend the validity, importance and efficacy of public financing systems generally, and to urge the Court to refrain from casting doubt on the validity of these systems, regardless of how the Court may resolve the narrow issue in this case.

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Court upheld the constitutionality of the provisions of the 1974 Federal Election Campaign Act ("FECA") that established a system of public financing for presidential elections. The Court expressly rejected the argument that "any scheme of public financing of election campaigns is inconsistent with the First Amendment." *Buckley*, 424 U.S. at 90. To the contrary, the Court recognized that the public financing system was "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process." *Id.* at 92-93. Thus, the Court held, the presidential public financing system "furthers, not abridges, pertinent First Amendment values." *Id.*

In light of *Buckley*, a number of states – including Connecticut, Maine, Minnesota and North Carolina, in addition to Arizona – have adopted voluntary programs providing for public financing of certain state election campaigns. These programs have been

enacted to serve purposes similar to those underlying the presidential public financing system: "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Id.* at 91. In general, these programs have been extremely popular and successful within their states, and the basic constitutionality of these programs has been repeatedly sustained.

Petitioners are careful to distinguish the matching grant provisions at issue here from the public financing system upheld in *Buckley*, and make no effort to challenge the validity of public financing systems generally. *See, e.g.*, Brief for Petitioners at 57-58, 69-70, 78-79. Some of petitioners' *amici*, however, are not nearly so scrupulous, and urge this Court to take this occasion to call into question the validity *vel non* of all public financing systems. *See, e.g.*, Brief of *Amicus Curiae* Center for Competitive Politics in Support of Petitioners at 5-9.

We urge the Court to resist this invitation. Contrary to the claims of petitioners' *amici* that there is no evidence public financing systems have accomplished any valid purpose, the presidential public financing system has been an unqualified success for more than 35 years. While the system needs to be updated to maintain its relevance in light of the increased cost and fundraising capacity of presidential campaigns, the presidential public financing system has been used by the great majority of credible presidential candidates, across the political spectrum, since its enactment. From 1976 through 2004, every major party presidential nominee chose public funding in the general election, as did John

McCain in 2008. These general election grants freed candidates of both major parties from the need to raise money during the most crucial phase of the presidential campaign, and gave them more time to make their case to the electorate.

Similarly, the majority of contenders for the Republican and Democratic Party presidential nominations have chosen to participate in the public matching funds program applicable to primary election contests. Public matching funds in the primaries have particularly benefited candidates, in both major parties, who were lesser-known or who were challenging their party's establishment, including Ronald Reagan in 1976, Pat Robertson in 1988, and Patrick Buchanan in 1992. By virtue of their success in soliciting small contributions from a broad base of individual donors, public financing has provided these candidates with the resources to mount competitive campaigns and to present their case to the voters, particularly in the crucial early primary states. Public financing has not only served to promote competition in elections and to provide more meaningful choices to voters, but it has also helped to ensure that more candidates have the opportunity to share their views with the electorate.

Public financing has accomplished these objectives while at the same time largely eliminating corruption or the appearance of corruption from the presidential election process, one of the legislation's primary purposes. The public financing system was adopted in large part to address the abuses of the 1972 presidential campaign – including secret slush funds and secretive hand-offs of bags of money – which were revealed in the Watergate scandal.

The Court should take care in its opinion not to call into question the validity of the presidential public financing system, or the validity of the various public financing programs that have been adopted by the states and municipalities. Several of the state and local programs, including the Arizona measure before the Court, were adopted in the wake of serious corruption scandals; all were intended to create a system of public financing of the specified state and local elections that reduced or eliminated the risk or appearance of corruption. Each of the state and local systems varies considerably in its details. The states and local governments should be free to adopt public financing systems that respond to local needs and conditions, unless and until a particular provision is shown on a full record to impermissibly burden constitutional rights. It is well settled that the states are principally responsible for choosing their own system of elections, and the Court should be very reluctant to limit the states' ability to choose public financing as a component of the states' election mechanisms.

ARGUMENT

I. Public Financing at the Federal Level: The Presidential Public Financing System Upheld in *Buckley* v. *Valeo*.

Congress responded to the financial abuses that occurred in the 1972 presidential election and those revealed by the Watergate investigations by enacting the 1974 Federal Election Campaign Act, now codified at 2 U.S.C § 431 *et seq.*, 26 U.S.C. § 9001 *et seq.*, and 26 U.S.C. § 9031 *et seq.* One of the hallmarks of this legislation was the creation of a voluntary program of public funding for presidential cam-

paigns. This innovative reform – which remains the model for public financing systems adopted by states and local governments throughout the United States – was designed to establish a safeguard against corruption in the political system, by reducing the emphasis on fundraising in presidential campaigns and diminishing the influence of large private donations. *See* S. Rep. No. 93-689, at 5 (1974). FECA also sought to reduce the influence of wealthy interests by promoting the participation of donors of small sums in the financing of presidential campaigns. *Id.* at 6-7. Further, due to congressional concerns about the effects of rising campaign expenditures, *id.* at 5, FECA required candidates and parties who opted to accept public money to agree to limits on their campaign spending. 26 U.S.C. §§ 9003(b), (c); 9008(d)(1), (d)(2); 9033(b)(1).

The presidential public funding system provides support to candidates or national party committees at each stage of the presidential selection process. In the prenomination or primary election period, a candidate may qualify for public matching funds on a dollar-for-dollar basis for the first $250 contributed by any individual donor. 26 U.S.C. § 9034(a). To be eligible for such primary election matching funds, a candidate must raise a threshold amount from private contributions in at least 20 states, counting only the first $250 donated by each contributor, 26 U.S.C. §§ 9033(b)(3), (4), and must agree to limit personal contributions to his or her own campaign to a maximum of $50,000. 26 U.S.C. §§ 9033(b)(1), 9035(a). The candidate must also agree to abide by state-by-state aggregate spending limits, and agree to a post-election financial audit of campaign funds, conducted by the Federal Election Commission. 26

U.S.C. § 9033(a)(3). Candidates who meet these requirements may receive matching funds on qualified individual contributions received after January 1 of the year preceding the election year, and may receive public funds up to a maximum of half of the candidate's aggregate spending limit. 26 U.S.C. §§ 9034(a), (b).

In the general election campaign, candidates can choose to receive a public grant that provides full funding for his or her campaign. *See* 26 U.S.C. § 9003. The amount of the grant is based on a formula set out in the statute, which set an initial limit in 1974 of $20 million, plus adjustments for inflation. By 2004, the amount of the grant had risen to $74.6 million. *See* Anthony Corrado, *Public Funding of Presidential Campaigns*, *in* THE NEW CAMPAIGN FINANCE SOURCEBOOK 180, 193 (Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz & Trevor Potter eds., 2005). In 2008, the grant amount increased again to $84.1 million. *See* Federal Election Commission, *Presidential Election Campaign Fund (PECF)*, http://www.fec.gov/press/bkgnd/fund.shtml (last visited Feb. 16, 2011). To be eligible for public financing, a candidate must be the presidential nominee of a party that qualifies for funding under the terms of the statute. 26 U.S.C. § 9003. As in the primaries, a participating candidate must also agree to abide by the spending limit, restrict any personal contributions to a maximum of $50,000, and agree to a post-election financial audit. 26 U.S.C. §§ 9003, 9004. A candidate who did not accept public financ-

ing in the primaries may nevertheless choose to receive public financing in the general election.[3]

The program also offers national party committees the option to accept a grant to finance the expenses incurred for a presidential nominating convention. The amount of this grant was originally set in 1974 at $2 million, plus adjustments for inflation, but the base amount was subsequently increased in 1979 and 1984. *See* Corrado, *Public Funding of Presidential Campaigns*, *supra*, at 190. By 2008, the amount provided to each of the major parties was $16.8 million. *See* Federal Election Commission, *Presidential Election Campaign Fund*, *supra*. As with gen-

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[3] The law distinguishes between major party nominees and minor party nominees for purposes of determining the amount of the general election grant. A major party nominee, defined as the nominee of a party that received at least 25 percent of the vote in the previous presidential election, is eligible to receive the full amount of the grant. A minor party nominee or independent candidate is eligible for a proportionate share of the full amount, based on the proportion of the major parties' average vote share represented by the minor party's or candidate's share, provided that the minor party or candidate received at least five percent of the vote in the previous election. 26 U.S.C. § 9004(a)(3). Thus, in 1996, Reform Party nominee Ross Perot received $29.1 million in general election public funding, slightly less than half of the full $68.1 million received by each major party nominee that year, based on the proportionate share of the general election vote that Perot received in 1992. *See* Corrado, *Public Funding of Presidential Campaigns*, *supra*, at 194. A participating minor party candidate may raise additional private contributions, subject to generally applicable contribution limits, to make up the difference between the amount of the minor candidate's grant and the amount of the full grant awarded to a publicly financed major party contender.

eral election funding, a minor party committee can qualify for a proportionate share of the amount provided to each major party, based on the vote in the previous presidential election, provided that the minor party's nominee received at least five percent of the vote. 26 U.S.C. §§ 9003(c), 9008(b)(2).

This Court upheld the constitutionality of these provisions in *Buckley*, 424 U.S. at 90-109, and rejected the argument that such a system of public financing of election campaigns was inherently inconsistent with the First Amendment. The Court emphasized that the public financing system was "a congressional effort . . . to use public money to facilitate and enlarge public discussion and participation in the electoral process," and therefore "furthers, not abridges, pertinent First Amendment values." *Id.* at 93.[4] Moreover, the Court held, "it cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest." *Id.* at 96.[5]

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[4] The Court explained the purposes of the presidential public financing system as "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Buckley*, 424 U.S. at 91 (citing S. Rep. No. 93-689, 1-10 (1974)).

[5] The Court rejected additional constitutional challenges to the presidential public financing system in *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *aff'd*, 445 U.S. 955 (1980).

II. The Success of the Presidential Public Financing System.

Since 1976, the first presidential election in which public funds were available, every presidential election has been financed in part with public funds. From 1976 through 2004, every major party presidential nominee relied on public money for the financing of his general election campaign, and John McCain did so in 2008; only Barack Obama in 2008 opted to decline the general election grant, because of his ability to raise extraordinary sums that far exceeded the current amount of the public grant. In every election cycle since 1976, through and including 2008, both the Democratic and Republican national party committees have accepted public money to finance their presidential nominating conventions. And the great majority of presidential candidates since 1976 have relied upon the public matching grants available during the primary elections. Indeed, from 1976 through 1996, every candidate who won the nomination of one of the major parties did so with the assistance of public matching funds.[6]

Public funding has provided substantial support to a wide range of presidential aspirants. Republicans and Democrats alike, as well as some minor party candidates and a minor party committee, have

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[6] In the eight presidential elections from 1976 through 2004, presidential candidates and national party committees received more than $1.3 billion in public funds. *See* Corrado, *Public Funding of Presidential Campaigns*, *supra*, at 182. Candidates seeking their party's nomination received about $342 million of public money in total during this period; general election contenders received a total of $839 million; and national party committees qualified for a total of $152 million. *Id.*

participated in the program. Democratic contenders and their national party committee received $646 million of public funding through the 2004 election, while Republican candidates and their national party committee received $628 million. Minor party candidates and one minor party committee received a total of $60 million. Corrado, *Public Funding of Presidential Campaigns*, *supra* at 182.[7]

In the first two decades of experience under the public funding programs, the vast majority of contenders for the Republican and Democratic presidential nominations chose to participate in the public matching funds program. Of all the candidates who ran for the Democratic or Republican nomination in the six elections between 1980 and 2000, only six candidates, all Republicans, decided to forgo public money during the primary campaign: John Connally in 1980; Malcolm "Steve" Forbes, Robert Dornan, and Maurice Taylor in 1996; and Forbes, George W. Bush and Orrin Hatch in 2000. Anthony Corrado, BEYOND

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[7] Democrats have qualified for a slightly larger amount of public funding over the course of the program principally because of the greater number of contested Democratic presidential nomination races during this period, which led to a greater number of candidates qualifying for primary matching funds. In all, 91 challengers for a presidential nomination in the elections from 1976 through 2004 qualified for and accepted primary campaign matching funds, including 53 Democrats, 29 Republicans, and 9 minor party aspirants. *See* John C. Green, *Financing the 2004 Presidential Nomination Campaigns*, *in* FINANCING THE 2004 ELECTION 93, 121 (David B. Magleby, Anthony Corrado & Kelly Patterson eds., 2006).

THE BASICS: CAMPAIGN FINANCE REFORM 60-61 (2000).[8]

Presidential aspirants embraced public funding because the public grants proved to be an invaluable resource. The general election grants alone freed candidates of the need to raise money and gave them more time to make their case to the electorate. *Id.* Without public funding, candidates would have to spend most of their time between July and November raising funds in order to accrue the tens of millions of dollars needed to mount a national campaign. The public option also helped to hold down campaign expenses, since candidates did not have to spend the millions of dollars needed to generate the sums offered through public funding.

Primary campaign matching funds have also proved to be an important source of support for presidential candidates. In each election between 1976 and 1996, about a third of the monies raised by presidential contenders came from the public match. Corrado, *Campaign Finance*, *supra* at 60-61. Public financing has particularly benefited candidates who challenged their party's establishment, or lesser-known aspirants. Public funding has provided these candidates with the resources to mount viable campaigns and to present their case to the voters. This is particularly true in the crucial early primary states. For many candidates, public funding was the source of sorely needed funds at crucial points in a presidential race. In this way, public funding has not only served to promote competition in elections and provide more

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[8] In addition, in 1992, independent presidential candidate H. Ross Perot chose not to participate in public funding in his unorthodox campaign for the presidency. *See id.*

meaningful choices to voters, but it has also helped to ensure that more candidates have the opportunity to share their views with the electorate.

For example, conservative candidates such as Republicans Pat Robertson in 1988 and Patrick Buchanan in 1992 received large sums of public money in their bids for the presidency by successfully soliciting small contributions from a broad base of individual donors. Robertson raised $20.6 million in 1988 and accrued $9.7 million in matching funds. Buchanan raised $7.2 million in 1992, which generated $5 million in matching funds. *Id.* at 61. Similarly, liberal candidates such as Democrats Jesse Jackson in 1984 and 1988 and Jerry Brown in 1992 derived the majority of their campaign funds from smaller donations and thus qualified for substantial amounts of public money. Jackson raised a combined $17.4 million from individuals in his two bids for the presidency and accrued $10.7 million in matching funds; Brown chose to accept only individual donations in small amounts in his 1992 bid for the Democratic nomination, and raised $5.2 million in private contributions that were matched with $4.2 million in public funds. *Id.*

But no candidate benefitted from public funding more than Ronald Reagan. Due to his broad base of supporters throughout the nation, Reagan was able to capitalize on his small-donor fundraising capacity to accrue substantial sums of public money. During his 1976 primary challenge to incumbent President Gerald Ford, for example, Reagan had less than $44,000 in campaign money left at the end of January, while President Ford had fifteen times more cash on hand. The $1 million in public funds that

Reagan received in January and the additional $1.2 million that he received in February were pivotal in allowing Reagan to continue his campaign. *See* Michael J. Malbin, *Are Matching Funds Only "For Losers"? A Post-2004 Vision for a Renewed Public Funding System*, WELFARE FOR POLITICIANS? TAXPAYER FINANCING OF CAMPAIGNS 251, 256 (John Samples ed., 2005). Reagan was once again short of cash at the end of March, and was able to continue his campaign only as a result of a further infusion of public money. *Id.*

Even in 1984, when as President he was seeking reelection without significant opposition within his own party, Reagan raised about 60 percent of the funds for his campaign from small donors and, as a result, received $9.7 million in matching funds. *See* Anthony Corrado, *The Changing Environment of Presidential Campaign Finance*, *in* IN PURSUIT OF THE WHITE HOUSE: HOW WE CHOOSE OUR PRESIDENTIAL NOMINEES 233 (William G. Mayer ed., 1996). Notably, this was the maximum amount of public money a primary candidate could receive in accordance with the law at the time. To this day, President Reagan remains the only candidate to ever reach the public funding primary campaign maximum. *See id.* at 233-34.

The availability of public funding has also made it possible for minor party candidates to share their views with the electorate. In every presidential election since 1984, at least one minor party candidate has qualified for and received public matching funds. In the 2000 campaign, for example, three minor party candidates – one each from the Reform Party, the Natural Law Party, and the Green Party –

received public matching funds. *See* Green, *Financing the 2004 Presidential Nomination Campaigns*, at 121.

This history shows the invalidity of the claim by the Center for Competitive Politics that there is no evidence public financing has furthered any of its goals. *See* Brief of *Amicus Curiae* Center for Competitive Politics in Support of Petitioners at 4, 5-9. While the presidential public financing system needs to be updated and grant levels increased to maintain its relevance in light of the increasing expense of presidential campaigns, the presidential public financing system has demonstrably increased competition and voter choice. It has provided challengers who have grass-roots support with the resources to mount viable and competitive campaigns. For many candidates, public funding has been the source of sorely needed funds at crucial points in their races, and provided them with funding that permitted them to continue their campaigns. Public funding has provided important support to independent candidates, increasing the diversity of voices and views presented to the electorate. It has enabled presidential nominees to put aside the needs of fundraising during the crucial final months of the campaign, and allowed them to concentrate on making their case to the electorate. Public funding has thus served to promote competition in elections, provide more meaningful choices to voters, and free candidates to focus on presenting their views to the electorate rather than raising campaign contributions. And in so doing, it has simultaneously removed from presidential campaigns the greatest source of potential corruption and the appearance of corruption, the

need for candidates to solicit large contributions from donors.

III. The Constitutionality of Arizona's Matching Grants.

The voters of Arizona adopted the state's public financing system through an initiative measure approved in the 1998 elections. *See McComish* v. *Bennett*, 611 F.3d 510, 514 (9th Cir. 2010). As the Ninth Circuit noted, the "Citizens Clean Elections Act" was passed in the wake of a long series of serious corruption scandals involving Arizona public officials, including the indictment of two of its governors. *Id.* It is readily apparent – from the historical context in which it was adopted, from the ballot pamphlet's explanation of its purposes, indeed, from the very name of the Act – that one of its principal purposes was to prevent political corruption and to reduce the public's perception that Arizona politics were irrevocably broken. Indeed, the voter information pamphlet stated that the central goal of the legislation was to "improve the integrity of Arizona state government" by, among other things, "diminishing the influence of special-interest money." Ballot Propositions Publicity Pamphlet for the 1998 Ariz. General Election, http://www.azsos.gov/election/1998/info/pubpamphlet/prop200.pdf. *See McComish*, 611 F.3d at 514-15.

The matching grant provisions of the Arizona law are constitutional, and should be upheld. It is well settled that the states have a sufficiently important interest to justify adoption of campaign finance regulations that combat corruption and the appearance of corruption, *see, e.g., Davis* v. *FEC*, 554 U.S. 724, 737 (2008); *McConnell*, 504 U.S. at 136, and the

Ninth Circuit reasonably concluded that one of the principal purposes of the Act was to reduce *quid pro quo* corruption. *See McComish*, 611 F.3d at 515-16. The matching grant provisions were intended to encourage participation in the state's public financing system, *see id.* at 526, and the state – having decided to establish a public financing system – has an equally important interest in adopting measures to incentivize participation and attempt to ensure that the system is successful in reaching its anti-corruption goals. *See Rosenstiel* v. *Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996) (holding that the state had "a compelling interest in stimulating candidate participation in its public financing scheme"); *Vote Choice, Inc.* v. *DiStefano*, 4 F.3d 26, 39-40 (1st Cir. 1993) (same).

Moreover, the challenged matching grant provisions do not significantly burden the First Amendment rights of non-participating candidates or independent spenders. As the Ninth Circuit found, the record does not support petitioners' claims that the matching grant provisions created any meaningful disincentive against them exercising their First Amendment rights to the fullest extent in support of their campaigns. *See McComish*, 611 F.3d at 522-25. In the absence of any evidence that the matching grant provisions in fact impose a severe burden on petitioners' speech, the logical or theoretical argument that it could conceivably have that effect does not create a sufficient burden on First Amendment rights to hold them unconstitutional. *See McComish*, 611 F.3d at 525; *see, e.g.*, *Rosenstiel*, 101 F.3d at 1552-53; *Vote Choice*, 4 F.3d at 40.

IV. The Validity of State and Local Public Financing Systems Generally.

Even if the Court concludes that the matching grant provisions are problematic, however, there is no occasion for the Court to address any broader issue involving the constitutionality of public financing systems generally, and the Court should avoid any ruling that might call into question their constitutionality.[9]

In the wake of *Buckley*, the states have adopted a diverse array of public financing statutes, which vary considerably in their details. As of 2009, twenty-four states operated some system of public financing. These programs range from full public financing to qualified candidates running for certain state offices, offered by Arizona, Connecticut, Maine, New Mexico and North Carolina, to a tax credit to individuals who make a political contribution in their state, provided by six states. Jessica A. Levinson, Center for Governmental Studies, *State Public Financing Charts*, at 1 (2009).[10] Each state's public financing laws take different positions on questions such as whether funding should apply to primary elections;

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[9] Petitioners have not challenged any other aspect of the Arizona public financing system.

[10] The states which have adopted some form of public financing system are: Arizona, Arkansas, Connecticut, Florida, Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, Utah, Vermont, Virginia, and Wisconsin. *Id.* The Center for Governmental Studies report also listed Idaho among the states with public financing programs, but Idaho repealed its program effective January 1, 2010.

whether payment should be made in the form of matching funds, lump sum payments, or both; what factors should determine the amount of the payment; and what entity should receive the funding – the candidate or the political party. For example, Florida, Massachusetts, and Michigan each provide matching funds to qualifying candidates for certain statewide offices for both primary and general elections. *Id.* By contrast, Iowa provides funding to political parties, and only for the general election. *Id.* Minnesota offers a variation on that program, providing lump sum payments to qualifying candidates for certain statewide offices, to state committees of political parties, and to the state general fund for administrative purposes. *Id.*

In addition, a number of local governments have adopted some form of public financing system. Most notably, the City of New York has adopted a system which provides qualified candidates with matching funds for the first $175 in contributions received from any donor, at a rate of $6 in matching funds for every $1 in contributions. New York City Campaign Finance Board, *Public Matching Funds*, http://www.nyccfb.info/candidates/candidates/publicmatchingfunds.aspx (last visited Feb. 7, 2011). Similarly, Albuquerque, New Mexico provides significant public financing to qualifying candidates. Other cities providing at least partial public financing to local candidates include Miami, Florida; Austin, Texas; Boulder, Colorado; and several cities in California. *See* Jessica Levinson & Smith Long, Center for Governmental Studies, *Mapping Public Financing in American Elections*, at 3 (2009).

There have been several lawsuits challenging these public financing systems, but their validity has generally been sustained, against a broad variety of constitutional claims. *See N.C. Right to Life Comm. v. Leake*, 524 F.3d 427 (4th Cir. 2008) (upholding North Carolina system for public financing of judicial elections); *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding constitutionality of Maine's Clean Election Act); *Vote Choice*, 4 F.3d at 40 (upholding provisions of Rhode Island public financing system); *Rosenstiel*, 101 F.3d at 1565 (upholding constitutionality of Minnesota's public financing system); *Wilkinson v. Jones*, 876 F. Supp. 916 (W.D. Ky. 1995) (upholding constitutionality of provisions of Kentucky's public financing system); *see also Green Party v. Garfield*, 616 F.3d 213 (2d Cir. 2010) (upholding constitutionality of Connecticut's public financing system generally, even while holding its matching grant provisions unconstitutional).

The Court in this case should avoid any ruling that would call into question the validity of these diverse state and local public financing systems. The states should have the flexibility to adopt public financing systems that are adapted to their local needs, conditions, and histories. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 393-94 (2000) (relying on evidence of local history and conditions to support constitutionality of state contribution limits). This is particularly true since public financing programs are generally intended to reduce political corruption and to restore public confidence in the integrity of state and local government, and are often adopted, as in Arizona, in the wake of corruption scandals. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("A State

indisputably has a compelling interest in preserving the integrity of its election process") (internal citations omitted). Absent a record demonstrating that a particular provision has an impermissible impact on First Amendment rights, the Court's ruling should leave room for the states to continue to experiment with these public financing systems.

The Court has repeatedly recognized, in a variety of election-related contexts, that the states have "broad power . . . over the election process for state offices" with which this Court should be reluctant to interfere. *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 458 (2008) (internal citations omitted); *see Storer* v. *Brown*, 415 U.S. 724, 730 (1974) (states have long been primarily responsible for regulating elections, including registration, eligibility, ballot and vote-counting requirements); *Crawford* v. *Marion County Election Board*, 553 U.S. 181, 208 (2008) (Scalia, J., concurring) ("detailed judicial supervision of the election process would flout the Constitution's express commitment of the task to the States"). As the Court observed in *Oregon* v. *Mitchell*, 400 U.S. 112, 124-25 (1970), "[n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters . . . and the nature of their own machinery for filling local public offices." The Court has thus repeatedly recognized that "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections," and that "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be

chosen." *Gregory* v. *Ashcroft*, 501 U.S. 452, 461-62 (1991) (internal citations omitted); *accord Northwest Austin Mun. Utility Dist. No. One* v. *Holder*, 129 S. Ct. 2504, 2520 (2009).

These fundamental principles of federalism suggest that the Court should tread cautiously before issuing a ruling that could undermine the validity of state public financing statutes.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

IRA M. FEINBERG*
KAREN L. COURTHEOUX
JANOS D. MARTON
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
(212) 918-3000
ira.feinberg@hoganlovells.com

Counsel for Amici Curiae
*Counsel of Record

AMICUS CURIAE BRIEF

No. 10-238, 10-239

IN THE

Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ET AL.,

Petitioners,

and

JOHN MCCOMISH, ET AL.,

Petitioners,

v.

KEN BENNETT, IN HIS OFFICIAL CAPACITY AS ARIZONA SECRETARY OF STATE, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICI CURIAE* COSTAS PANAGOPOULOS, PH.D., RYAN D. ENOS, PH.D., CONOR M. DOWLING, PH.D. AND ANTHONY FOWLER IN SUPPORT OF RESPONDENTS

ALEXIS S. COLL-VERY
Counsel of Record
GEORGE R. MORRIS
DEANNE K. CEVASCO
MICHELLE P. WOODHOUSE
SERENA M. ORLOFF
CHRISTOPHER J. JUDGE
SIMPSON THACHER & BARTLETT, LLP
2550 Hanover Street
Palo Alto, CA 94304
acoll-very@stblaw.com

234828

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae ("*Amici*") are scholars (political scientists) who are experts in the American electoral system including campaigns and elections, campaign strategy, voting behavior, public opinion, campaign finance, political psychology, racial politics, and state and local politics. In their research they routinely utilize econometric tools and statistical methods. The team leader, Costas Panagopoulos, Ph.D.,[2] is an Assistant Professor of Political Science, director of the Master's Program in Elections and Campaign Management and founder and director of the Center for Electoral Politics at Fordham University. Dr. Panagopoulos is also an expert on public financing in American elections and editor of the forthcoming book volume, *Public Financing in American Elections* (Temple University Press). Ryan D. Enos, Ph.D. is an Assistant Professor of Government, Faculty Associate at the Institute of Quantitative Social Science, and a member of the Executive Committee for the Center for American Political Studies at Harvard University. Conor M. Dowling, Ph.D. is a postdoctoral associate in the Institution for Social & Policy Studies and the Center

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amici*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have filed blanket waivers with the Court consenting to the submission of all amicus briefs.

2. A more detailed description of the credentials of each *Amicus* can be found in the Appendix, which includes *Amici's* report "The Effects of Arizona's Campaign Finance Laws on Campaign Spending and Free Speech" ("*Amici's* Report"), at 1a-3a.

for the Study of American Politics at Yale University. Anthony Fowler is a Ph.D. student in the Department of Government at Harvard University.

Amici write to provide the Court with their original data analyses and the findings of their empirical testing of Petitioners' claim that the matching funds provision in Arizona's Citizens' Clean Elections Act (the "Act") inhibits the free spending of nonparticipating candidates and independent groups. *Amici* believe it is essential that the Court have empirical data regarding the systematic impact of the Act's matching funds provision on candidate spending behavior in Arizona. After conducting multiple, rigorous statistical tests, *Amici* found no empirical evidence to support the Petitioners' claim that the matching funds provision inhibits political spending (i.e., "chills" political speech). Rather, nonparticipating candidates and independent groups appear to spend just as much when the matching funds provision is applicable as they do in the absence of the law.

SUMMARY OF THE ARGUMENT

Despite Petitioners' claims that the matching funds provision in the Act burdens political speech and, therefore, is subject to strict scrutiny, the empirical evidence demonstrates that the matching funds provision does not deter, limit, or otherwise restrain speech. Without such deterrence or restraint on speech, Petitioners cannot show that the matching funds provision imposes a direct and substantial burden on speech, as is necessary for this Court to apply strict scrutiny to the statute.

In an attempt to convince this Court otherwise, Petitioners have emphasized anecdote over empirical

reality. Petitioners' arguments are unavailing, however, as all available empirical evidence – the scientific studies currently in the record and the original data analyses performed by *Amici* – find no evidence that spending has been chilled.

Amici tested whether nonparticipating candidates' spending tends to cluster below the matching funds provision's triggering threshold; if the provision actually inhibits spending by nonparticipating candidates, one would expect nonparticipating candidates to spend just below the threshold that would trigger additional funds to their participating opponents. *Amici*, however, found no evidence of such behavior. In addition, *Amici* tested whether spending by nonparticipating candidates and independent groups increased when the Act's matching funds provision was suspended by this Court's injunction in 2010. If the matching funds provision inhibited spending, one would expect a marked increase in spending by nonparticipating candidates once the distribution of matching funds was suspended. Again, *Amici* found no evidence of such behavior.

What do *Amici's* analyses and findings affirmatively demonstrate? (A) There is no statistically significant evidence of clustering below the triggering amount in Arizona elections between 2006 and 2010; and (B) Spending in Arizona's 2010 election, after the Court enjoined the operation of the matching funds provision, did not increase relative to other states. *Amici's* research, analyses and findings conclusively establish that the matching funds provision does not deter or otherwise "chill" the propensity to speak by nonparticipating candidates and their supporters.

Without any such deterrence, Petitioners have simply failed to demonstrate that the matching funds provision imposes a burden on speech. However, even if this Court decides, like the Ninth Circuit, that the Act's matching funds provision might indirectly and incidentally burden speech, the matching funds provision is only subject to intermediate scrutiny. Under intermediate scrutiny, the Ninth Circuit correctly held that the matching funds provision did not violate the First Amendment because there was a substantial relation between the Act's matching funds provision and Arizona's important and compelling government interest in preventing and combating corruption. Accordingly, the Ninth Circuit's judgment should be affirmed.

ARGUMENT

1. *AMICI'S* RESEARCH, ANALYSES AND FINDINGS DEMONSTRATE THAT THE MATCHING FUNDS PROVISION IN THE ACT DOES NOT IMPOSE A DIRECT AND SUBSTANTIAL BURDEN ON SPEECH

Unlike the expenditure bans struck down in *Buckley* and *Citizens United*, and unlike the discriminatory contribution limitations struck down in *Davis*, Arizona's matching funds provision does not limit or restrict the campaign spending of nonparticipating candidates in any way. Instead, the matching funds provision is simply a triggering mechanism for the fair and efficient distribution of public funding. Confronted with this clear distinction between regulations that directly and substantially burden speech and the challenged matching funds provision, Petitioners have relied on personal,

anecdotal evidence – not empirical data and scientific analysis – to claim that fundraising and spending have been unconstitutionally burdened. The *Amici's* research, however, shows that Petitioners' claims of "burden" are overstated and unsupported and, thus, that their argument for the application of strict scrutiny is fatally flawed.

A. Petitioners Levy Weak Support for Their Claims That the Matching Funds Provision Burdens Speech

Petitioners rely almost exclusively on anecdotal evidence to support their assertion that the impact of the matching funds provision is to create a direct and substantial burden on speech. Yet such anecdotal evidence, because it is grounded in human attribution, by its very nature cannot control for multi-variable causation. Accordingly, such evidence, cannot foreclose the possibility that, notwithstanding the good faith beliefs or perceptions of those who gave such testimony in the proceedings below, variables *other* than the matching funds provision actually drove spending decisions. Therefore, Petitioners' evidence fails to establish definitively any causal effect between the matching funds provision and the amount of speech actually disseminated by a single candidate or Arizona candidates as a group.

For example, Petitioners rely on testimony that Petitioner McLain and former gubernatorial candidate John Munger both decided to forego or minimize self-financing after considering the effect of matching funds on the competitiveness of their campaigns. However, these representations by the parties-in-interest in this case say nothing about the total amount of money ultimately spent

by their respective campaigns. Nor do they definitively establish that *matching funds* (rather than, for example, a particularly strong oppositional candidate) was the causal force behind such a decision. A rational candidate will always consider her own resources and prospective resources, the resources and prospective resources of her opponents, and the marginal value of any additional dollar spent at any given time or place, in determining an optimal campaign spending strategy.[3] That this is so, and that in certain circumstances the analysis of an opponent's potential resources may involve reference to the matching funds provision, says nothing about what that opponent's resources would have been in the absence of a public finance system or that, in the absence of the matching funds provision, the testifying candidates would necessarily have spent more money or disseminated more speech. Indeed, Petitioners themselves present several examples of candidates and independent expenditure groups making expenditures notwithstanding the presence of matching funds. *See e.g.*, Brief for Petitioners McComish *et al.* ("McComish Brief") at 41 (noting gubernatorial candidate Matt Salmon held fundraiser notwithstanding

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3. *See e.g.*, Adam Nagourney & Jeff Zeleny, *Obama Forgoes Public Funds in First for Major Candidate*, N.Y. TIMES, June 20, 2008 (discussing factors underlying presidential candidates Barack Obama's and John McCain's respective decisions to reject and accept public financing, including assessments of how much the other had raised and could raise); Stanton A. Glantz *et al.*, *Election Outcomes: Whose Money Matters?*, 38 J. POL. 1033 (1976) (presenting research that marginal value of election money spent is greater for challengers than incumbents); Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court's Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679, 686 (2010) (underscoring the "importance of tactical maneuvering in political campaigns"), 695–698 (discussing strategies for maximizing the campaign value of political speech).

disbursement of matching funds to his opponent); Brief for Petitioners Arizona Free Enterprise Club's Freedom Club Pac, *et al.* at 18-19 ("Committee Brief") (citing independent expenditures made by Republican Party on behalf of Matt Salmon, despite the availability of matching funds); McComish Brief at 32 (noting the Arizona Realtors Association made independent expenditures of $6,500 for the election of Petitioner McComish, triggering $18,330 to his opponents). Thus, the many concrete examples in the historical record that are cited by Petitioners show that candidates and their supporters have not been chilled by matching funds, but instead have chosen to speak, fundraise and spend without regard for the matching funds provision.

As such, although the record discusses the various *perceptions* and *attributions* of various interested parties regarding the impact of matching funds on campaign spending, such testimony is of limited value because it cannot, by its very nature, scientifically control for the possibility that factors other than matching funds affected spending choices or the alternate possibility that campaign spending has not, in adjusted terms, changed at all as a result of the matching funds provision.[4] Moreover, this anecdotal evidence is contradicted by the behavior of the Petitioners themselves, many of whom triggered the matching funds by exceeding the threshold despite their knowledge of the Act. *See, e.g.*, Respondent Clean

4. Wilson, *supra*, at 699 (discussing research demonstrating "that individuals who are predisposed to a certain position or explanation are significantly less likely to generate or be receptive to disconfirming or challenging information"); Charles G. Lord *et al.*, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. Personality & Soc. Psychol. 2098 (1979).

Elections Institute, Inc. Brief ("Clean Elections Brief") at 6-7 (noting Petitioners McComish, Bouie, and McLain each exceeded the spending limit despite the distribution of matching funds; Petitioner Martin triggered matching funds in contradiction of his sworn testimony that he could not recall having done so; matching funds never caused Petitioners Murphy or McLain to reject a contribution or stop fundraising) (citing JA 433-34; JA 704; JA 384-85; 545-46; ECF 369-2, 370-2; JA 574-75, 755; JA 410; 594-95; JA 412; JA 416.)[5]

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5. In addition to relying exclusively on anecdotal evidence, Petitioners mischaracterize aspects of the operation of the Act. For example, they mistakenly claim the existence of a so-called multiplier effect where multiple privately financed candidates run against a single publicly financed candidate. Petitioners suggest that in this scenario, if $10,000 in expenditures above the spending limit are made by or on behalf of each privately financed candidate, the single publicly funded candidate will receive $28,200 in matching funds ($30,000 minus six percent). Committee Brief at 5; *see also* McComish Brief at 31-32. However, Petitioners have failed to acknowledge the fact that the disbursement of matching funds adjusts the spending limit for a publicly funded candidate. *See* A.R.S. § 16-952. Thus, where one publicly financed candidate competes against three privately financed candidates and all candidates have spent up to (but not exceeded) a hypothetical $10,000 spending limit, if an independent expenditure of $10,000 is made on behalf of one privately funded candidate, the publicly funded candidate will receive $10,000 in matching funds (minus six percent) and the spending limit will be adjusted upward to $20,000. If a second or third independent expenditure of $10,000 is made on behalf of a second or third privately funded candidate, no additional matching funds will be disbursed because the adjusted spending limit of $20,000 has not been exceeded. All candidates have spent up to, but not exceeded, the adjusted spending limit. Thus, Petitioners' so-called "multiplier effect" simply does not exist.

B. *Amici's* Research Extends and Confirms the Research Already in the Record Showing That the Matching Funds Provision Does Not Cause Clustering and Has No Impact on Overall Spending

1. Professor Green's research indicates that clustering did not occur at the Act's matching funds provision's threshold amount

Professor Donald Green is the A. Whitney Griswold Professor of Political Science at Yale University. JA 874-75 at ¶ 2. Professor Green wanted to assess empirically whether clustering occurred at the Act's matching funds provision's threshold amount. His methodology was: (1) reviewing all campaign expenditures in 1998 before implementation of the Act; (2) reviewing all campaign expenditures in 2006 after the Act was applied; and (3) reviewing patterns of spending by nonparticipating candidates in 2006 who were opposed in the general election by at least one participating candidate. JA 943 at ¶ 10.

As Green hypothesized, if nonparticipating candidate behavior was in fact burdened by the matching funds provision's threshold limit, one would expect to see nonparticipating candidate spending cluster just below the threshold amount. In this way nonparticipating candidates could make the maximum amount of expenditures but avoid triggering the matching funds provision. Yet Professor Green's testimony is that his research unequivocally demonstrates that no such clustering occurred. *Id.* at ¶ 11.

For example, in 2006 the Act's matching funds threshold was $17,918. *Id.* In that year 46 nonparticipating candidates faced a publicly financed opponent in the general election. *Id.* at ¶ 12. Of the 46 candidates, 39 spent less than $15,000 and therefore never reached the matching funds threshold. JA 943-44 at ¶ 12. One candidate spent between $15,000 and $26,000; the remaining six candidates spent between $26,000 and $149,000. JA 944 at ¶ 12. Based on this "smooth" distribution, Professor Green concluded there was no tendency for nonparticipating candidates' expenditures to cluster just below the $17,918 threshold limit. JA 943 at ¶ 11. Professor Green's findings suggest that nonparticipating candidates' behavior is not governed by the Act's matching funds provision and their speech is not burdened by the Act.

2. The *Amici*'s new research on clustering confirms that there is no statistically significant evidence of clustering in Arizona elections between 2006 and 2010

Amici, like Professor Green, undertook an analysis to determine whether nonparticipating candidates in Arizona spent just below the matching funds provision's triggering threshold. Unlike Professor Green, *Amici* also included the 2010 election year in the analysis, as well as the 2006 and 2008 election years. In addition, *Amici* conducted rigorous statistical tests to determine if there was empirical evidence of systematic clustering at conventional levels of statistical significance in the election cycles they analyzed. The results of their analyses indicate that nonparticipating candidates' spending did not "cluster" below the triggering threshold.[6]

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6. *Amici* note that they cannot test whether spending was "chilled" for individual candidates, but they can look at

To test for clustering, *Amici* collected general election data for every nonparticipating state legislative candidate in 2006, 2008 and 2010 in Arizona who ran against at least one participating candidate. The distribution of spending for these nonparticipating candidates in each of the elections reveal no evidence of clustering below the triggering threshold, and therefore contradicts the contention that nonparticipating candidates intentionally spend below the threshold.[7] For 2006 and 2008, there were 88 nonparticipating candidates for Arizona state legislature running against a participating opponent. Of those, 55 nonparticipating candidates spent less than $10,000, which is well below the triggering thresholds in each cycle respectively. Of the remaining 33 candidates, 11 spent more than $30,000, well above the triggering thresholds. These candidates do not appear to be deterred by the matching provision. That leaves only one-fourth of nonparticipating candidates in these election cycles whose spending could have been plausibly deterred by the matching funds provision. Among these candidates, *Amici* found no evidence that these candidates spent strategically below the threshold.[8]

Furthermore, this Court's issuance of an injunction suspending Arizona's matching funds provision in June 2010 failed to alter nonparticipating candidate spending behavior; as *Amici's* analysis shows, the distribution of

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the spending of many candidates to assess the extent to which candidates may have strategically held back their spending to avoid triggering matching funds.

7. For complete details on this analysis please see Appendix, *Amici's* Report at 5a-12a.

8. Appendix, *Amici's* Report at 6a-7a.

spending is similar for all three years, and there is no evidence of clustering in any year.[9]

As an additional test, the *Amici* conducted the same analytical method for the state of Maine, which has a similar, although not identical,[10] matching funds provision as Arizona, to test whether a similar pattern exists there. *Amici* compiled general election spending data from nonparticipating state legislative candidates from 2000-2010, and found no statistical evidence of clustering around the triggering threshold.[11] In short, analysis of clustering around the triggering threshold in Arizona and Maine indicates that nonparticipating candidates do not strategically stop their spending to avoid triggering the matching funds.[12]

Accordingly, as Professor Green previously demonstrated, and *Amici* now confirm with original analyses of the 2006, 2008 and 2010 election cycles, the matching funds provision does not cause a clustering of spending below the triggering threshold. This in turn demonstrates that the matching funds provision does not deter or otherwise "chill" spending.

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9. *Id.* at 7a.

10. Maine's matching funds provision can be found at 21-A Maine Revised Statutes ("M.R.S.") § 1125(9).

11. Appendix, *Amici's* Report at 8a-12a.

12. *Id.*

C. The *Amici's* Research and Analyses Demonstrates No Change in Political Spending in 2010 Despite this Court's Injunction on the Act's Matching Funds Provision

The Respondents' experts have previously demonstrated that the Act's matching funds provision did not create a reduction in privately financed candidates' or independent groups' expenditures, but instead that expenditures of both have increased over time since the Act took effect in Arizona. *See, e.g.*, Clean Elections Brief at 6-7, 18-19. *Amici* recognized that this Court's injunction, which suspended the distribution of matching funds during the 2010 Arizona elections, provided a unique opportunity to test for the effects of the matching funds provision on overall campaign spending to see whether spending increased in 2010 more than would have been expected had the matching funds provision not been enjoined. *Amici*, therefore have collected and analyzed political expenditure data in Arizona in order to analyze the injunction's effect on spending. If, as Petitioners argue, the Act's matching funds provision deters political spending and therefore burdens speech, one would expect to see a marked increase in political spending in the 2010 election *after* suspension of the matching funds provision. Instead, the empirical data fail to demonstrate any statistically significant evidence of an increase in 2010 election spending in Arizona.[13]

Again using the Arizona spending data, *Amici* analyzed the mean and median levels of spending for

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13. For complete details of the analyses performed by *Amici* please see Appendix, *Amici's* Report, at 13a-20a.

nonparticipating state legislative candidates who ran against at least one publicly funded opponent in 2006, 2008 and 2010. The data revealed that the distribution and magnitude of spending was no different under a system of matching funds (2006 and 2008) than it was when the matching funds provision was removed in 2010. In fact, spending levels were lower in 2010 than in 2008. This is evidence that matching funds did not "chill" the spending of nonparticipating candidates; if they had, one would expect to see more spending in 2010 after the injunction was issued.[14]

To test this hypothesis further, *Amici* compared Arizona and Maine since both states have similar matching funds programs and have similar levels of *per capita* campaign spending. Comparing Arizona and Maine, both states exhibit a similar trend in spending between 2002 to 2008. If, as Petitioners contend, the matching funds provision actually chilled political spending, the injunction in Arizona should have caused Arizona's spending to significantly increase relative to Maine (where matching funds were not enjoined). However, the evidence shows that overall *per capita* spending in Maine actually increased more than Arizona between 2008 and 2010. This is further proof that the injunction did not increase spending in Arizona.[15]

For yet another test of this hypothesis, *Amici* collected data on overall campaign spending from 2000 through 2010 for as many states as possible.[16] For each state *Amici*

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14. Appendix, *Amici*'s Report at 13a.

15. *Id.* at 14a-15a.

16. *Id.* at Appendix Table 1.

obtained the following: (1) the total amount of spending by statewide and state legislative candidates and (2) total amount of spending by PACs and interest groups.[17] Next, *Amici* employed a statistical technique called synthetic control that allowed *Amici* to find the weighted average of other states that most closely mirror Arizona in terms of campaign spending, population, population growth and other demographic or political variables. Through multiple tests and specifications, *Amici* found no evidence that overall campaign spending increased in Arizona in 2010 relative to the synthetic control of other comparable states, despite the injunction. If anything, the increase in overall spending in Arizona between 2008 and 2010 was *smaller* than the increase in these other states.[18]

As a final test of the effects of the 2010 injunction, *Amici* employed the "difference-in-differences"[19] method to test whether election spending in Arizona in 2010 increased more than would have been expected in the absence of the injunction. *Amici* then generated regression analyses (i.e., predictive statistical spending models) to test if the injunction caused the difference between Arizona in 2010 and previous years to be greater than the difference between 2010 and previous years for other states. The regression models test for the effect

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17. For each state, campaign expenditure data was collected from the state's official election web pages.

18. Appendix, *Amici*'s Report at 16a-17a (providing an example of such a synthetic control analysis using California, Maine, Michigan and Tennessee).

19. A difference-in-differences method looks at the differences in changes in spending from one election year to the next between sets of states.

of the 2010 injunction in Arizona, while controlling for different average levels of spending in each state and for different spending levels in each year (captured through the use of state and year fixed effects variables in the models).[20] The regression models estimated the effect of the injunction on three types of spending: (1) total candidate spending, (2) total spending of privately funded, nonparticipating candidates, and (3) total spending by PACs and independent groups.[21] If the matching funds provision caused a "chill" on campaign spending before 2010, a large, positive effect of the injunction on spending would be expected. However, for all three types of spending, there was not a statistically significant or substantively significant effect of the injunction. In fact, the models indicate that candidate spending actually decreased after the injunction in 2010.[22] This is the opposite of what should happen if spending was chilled, as Petitioners contend. Indeed, focusing on the analysis of private and independent spending, the nonparticipating candidates spent three dollars per person less than expected and independent groups spent twenty-five cents per person more than expected.[23] Neither result, however, is statistically significant or substantively meaningful. In sum, there was no evidence found to support the notion that the injunction resulted in increased spending or that the matching funds provision inhibited spending in Arizona. Accordingly, Petitioners' claim that the matching funds provision deters or otherwise "chills" spending is entirely unsupported by the empirical evidence.

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20. Appendix, *Amici's* Report at 18a-19a.

21. *Id.* at 19a.

22. *Id.* at 19a-20a.

23. *Id.* at 20a.

II. ALTHOUGH THE EMPIRICAL DATA REVEAL THAT THERE IS NO EVIDENCE THAT THE ACT'S MATCHING FUNDS PROVISION BURDENS SPEECH, IF THIS COURT FINDS THAT THERE MAY BE AN INCIDENTIAL OR INDIRECT BURDEN, THE MATCHING FUNDS PROVISION IS SUBJECT ONLY TO INTERMEDIATE SCRUTINY REVIEW

As the research and analyses performed by *Amici* demonstrate, there is no empirical evidence that the matching funds provision even incidentally burdens speech, as Arizona's campaign spending continued to rise while the matching funds provision was in place, and there was no statistically significant increase in spending when the matching funds provision was suspended by the injunction in 2010. *See supra* pp. 13-17. This evidence, coupled with Petitioners' failure to provide any concrete evidence to the contrary, demonstrates that the Act imposes no burden on speech. However, even if this Court decides, like the Ninth Circuit, that the matching funds provision might indirectly and incidentally burden speech, the matching funds provision is subject to only intermediate scrutiny. *McComish v. Bennett*, 611 F.3d 510, 520 (9th Cir. 2010); *see also Buckley v. Valeo*, 424 U.S 1, 52 (1976); *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 908 (2010); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 740 (2008).

Ultimately, Petitioners' complaint about the Act's matching funds provision is not that their speech has been silenced, but rather that their opponents' speech has been enabled. If the Court accepts this proposition it will allow Petitioners to use the First Amendment to

condone a candidate's choice not to speak unless his can be the only voice heard. The Ninth Circuit properly rejected this argument, as did the First Circuit before it. *See McComish*, 611 F.3d at 524; *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000) (holding the First Amendment includes "no right to speak free from response"). This Court should do so as well.

CONCLUSION

Based on the foregoing, the Act's matching funds provision does not place a direct and substantial burden on political speech, subjecting the statute to intermediate, not strict scrutiny. Accordingly, because the matching funds provision directly furthers Arizona's compelling interest in combating corruption and enhancing political speech, the Ninth Circuit's judgment should be affirmed.

Respectfully submitted,

ALEXIS S. COLL-VERY
Counsel of Record
GEORGE R. MORRIS
DEANNE K. CEVASCO
MICHELLE P. WOODHOUSE
SERENA ORLOFF
CHRISTOPHER J. JUDGE
SIMPSON THACHER & BARTLETT, LLP
2550 Hanover Street
Palo Alto, CA 94304
acoll-very@stblaw.com

APPENDIX

APPENDIX — THE EFFECTS OF ARIZONA'S CAMPAIGN FINANCE LAWS ON CAMPAIGN SPENDING AND FREE SPEECH

The Effects of Arizona's Campaign Finance Laws on Campaign Spending and Free Speech

Academic Team

Costas Panagopoulos (Team Leader)
Fordham University

Anthony Fowler
Harvard University

Ryan Enos
Harvard University

Conor Dowling
Yale University

Credentials

COSTAS PANAGOPOULOS, Ph.D., is assistant professor of political science (2005-present), director of the Master's Program in Elections and Campaign Management (2005-present), and founder and director of the Center for Electoral Politics (2008-present) at Fordham University. He was previously a research fellow at the Institution for Social and Policy Studies at Yale University (2005-2006). He served as an American Political Science Association Congressional Fellow in the office of Senator Hillary Rodham Clinton (D-NY) in 2004-2005.

Appendix

Panagopoulos studies American politics with an emphasis on campaigns and elections, voting behavior and mobilization, campaign strategy, public opinion, campaign finance and Congress. He received his Ph.D. in Politics from New York University in 2005, his Master's in Politics from New York University in 2001 and his undergraduate degree in Government, *magna cum laude*, from Harvard University in 1994. His research has been published in the *American Journal of Political Science*, *Journal of Politics*, *Public Opinion Quarterly*, *Political Research Quarterly*, *Political Behavior*, *American Politics Research*, *Presidential Studies Quarterly*, *Electoral Studies*, *PS: Political Science and Politics*, *Women & Politics*, and the *Journal of Political Marketing*. Dr. Panagopoulos is editor of *Public Financing in American Elections* (Temple University Press, *forthcoming*) and *Rewiring Politics: Presidential Nominating Conventions in the Media Age* (LSU Press) and *Politicking Online: The Transformation of Election Campaign Communications* (Rutgers University Press) and coauthor (with Joshua Schank) of *All Roads Lead to Congress: The $800 Billion Fight Over Highway Funding* (CQ Press).

RYAN D. ENOS, Ph.D., is an Assistant Professor of Government, Faculty Associate at the Institute of Quantitative Social Science, and a member of the Executive Committee for the Center for American Political Studies at Harvard University (2010-present). His expertise is in American politics, political psychology, and racial politics. He has taught undergraduate and graduate courses in American politics, elections, political psychology, experimental methods, and other topics. His

research has been published in the *Quarterly Journal of Political Science*. He earned his BA in Political Science and History with high honors in Political Science and Distinction in General Scholarship from the University of California, Berkeley, and his M.A. and Ph.D. in Political Science from the University of California, Los Angeles (2010).

CONOR M. DOWLING, Ph.D., is a postdoctoral associate in the Institution for Social & Policy Studies and the Center for the Study of American Politics at Yale University. He received his Ph.D. from Binghamton University (State University of New York) in 2008. His research interests include campaigns and elections, political behavior, and state and local politics. In his dissertation, "The Cost of Running for Office: How Electoral Campaign Laws Structure Candidate Entry in U.S. Elections," he examined the effect of public funding systems on the number of candidates contesting gubernatorial elections from 1978-1998. His research has appeared in scholarly journals including: the *American Political Science Review, Journal of Politics, Political Analysis, American Politics Research, Political Research Quarterly, and State Politics & Policy Quarterly.*

ANTHONY FOWLER is a Ph.D. student in the Department of Government at Harvard University. He has completed undergraduate and graduate work at the Massachusetts Institute of Technology. His research focuses on elections, voting behavior, and statistical methodology.

Appendix

Summary of Findings

Our main goal is to empirically test the Petitioners' primary claim in *McComish v. Bennett* that Arizona's matching funds provision inhibits the free spending of independent groups and nonparticipating candidates. We proceed by testing whether nonparticipating candidate spending tends to cluster below the triggering threshold. If the trigger provision inhibits spending by nonparticipating candidates, we might expect nonparticipating candidates to spend just below the threshold that would trigger additional funds to their participating opponents. We find no evidence of such behavior. Second, we exploit the Court's 2010 injunction of Arizona's matching funds provision to test whether spending by nonparticipating candidates and independent groups increased when the provision was suspended. Comparing spending trends in Arizona to those in comparable states, we find no evidence that spending changed in 2010 as a result of the injunction. After multiple, rigorous statistical tests, we find no empirical evidence to support the Petitioners' claim that Arizona's matching funds provision inhibits political spending (i.e., "chill" political speech). Independent groups and nonparticipating candidates appear to spend just as much under the matching funds provision as they would in absence of the law.

Appendix

I. Does Spending Cluster Below the Triggering Threshold?

If nonparticipating candidates in Arizona consciously hold back their campaign spending to avoid the triggering of funds to their participating opponents, we might expect that spending would be clustered just below the triggering threshold. Under the hypothesis of such a "chilling" effect, a candidate who would have spent above the threshold might hold back and spend just below the threshold. For an individual candidate, we cannot test whether spending was chilled, but we can look at the spending of many candidates to assess the extent to which candidates may have strategically held back their spending to avoid triggering matching funds.

To test for clustering, we collected campaign spending data for every privately-funded (nonparticipating) state legislative candidate who faced a publicly-funded opponent in general elections in 2006, 2008 and 2010. For each nonparticipating candidate, we standardized spending in each cycle by dividing expenditures by the applicable triggering threshold ($17,918 for 2006, $19,382 for 2008, and $21,479 for 2010). Thus, a candidate that spent exactly as much as the triggering threshold (for example, $17,918 in 2006) would receive a value of 1, and so forth.

Figure 1 shows the distribution of general election spending for the privately-funded (nonparticipating) candidates who faced publicly-funded opponents in each election.[1] The horizontal axis displays the converted

1. For visual purposes, we do not show the candidates (less than 10% of the sample) who spent more than 2 times the threshold.

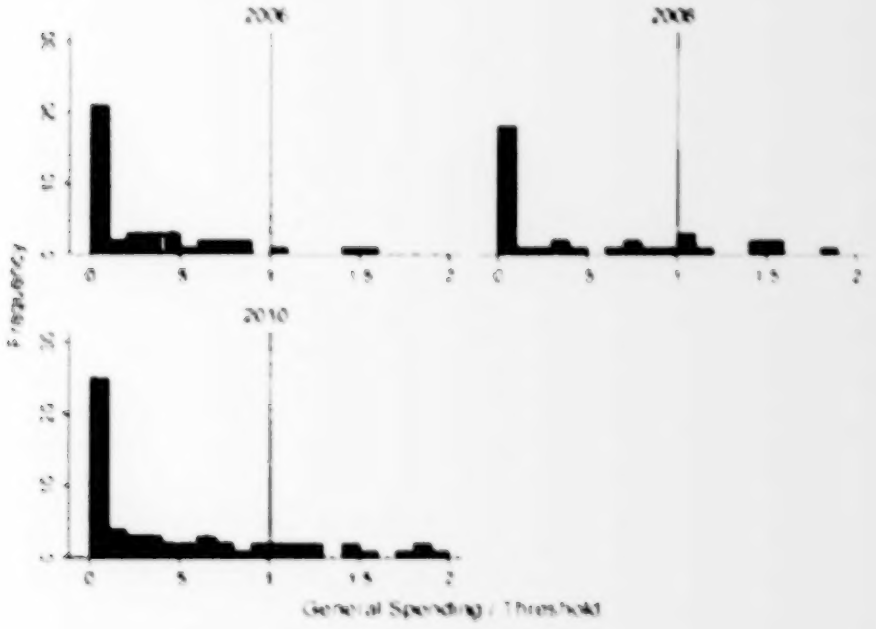
spending figures (nonparticipating candidate spending in the general election/triggering threshold), while the vertical axis displays the number of nonparticipating candidates that fall into each bin. Most nonparticipating candidates spend well below the threshold (denoted by the red vertical line). Many of these candidates were probably either likely to win by a large margin, uncompetitive, or unable to qualify for public funding. Nevertheless, we see no evidence that nonparticipating candidates intentionally spend below the threshold. If nonparticipating candidates were intentionally spending below the threshold, we might expect a cluster of spending just to the left of 1 (the red vertical line). However, there are just as many nonparticipating candidates spending barely above the threshold as there are nonparticipating candidates spending just below. In fact, in 2006 and 2008, more candidates spent just above the threshold than just below, which would be the opposite behavior we would have expected if a chill was caused by the matching funds provision.

For 2006 and 2008, there were 88 nonparticipating candidates for state legislature running against a participating opponent in Arizona. Of these, 55 nonparticipating candidates spent less than $10,000, well below the triggering thresholds in each cycle respectively. These candidates were not deterred by matching funds because they did not raise or spend enough funds for the threshold to be a relevant consideration. For example, in 2008, these candidates could have spent an extra $9,382 without triggering matching funds. Of the remaining 33 candidates, 11 spent more than $30,000, well above the triggering thresholds. These candidates also do not appear to be deterred by matching funds. That leaves only one-fourth of nonparticipating candidates in these

election cycles whose spending could have been plausibly deterred by the matching funds provision. Among these candidates, we see no evidence that they strategically stop their spending below the threshold

Furthermore, because the Supreme Court issued an injunction in 2010, which suspended the distribution of matching funds during the 2010 campaign, we might expect candidates to behave differently in 2010 than 2006 or 2008. Yet, the distribution of spending is similar for all three years, and there is no evidence of clustering below the triggering thresholds in any year.

Figure 1. Distribution of Spending by Privately-Funded (Nonparticipating) State Legislative Candidates Facing Publicly-Funded Opponents in Arizona (General Elections, 2006-2010)

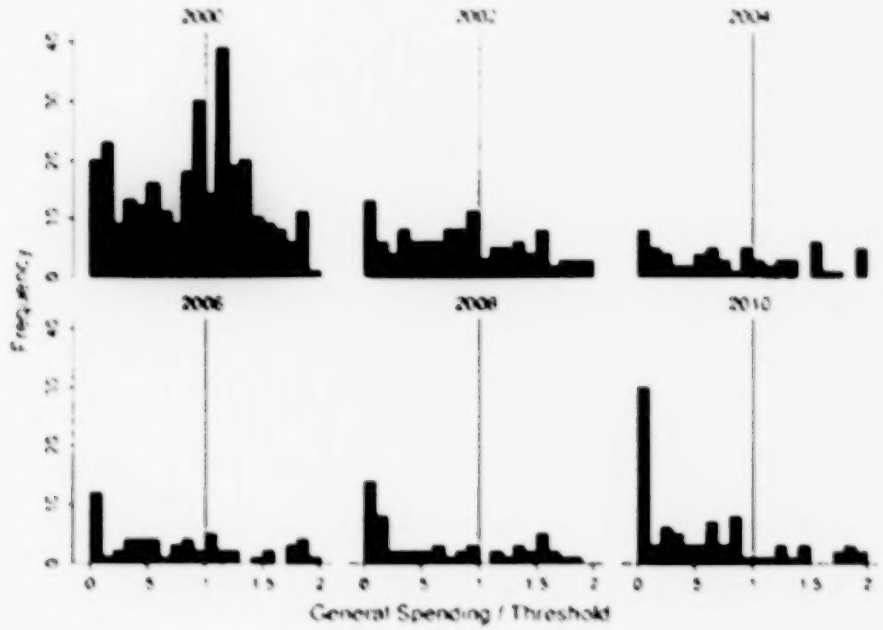


Appendix

As an additional test, we conduct a parallel analysis using general election campaign spending data for privately-funded (nonparticipating) state legislative candidates who faced publicly-funded opponents in Maine between 2000 and 2010. Maine has a similar, although not identical, public financing program with a matching funds provision for state legislative candidates. Figure 2 presents the spending distributions among these candidates for each election cycle. The evidence reveals the overall number of nonparticipating candidates has decreased over time, but, as in Arizona, clear visual evidence of clustering below the corresponding triggering thresholds for each cycle does not emerge. Below we proceed to perform more rigorous analytic tests to detect clustering.

Appendix

Figure 2. Distribution of Spending by Nonparticipating State Legislative Candidates Facing Publicly-Funded Opponents in Maine (General Elections, 2000-2010)



Beyond the visual analyses we present above, we can conduct statistical tests for evidence of clustered spending around the triggering thresholds. The most rigorous approach, proposed by McCrary (2008), tests for a discontinuity of the density function at the threshold by conducting local linear regression on both sides of the threshold.[2] Table 1 presents statistical estimates for the

2. This method requires arbitrary decisions to be made about the bin size and the window of analysis. However, the results are insensitive to changes in these specifications. Reference: McCrary, Justin. 2008. "Manipulation of the Running Variable in the Regression Discontinuity Design: A Density Test." *Journal of Econometrics* 142(2): 698-714.

extent of clustering around the threshold for the analysis of candidate spending in Arizona. The coefficients we report can be interpreted as the difference between the number of nonparticipating candidates spending just below the threshold and the number of nonparticipating candidates spending just above the threshold. Positive values would indicate clustering below the threshold and negative values would indicate clustering above the threshold. The *p*-value is a standard measure of statistical significance. It indicates the probability that our observed result would have occurred by chance if there truly was no clustering. A lower *p*-value indicates a lower probability that our observed result could have occurred by chance. Generally, a coefficient is not considered statistically significant unless the *p*-value is at least less than .05, suggesting confidence at the 95 percent level. The most reliable statistical estimates are achieved by pooling the data across years. This approach provides for more data and allows for the most rigorous test of the clustering hypothesis. In Arizona, we pool the data from 2006 and 2008 and compare the results in those years to 2010, when the Court issued the injunction. If clustering existed prior to the Court issuing the injunction we would expect to see evidence for it in the pooled data from 2006 and 2008, but not in 2010.

Table 1 reveals no statistically significant evidence of clustering in Arizona for general elections in 2006 and 2008, before the injunction was issued. The clustering coefficient is substantively small and statistically indistinguishable from zero. The coefficient for 2006 and 2008 is also similar to the coefficient for 2010, indicating

that candidate spending was similar with and without the presence of a triggering threshold. In addition, the signs of the coefficients are negative, which would suggest, if anything, clustering *above* the triggering threshold, a finding that directly contradicts the claim that triggering thresholds artificially suppress spending to just below the thresholds.

Table 1. Statistical Tests for Clustering Around the Triggering Threshold (Arizona, 2006-2010)

	Coefficient	Standard Error	*p*-value
2006-2008	-0.30	0.94	0.75
2010	-0.42	0.43	0.33

In addition, the substantive interpretation of these coefficients gives a sense of how little clustering there actually is. A coefficient of 1 would indicate that there is only a single additional candidate clustered just below the threshold than just above it. Similarly, a coefficient of -1 would indicate a single additional candidate clustered just above the threshold. The coefficients above are between -1 and 1, which means that the statistical evidence indicates virtually no clustering.

We replicate these statistical tests for Maine as well using spending data from privately-funded (nonparticipating) state legislative candidates who faced publicly-funded opponents in general elections between 2000 and 2010. Similar to the Arizona analysis above, here we pool the Maine spending data for all years

in order to provide for the most rigorous test of the clustering hypothesis. We do not find statistically reliable evidence of systematic clustering around the triggering threshold. The coefficient for clustering in Maine is 2.90, with a standard error of 7.10, yielding a p-value of .69. This result falls far outside the accepted standards of statistical significance, indicating there was not systematic clustering behavior.

Additionally, the clustering estimate in Maine is substantively small: the coefficient indicates that across all 6 election cycles for which spending data is available, there were about 3 more candidates just below the threshold than candidates just above. With 802 nonparticipating candidates in total during this period, the estimated effect is extremely small. Regardless, we emphasize the coefficient is not nearly statistically significant at conventional levels. The small and statistically insignificant effect indicates that there has been no substantial clustering of candidates below the triggering threshold in Maine either.

In short, both the visual and statistical analyses for clustering around the triggering thresholds in Arizona and Maine do not reveal evidence that candidate spending is strategic around the triggering thresholds. These empirical results lead us to conclude matching funds do not chill spending.

Appendix

II. Spending Increase in Arizona after the 2010 Injunction?

In June 2010, the Supreme Court issued an injunction that suspended the distribution of matching funds during the 2010 election cycle in Arizona. This rare intervention provides a unique opportunity to test for the effects of the matching funds provision on overall campaign spending. If matching funds had previously had a chilling effect on the spending of nonparticipating candidates, we should see their spending increase dramatically in Arizona relative to other states in 2010.

We return to spending data for nonparticipating state legislative candidates to test this hypothesis. In 2010, candidates in Arizona decided whether or not to participate in public funding before the injunction occurred, so the types of candidates participating should be similar for 2006, 2008, and 2010. This means we can make a valid comparison of the spending of candidates in these years.

Table 2 shows the mean and median levels of spending for nonparticipating state legislative candidates who ran against at least one participating opponent in Arizona in the election cycles we analyze. We can see that 2010 was not an extraordinary year in terms of campaign spending for this subset of candidates. This initial comparison suggests that the injunction did not have a significant effect on the spending behavior of state legislative candidates. The distribution and magnitude of spending was no different under a system of matching funds (in 2006

and 2008) than it was when the provisions were removed (in 2010). In fact, spending was even lower in 2010 than it was in 2008. This is evidence that matching funds did not chill the spending of nonparticipating candidates; if matching funds had chilled spending, we should observe more spending in 2010 when the injunction had been issued.

Table 2. Magnitude of General Election Spending by Nonparticipating State Legislative Candidates across Elections (Arizona, 2006-2010)

Year	Spending	
	Mean	Median
2006	11550	3637
2008	16172	6565
2010	15223	6898

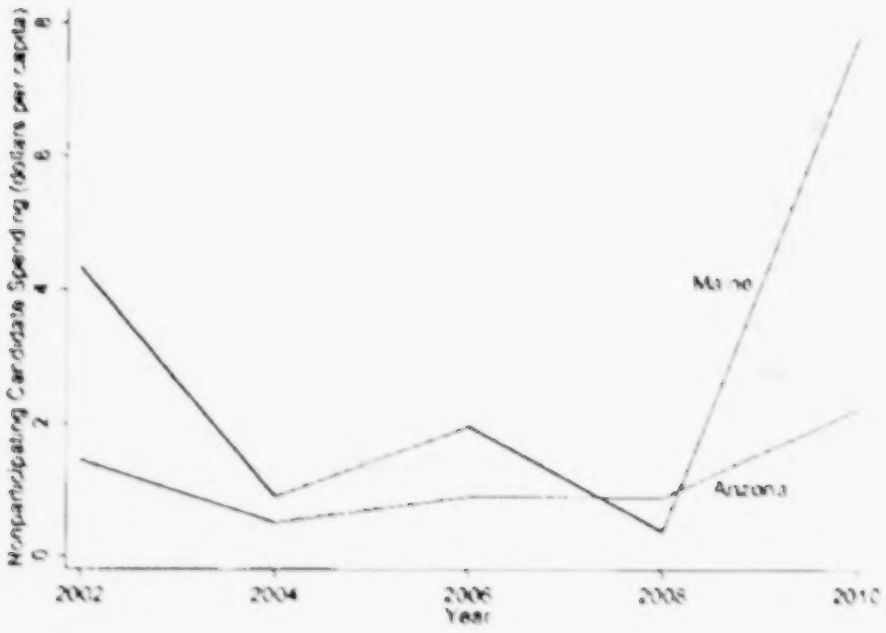
In order to better understand the effect of the injunction, we can also compare spending in Arizona to other states over time. Every election year is different, and the magnitude of spending will vary with the political climate of the time. For example, spending in states holding elections for high-profile, statewide offices, like governor, will likely be higher than in elections without statewide contests. However, states that share the same electoral calendar (gubernatorial and statewide races occurring at the same time) should exhibit similar trends in campaign spending. Therefore, we can compare changes in spending in Arizona in 2010 to the spending changes in other states to obtain a better estimate of the effect of the injunction.

Appendix

As we note above, Maine's campaign finance program is similar to Arizona's, and both states have similar levels of per capita campaign spending, making Maine a natural state to compare with Arizona for an initial cross-state analysis. Figure 3 shows the trends in campaign spending for all state legislative and statewide candidates from 2002 to 2010 who opted out of public funding. Both states exhibit a similar trend in spending from 2002 to 2008. If matching funds chill political spending, we should expect that the removal of this provision in Arizona in 2010 would cause spending in Arizona to increase more precipitously relative to spending in Maine. However, the evidence shows that per capita spending in Maine actually increased more so than in Arizona between 2008 and 2010. Over this period, nonparticipating candidates in Maine increased their spending by 7.4 dollars per person, while Arizona's nonparticipating candidates only increased spending by 1.3 dollars per person. Again, we find no evidence that the injunction increased spending in Arizona.

Appendix

Figure 3. Spending Trends for Nonparticipating Candidates in Arizona and Maine (2002-2010)



To test this hypothesis further, we collected data on general election campaign spending between 2000 and 2010 for as many states as possible. For each state-election, we obtained two figures: (1) the total amount of spending by statewide and state legislative candidates and (2) the total amount of spending by PACs and interest groups.[3] Appendix Table 1 shows the state-elections for

3. Each state has different reporting requirements and differing degrees of data accessibility. However, for the purposes of our analysis, it is most important that the data is consistent within each state. This is because the difference-in-differences design used below compares differences within states, which effectively controls for any other differences between states.

which this data has been collected. All of these states hold their gubernatorial and statewide races at the same time, so for the purposes of our analysis, we should expect that these states exhibit similar trends in campaign spending over time.

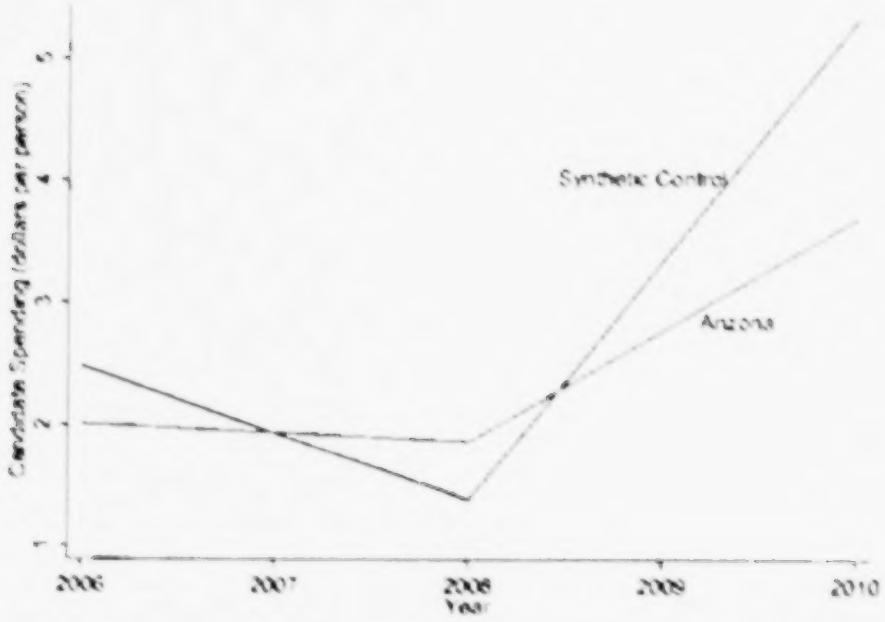
Instead of relying on Maine as our only control state, we can employ a statistical technique called synthetic control to create an additional baseline against which to compare spending changes in Arizona.[4] This approach allows us to find the weighted average of other states that most closely mirror Arizona in terms of campaign spending, population, and population growth, and other demographic or political variables. Through multiple tests and specifications, we find no evidence that campaign spending increased in Arizona in 2010 relative to the synthetic control of other comparable states. If anything, the increase in spending in Arizona between 2008 and 2010 was *smaller* than the increases in other states.

Figure 4 provides one example of such a synthetic control analysis. For all states where we could obtain candidate spending data for 2006, 2008, and 2010 (CA, ME, MI, and TN), we estimated the control group that best matches Arizona in terms of per capita candidate

4. This is a statistical technique published in a leading academic statistical journal in the United States. Reference: Abadie, Alberto, Alexis Diamond, and Jens Hainmueller. 2010. "Synthetic Control Methods for Comparative Case Studies: Estimating the Effect of California's Tobacco Control Program." *Journal of the American Statistical Association* 105(490): 493-505.

spending in 2006 and 2008 and population growth. This particular synthetic control group is a weighted average of Tennessee (weight = .93) and California (weight = .07). Between 2008 and 2010, spending in the synthetic control group increased by 4.0 dollars per capita, while spending in Arizona increased by only 1.8 dollars per person.

Figure 4. Candidate Spending in Arizona and Synthetic Control Group (2006-2010).



As a final test of the effect of the 2010 injunction, we can employ difference-in-differences methods to test whether spending in Arizona in 2010 increased more than would have been expected in the absence of the injunction. A difference-in-differences method simply means we look at the differences in changes in spending between sets of

states. If the injunction had an effect, we would expect the difference between Arizona in 2010 and previous years to be greater than the difference between 2010 and previous years for other states.

In Table 3, we present the results of three regression analyses designed to systematically test for such an effect. The regression models test for the effect of the 2010 injunction in Arizona while controlling for different average levels of spending in each state and for different spending levels in each year (captured through the use of state and year fixed effects variables in the models). The table reports the estimated effect of the injunction on three types of spending separately: (1) total candidate spending, (2) total spending of privately funded, nonparticipating candidates, and (3) total spending by PACs and independent groups. The estimates are reported in units of dollars spent per person living in the state. The table also presents the standard errors associated with each estimate and the corresponding *p*-values, indicating whether the estimates are statistically different from zero.

Table 3. The Estimated Effect of the Injunction on Three Types of Spending

	Coefficient	Standard Error	*p*-value
Candidate Spending	-5.45	3.90	.20
Nonparticipating Candidate Spending	-2.62	2.22	.27
Independent Spending	.25	1.82	.89

Appendix

If the matching funds provision caused a "chill" on campaign spending before 2010, we would expect a large, positive effect of the injunction on spending. For all three types of spending, we fail to estimate a statistically significant or substantively meaningful effect of the injunction. In fact, the models indicate that candidate spending actually decreased after the injunction in 2010. This is the opposite of what should happen if spending was chilled. Focusing on the analysis of private and independent spending, we estimate that nonparticipating candidates spent about 3 dollars per person less than expected and independent groups spent 25 cents per person more than expected on average. Neither result, however, is statistically significant or substantively meaningful. In sum, we fail to find any evidence that the injunction increased spending or that matching fund provision inhibited spending.[5]

Appendix Table 2 provides the more detailed results of the six regressions we estimated with alternative measures of the dependent variables. Again, we find no statistically or substantively significant effect of the injunction on campaign spending. On average, Arizona candidates appear to spend just as much in the presence of the matching funds provision as they would in the absence of such a policy.

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5. For an even simpler test of the hypothesis of a chill, we can estimate these same regression models without controlling for different average levels of spending in each state (state fixed effects) and for different spending levels in each year (year fixed effects). These specifications also fail to detect any statistical or substantive evidence for an increased spending after the Court's injunction.

Conclusion

We conducted a series of statistical analyses to determine whether there is empirical support for the claim that the matching funds provision chill spending, and thereby speech, in Arizona elections. Overall, the evidence we present consistently points in the same direction and leads us to conclude there is no systematic, empirical evidence of such a chilling effect.

Appendix

Appendix Table 1. Available Campaign Finance Data by State and Year

	2000	2002	2004	2006	2008	2010
AK		2		2		2
AZ	2	2	2	2	2	2
CA		1	1	1	1	1
CO		2		2		2
CT		1		1		2
FL		2		2		2
ME		2	2	2	2	2
MI		2	2	2	2	2
OR	1	1	1			
TN			2	2	2	2

A value of 2 means that both candidate and independent spending data is available for this election. A value of 1 means that only candidate spending is available.

Appendix

Appendix Table 2. The Effect of the 2010 Injunction in Arizona on Campaign Spending

	Candidate Spending		Private Spending		Independent Spending	
	per capita	log	per capita	log	per capita	log
Injunction	**-5.45**	**-0.43**	**-2.62**	**-0.06**	**0.25**	**0.63**
	(3.90)	(0.38)	(2.22)	(0.33)	(1.81)	(0.47)
Constant	8.21	14.95	10.12	15.39	7.63	14.70
	(1.64)*	(0.22)*	(1.25)*	(0.22)*	(0.81)*	(0.23)*
Observations	40	40	37	37	30	30
R-squared	0.64	0.90	0.76	0.93	0.86	0.86
SER	4.04	0.50	2.54	0.50	1.95	0.86

NOTES: Ordinary least squares regression. State-clustered standard errors in parentheses. All models include state and year fixed effects.

* Denotes statistical significance at the $p<.05$ level.

AMICUS CURIAE BRIEF

Nos. 10-238 and 10-239

IN THE

Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, et al.,
Petitioners,

v.

KEN BENNETT, et al.,
Respondents.

JOHN McCOMISH, et al.,
Petitioners,

v.

KEN BENNETT, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* FORMER ELECTED OFFICIALS IN SUPPORT OF RESPONDENTS

CHARLES FRIED*
1563 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4636
fried@law.harvard.edu

*Counsel of Record

CLIFFORD M. SLOAN
BRADLEY A. KLEIN
GEOFFREY M. WYATT
CORY C. BLACK
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000

Attorneys for Amici Curiae

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BRIEF OF *AMICI CURIAE* FORMER GOVERNORS, SENATORS, AND REPRESENTATIVES IN SUPPORT OF RESPONDENTS

Amici respectfully submit this brief in support of the respondents defending the judgment of the Court of Appeals ("Respondents").[1]

STATEMENT OF INTEREST

Amici are former elected officials from both political parties who have extensive experience with the realities of electoral politics.

Bruce Babbitt is a former Governor of Arizona, a former Secretary of the Interior, and a former candidate for President of the United States.

Bill Bradley is a former United States Senator from New Jersey and a former candidate for President of the United States.

Amory Houghton is a former United States Representative from New York.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, Petitioners and Respondents have each filed with the Clerk of the Court a letter granting blanket consent to the filing of *amicus* briefs.

Nancy Landon Kassebaum is a former United States Senator from Kansas.

Bob Kerrey is a former Governor of Nebraska, a former United States Senator from Nebraska, and a former candidate for President of the United States.

Madeleine Kunin is a former Governor of Vermont, a former Deputy Secretary of Education, and a former Ambassador to Switzerland.

Connie Morella is a former United States Representative from Maryland and a former Ambassador to the Organization for Economic Cooperation and Development.

Sam Nunn is a former United States Senator from Georgia.

John Edward Porter is a former United States Representative from Illinois.

Larry Pressler is a former United States Senator from South Dakota and a former United States Representative from South Dakota.

Warren Rudman is a former United States Senator from New Hampshire.

Alan Simpson is a former United States Senator from Wyoming.

Christie Todd Whitman is a former Governor of New Jersey and a former Administrator of the Environmental Protection Agency.

Timothy Wirth is a former United States Senator from Colorado and a former Undersecretary of State for Global Affairs.

INTRODUCTION AND SUMMARY OF ARGUMENT

Consideration of this case should proceed from recognition of a simple point: the law at issue in this case is not, in the words of the First Amendment, a law "abridging the freedom of speech." Rather, it adds voices to the political forum and thereby expands speech. It is Petitioners – in complaining that these additional voices are a burden on their message – who in reality are seeking to restrict speech.

If there is one fixed star in the constitutional firmament, it is that arguments seeking to compel a reduction in speech face an extraordinary hurdle. This Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), has been celebrated and criticized as enabling corporate speech in the political arena, but its clear message is that arguments for shutting down speech are constitutionally suspect. Absent the gravest justification, demands to limit or eliminate speech have no constitutional force.

Petitioners attempt to portray Arizona's law as a restriction on speech, when in fact it is their position that would have a restrictive effect on political discourse. They challenge a regime that silences no one, prohibits no speech, and only enables additional speech. To make their counterintuitive point that Arizona's law is nonetheless constitutionally defective, Petitioners must argue that, because the Arizona law enables *more* speech, it somehow has impermissibly interfered with their ability to speak as much as they want on any subject they choose. This objection depends on a premise that this Court

in many ways and contexts has firmly rejected. Petitioners' argument depends on the premise that the speech of others who disagree with them somehow interferes with, silences, swamps, or unfairly competes with, their speech. But, except where a speaker quite literally shouts down another, this Court has always rejected the notion that more speech somehow interferes with, silences, swamps, or unfairly competes with speech it opposes. It is up to the listener to decide to whom he wants to attend, to decide when he has heard enough from one speaker, to decide when one speaker is so insistent, verbose, or annoying that he no longer chooses to listen to him. That is not a choice for government to make, or for courts to compel.

Never has this "drown out" form of argument been more eloquently rejected than by Judge Easterbook, whose opinion in *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986), was affirmed by this Court. In that case, a municipality championed a thesis, urged by Professor Catharine MacKinnon, that certain speech demeaning to women so deterred, so discouraged them from speaking that the offensive speech – though not obscene – could be prohibited *in the name of free speech itself*. Judge Easterbrook rejected that argument. Such screening, he said, must be left to the listeners alone, and the danger that they may be overwhelmed by too many messages or messages too strident or crafty is a danger that government has no power to address by prohibition. Yet Petitioners' claim that Arizona's scheme deters, burdens, or threatens to drown them out depends on that rejected premise.

This fundamental principle of First Amendment law – that speech is not burdened by more speech – is illustrated by cases as diverse as *Rust v. Sullivan*, 500 U.S. 173 (1991) and *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005). In quite different contexts, the Court has turned aside claims that more speech – there the government's own speech – somehow interfered with speech it neither sought to regulate nor prohibit.

In *Rust*, the Court pointed to the absurdity of barring the government from promoting democracy without granting equal time to proponents of fascism. 500 U.S. at 194. In *Johanns*, the Court ruled it entirely permissible for the government to spend government money to promote beef consumption, even though such promotion may be thought to compete with the business of pork or chicken producers, who may believe that they must increase their own promotional budgets to rebut the government's message. 544 U.S. at 561–62. In such cases, we are brought back to the fundamental premise of First Amendment jurisprudence, explicated in *Citizens United*, that listeners must be left to make their own judgments among the myriad signals that reach them – whoever the speaker, whatever its funding.

The permissibility of the Arizona law follows *a fortiori* from the teaching of cases like *Rust* or *Johanns* or *Citizens United*. In contrast to government speech cases, Arizona does not pick from among candidates because of their message – as the government favored prenatal care (in *Rust*) or beef consumption (in *Johanns*). Instead, Arizona extends public financing to any candidate who meets certain

qualifications and agrees to forego fundraising from private sources. Thus, if the government violates no one's First Amendment rights, does not silence, suppress or deter anyone's speech by speaking a contrary message in its own voice, so most assuredly it burdens no speech when it makes funds available to all comers on a viewpoint neutral basis. More speech may answer speech but it does not silence it. What effect speech has on its audience the First Amendment leaves up to the audience.

In *Citizens United*, this Court sought to promote robust protections for freedom of speech in the public square. The Arizona law at issue here serves exactly the same purpose and is entirely consistent with *Citizens United*.

Petitioners' contrary arguments must fail for two reasons. First, Arizona's Citizen's Clean Elections Act *expands* rather than restricts speech. Following this Court's landmark decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), various states enacted laws providing for public financing of political campaigns as an appropriate measure to promote public political discourse. In response to a long and well-documented history of political corruption, Arizona has done the same. The matching funds provision is a permissible effort to ensure that the public financing option is viable.

Arizona's law is in harmony with this Court's long line of cases approving governmental promotion of speech. As this Court made clear in *Rust*, a government may promote certain speech, and does not violate the First Amendment by placing conditions on

its funding. Consistent with that principle, the Court later held in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), that the mere fact that the government might subsidize some speakers and not others does not violate the rights of those who do not receive such funding. These cases, and many others, draw a clear distinction between government restriction and government promotion of speech. Arizona's law clearly promotes speech – and it does so without reference to content or viewpoint, unlike the case in *Rust* and *Finley*. If those who saw themselves as competitors had no free speech claim in those cases, all the more they have none where the government's funding scheme is by contrast completely viewpoint neutral.

Second, none of the theories invoked by petitioners turns the promotion of speech at issue in this case into a burden on other speakers. Petitioners maintain that *Davis v. FEC*, 554 U.S. 724 (2008), compels invalidation of the Arizona law. But *Davis* concerned a different kind of law, one that imposed asymmetrical campaign contribution limits on candidates. The result of this disparate treatment was that opponents of self-financed candidates could raise three times the money of their opponents from individual donors; it was this "discriminatory" feature of the law that made it an impermissible "penalty" on speech. Arizona's law does no such thing. It finances, rather than limits, campaign speech, and it thus promotes, rather than burdens, First Amendment values.

Petitioners, relying on this Court's decisions in *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986), and *Miami Herald*

Publishing Co. v. Tornillo, 418 U.S. 241 (1974), contend that Arizona impermissibly burdens their speech by forcing them to subsidize speech by their competitors. But these precedents are entirely inapposite. Petitioners are not, as were PG&E and the Miami Herald, forced to subsidize unwanted messages by lending their own facilities to transmit messages offensive to them. Nor is there the slightest risk – as there was in those cases – that an audience might attribute opposing points of view to the supposedly burdened speaker.

Petitioners argue that Arizona's law "chills" their speech because candidates will self-censor to avoid triggering funding of their opponents. But this Court's "chilling" cases have traditionally been concerned that the threat of government regulation would suppress particular points of view – not that a speaker should be shielded from speech. Here, the "risk" from speaking is more speech – not censorship. Just as there is no "heckler's veto" of the speech of another, so too there should be no "speaker's veto" of the speech of another.

Because the Arizona law permissibly expands speech and thereby furthers First Amendment values, Petitioners' request that this Court invalidate the law is unavailing.

ARGUMENT

I. Arizona's Law Expands Free Speech.

Arizona's matching funds provision is not a restriction on speech. It is a permissible funding program that promotes speech. This Court has long

recognized the distinction between government subsidies of speech and government restrictions on speech. *See Finley*, 524 U.S. 569; *Rust*, 500 U.S. 173; *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983); *see also The Supreme Court, 2007 Term—Leading Cases: Freedom of Speech and Expression—Campaign Finance Regulation: Davis v. FEC*, 122 Harv. L. Rev. 375, 383-84 (2008) (discussing Supreme Court cases upholding various government promotions of speech).

Public financing of political campaigns has long been upheld as an appropriate measure to promote public discourse. In *Buckley*, the Court upheld public financing of presidential campaigns. In doing so, the Court found that the federal public financing system for voluntary participants was a "congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to self-governing people." 424 U.S. at 92-93. This objective serves the very purpose of the First Amendment – to secure the "widest possible dissemination of information from diverse and antagonistic sources." *Id.* at 49 (internal quotation marks and citations omitted).

Arizona's public financing and matching-funds provisions further precisely this goal. By providing a voluntary public financing system for candidates that is viable, the matching fund program aims to increase the speech in Arizona's public discourse, enriching the marketplace of ideas.

Petitioners' argument that reducing speech is constitutionally compelled must be met with appropriate skepticism. Examples of litigants arguing that speech should be reduced for an asserted laudable purpose are legion – and usually unsuccessful. For instance, in *American Booksellers*, the Seventh Circuit and this Court considered an Indianapolis ordinance drafted by Professor Catharine MacKinnon which prohibited "pornography" degrading women, even though the proscribed content did not qualify as obscenity. 771 F.2d at 329–30. The ordinance's defenders argued that its anti-discrimination and anti-subjugation goals justified the ban on otherwise permissible speech. Judge Easterbrook's unanimous opinion rejected the proffered justification for reducing speech, and this Court affirmed. Although that case involved direct viewpoint discrimination, the core principle is applicable: arguments premised on the desirability of reducing speech, as in petitioners' arguments in this case and unlike the holding in *Citizens United*, are inherently suspect.

This Court repeatedly has sustained governmental subsidies for speech in other contexts. Because the government is not required to fund *all* constitutional activities, it has the freedom to fund only *certain* constitutionally protected speech while declining to fund other protected speech. As this Court recognized in *Regan*, a "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." 461 U.S. at 549 (upholding a law forbidding nonprofits that engage in lobbying from receiving tax-deductible contributions because government has no obligation to subsidize all protected speech); *see also, e.g.*, *Buckley*, 424 U.S. 1

(upholding public financing of presidential candidates who opt in to a public finance program as an appropriate government promotion of speech). Consistent with these principles, the Court held in *Rust* that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest." 500 U.S. at 193. There, Congress conditioned federal funding on the recipient's agreement not to encourage, advocate, or promote abortion. The Court upheld the restriction, declaring that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.* at 194.[2]

In similar fashion, the Court has held that, in selecting how to award funding of art projects, the government can permissibly consider "general standards of decency." *Finley*, 524 U.S. at 587. The mere fact that the government might provide funding for some art projects, and not others, did not violate the rights of artists whose projects were not deemed worthy of funding.

Numerous other cases stand for the same proposition – that the government's selective promotion of a certain activity does not inherently constitute a penalty on other activities not similarly promoted. *See, e.g., Harris v. McRae*, 448 U.S. 297, 317 n.19

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[2] Indeed, the Arizona law in this case implicates far fewer First Amendment concerns than the provision upheld in *Rust*, which conditioned federal funding on the recipient's expressed viewpoint regarding abortion. Here, the Arizona law is completely viewpoint neutral. It does not subsidize political speech based on approval or disapproval of the views expressed.

(1980) (government medical aid programs need not subsidize abortions because "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity"); *Maher v. Roe*, 432 U.S. 464, 475 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."); *Norwood v. Harrison*, 413 U.S. 455, 462 (1973) (the government need not fund private schooling, even if it funds public schooling); *see also* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919, 1924 (2006) ("The government need not subsidize the exercise of constitutional rights, even when it subsidizes other analogous behavior."). To hold otherwise would effectively prohibit the government from promoting any speech unless it promotes all speech, an entirely untenable position. The national marketplace of ideas is so vast, and embraces so many varied forms of expressive activity, that all government subsidies necessarily must be limited to something less than all speech.[3]

Arizona's law falls comfortably within this well-established precedent supporting government efforts

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[3] The government has a long tradition of promoting certain aspects of political speech, ranging from authorizing state political committees to send mass mailings at a discounted rate, *see* 39 U.S.C. § 3626(e), to establishing the franking privilege enjoyed by members of Congress since the nation's founding. *See* Act of Congress, Sep. 22, 1789, 1 Stat. 70; *see also* Act of Congress, Aug. 4, 1790, 1 Stat. 178; Act of Congress, Mar. 3, 1791, 1 Stat. 218. *See generally* Matthew Eric Glassman, Cong. Research Serv., RL34274, *Franking Privilege: Historical Development and Options for Change* (2007).

to enhance speech. In response to perceived widespread corruption in the state's political history, Arizona voters passed the Citizen's Clean Elections Act in 1998. The Act made it possible for state candidates, on a non-discriminatory basis, to finance their campaigns with money from a public fund. The matching-fund provisions, in turn, are intended to ensure that the public option is viable in practice, and not hollow or illusory. Under the Arizona statue, public funding is intended to be a genuine option, not a ball-and-chain that hobbles participation in a vigorously contested election.

The public finance option strikes at the root cause of *quid pro quo* corruption by eliminating, for all voluntary participants, the need to raise funds from private entities. It thereby also reduces the appearance of impropriety among participating candidates. In advancing these goals, the Act simply embraces the principle articulated by the Court in *Buckley*, that public financing of campaigns is a permissible "means to reform the electoral process." 424 U.S. at 90.

By selecting which speakers to fund – *i.e.*, candidates who give up private funding in exchange for participating in the public financing program – the law enacts a legitimate prerogative of the government to subsidize some speakers and not others. As such, Arizona's law uses "public funds to establish a program" promoting speech and permissibly "define[s] the limits of that program." *Rust*, 500 U.S. at 194. Indeed, unlike *Rust* and other instances of government speech that have been upheld against First Amendment challenge, the program here defines its

limits without reference to viewpoint or content of the message. Accordingly, any objection that Arizona's public financing and matching-fund provisions are impermissible because they favor some speakers over others must fail.

II. Arizona's Law Does Not Impermissibly Penalize, Burden, Chill, Or Drown Out Speech.

Petitioners advance numerous other theories in support of their argument that this Court should invalidate Arizona's longstanding law. None of their arguments are persuasive, however, and none justifies this Court's rejection of the state's law.

At the outset, it must be recognized that the injury asserted by petitioners is the provision of more speech – speech in the public square on matters of core public interest. Petitioners, of course, carry a heavy burden in arguing the counterintuitive proposition that more speech violates the First Amendment. Petitioners nevertheless argue that this Court must set aside Arizona's law for four reasons: (1) invalidation is compelled by this Court's precedent in *Davis*, 554 U.S. 724; (2) the law forces petitioners to carry the speech of their opponents; (3) the law leads to self-censorship; and (4) the law will lead to state-supported speech drowning out other speech. These arguments fail to meet petitioners' formidable burden in asking this Court to throw out a state law that increases speech.

A. *Davis* Does Not Compel Invalidation.

Petitioners first argue that this Court's decision in *Davis* compels invalidation because Arizona's public finance system is constitutionally indistinguishable from the provision at issue in *Davis*. (McComish Br. 47; Arizona Free Enterprise Club's Freedom Club PAC ("Freedom Club PAC") Br. 28.) Petitioners argue that the law's use of triggers for matching funds renders Arizona's law constitutionally infirm, relying on this Court's recent decision in *Davis*, 554 U.S. 724. Petitioners' reliance on *Davis* is misplaced.

In *Davis*, this Court struck down the so-called "Millionaire's Amendment" to the Bipartisan Campaign Reform Act, which effectively trebled the contribution limits on Congressional candidates running opposite self-financed millionaires. In striking down the statute as violating the free speech protections of the First Amendment, this Court distinguished the Millionaire's Amendment from the public financing regime approved in *Buckley*. "[A] candidate . . . has two choices: abide by a limit on personal expenditures or endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits. The choice imposed by [the Millionaire's Amendment] is not remotely parallel to that in *Buckley*." *Id.* at 740. In other words, as petitioners recognize (*see* McComish Br. 48), the Millionaire's Amendment was faulted for its "discriminatory contribution limits," *Davis*, 554 U.S. at 740, a feature present neither in the public financing options in *Buckley* nor here.

That distinctive feature of the Millionaire's Amendment – contribution limits – is what made it an impermissible burden on speech. Arizona's law is different: it finances, rather than limits, campaign speech, and it thus promotes, rather than burdens, First Amendment values. *See, e.g.*, *The Supreme Court*, 122 Harv. L. Rev. at 384 (noting the "clear doctrinal line between the asymmetrical restriction scheme in *Davis* and the asymmetrical funding schemes in many states"). The fact that Arizona's law finances only some candidates – i.e., those who give up private financing – is not a cognizable "burden" or "penalty" on speech any more than was the denial of tax-deductible status to lobbyist nonprofits in *Regan*, nor is it meaningfully different than the refusal to subsidize certain types of art at issue in *Finley*. The law is "not aimed at the suppression of dangerous ideas," *Regan*, 461 U.S. at 550 (internal quotation marks and citation omitted), nor does it penalize "disfavored viewpoints," *Finley*, 524 U.S. at 587.

To be sure, if the government subsidies were "manipulated" to have a "coercive effect," the law might be constitutionally suspect. *See Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting); *see also Leathers v. Medlock*, 499 U.S. 439, 447 (1991) ("[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints."). But that is not the case here. Because candidates of all walks of life and political persuasions are permitted to participate in Arizona's public finance program, the law does not impermissibly penalize speech.

The fact that the amount of public financing varies according to the actual dynamic in the particular race does not change the underlying constitutional principle, or "penalize" anybody. The only "penalty" is the burden of enduring more speech in the public square, but such an injury is not constitutionally cognizable and surely not a valid First Amendment concern.

Davis is readily distinguishable for another reason as well. The provision at issue in *Davis* distinguished between speakers – candidates – on the basis of whether they self-financed or raised money from other sources. This discrimination among speakers for contribution limits was not constitutionally valid because there was no permissible reason for distinguishing between the two types of privately financed candidates. Here, the Arizona law is entirely agnostic on the source of the privately funded speaker's funds. The Arizona law is concerned only with ensuring that its public finance system is viable and that it has some flexibility to address the "on-the-ground" dynamic; it does not distinguish among speakers based on the source of their funds.

B. The Arizona Law Does Not Force Any Speaker To Bear Another Speaker's Speech.

Petitioners also theorize that Arizona's matching-funds provisions impermissibly burden their speech by forcing them to bear speech from their competitors. (McComish Br. 58-61; Freedom Club PAC Br. 32-35.) But the precedents on which petitioners rely concern

risks not present here – specifically, the risks that their audience might attribute opposing points of view to them, and that they may be forced to bear a message with which they disagree. In contrast, the law here is alleged only to affect the amount of the other speaker's speech, and petitioners' cases therefore do not apply.

For example, petitioners argue that Arizona's law chills speech in the same way as the law found to be unconstitutional in *Pacific Gas & Electric Co.*, 475 U.S. 1. In *PG&E*, this Court found an infringement on a utility company's First Amendment rights when a public commission ordered the utility to insert a newsletter from a third party – a group called Toward Utility Rate Normalization ("TURN") – in its billing envelope. The Court concluded that PG&E's rights were infringed by "[t]he Commission's order forc[ing] appellant to disseminate TURN's speech in envelopes that appellant owns and that bear appellant's return address. Such forced association with potentially hostile views burdens the expression of views different from TURN's and risks forcing appellant to speak where it would prefer to remain silent." *Id.* at 18.

No such risk is present here. Petitioners seize on the purported similarity of the triggering mechanism for opposing speech: in *PG&E*, the utility's decision to speak in its newsletter triggered a corresponding right to speak in the same newsletter by TURN, whose interests were in opposition to the utility's; here, raising or spending certain amounts of money in connection with a political campaign triggers funding of an opposing candidate. But this triggering

mechanism – by itself – was not the critical defect in the order scrutinized in *PG&E*. Rather, it was the requirement that the utility present views with which it disagreed *in its own mailings* – making it a "forced association with potentially hostile views." *Id.* Arizona's matching-funds provision does not associate traditional candidates with opposing speech at all – if anything, the resulting expansion of political speech would likely expand the candidates' opportunities to elucidate their views and distinguish them from those of their opponents. That result is entirely consistent with First Amendment principles; indeed, as the Court cautioned in *PG&E* itself, there exists no right to speak "free from vigorous debate." *Id.* at 14.

Similarly unavailing is petitioners' reliance on *Miami Herald Co. v. Tornillo*, 418 U.S. 241. In *Tornillo*, the Court considered a Florida statute that required newspapers that attack the character of a political candidate to afford free newspaper space for a reply. The Court held that the law violated the First Amendment guarantee of a free press. Its chief concern was that the law "exacts a penalty on the basis of the content of a newspaper" – a penalty that operates both in terms of economic cost to the newspaper and, more importantly, as a restraint on "editorial control and judgment." *Id.* at 256–58. Again, Arizona's law does nothing like this; it finances some candidates in response to fundraising or expenditures by others; but it does not purport to require privately financed candidates to transmit any message *on behalf of* opposing candidates. It thus threatens neither to expend their resources nor to

force them to carry a message with which they disagree.

C. The Arizona Law Does Not Lead To Self-Censorship.

Petitioners alternatively argue that Arizona's law "chills" their speech because the knowledge that expenditures beyond a certain point will cause funding of their rivals causes them to avoid speaking beyond that point – which they argue is akin to self-imposed censorship. (McComish Br. 48-49; Freedom Club PAC Br. 33.) Petitioners claim that this theory was adopted by the Eighth Circuit decision in *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), and implicitly approved by this Court when it cited *Day* in *Davis*. This theory, too, is wrong. This Court has never adopted *Day*, and the reasoning of the decision is flawed.

Day held that a matching-funds provision with some similarities to the one at issue here impermissibly chilled supporters from making campaign contributions because such contributions had the effect of increasing the funding of and raising the expenditure limits on public financed candidates. *Id.* at 1359-60. *Day* relied on *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), in reaching its conclusion. But *Lakewood* was concerned about an entirely different sort of chilling effect. In that case, the City of Lakewood vested unfettered discretion in its mayor to grant or deny permits to place news racks on city sidewalks. The Court's concern was that the lack of standards and transparency in the system would cause newspapers to refrain

from engaging in anti-mayoral speech – out of fear that the mayor could retaliate by denying permits in an effectively unreviewable decision. *Id.* at 760 (upholding facial challenge because "without standards to bound the licensor, speakers denied a license will have no way of proving that the decision was unconstitutionally motivated, and, faced with that prospect, they will be pressured to conform their speech to the licensor's unreviewable preference").

Lakewood's logic simply does not translate here. Arizona's law threatens no governmental restraint on speech in retaliation for speaking. If candidates or their supporters are "chilled," it is only by the prospect that their opponents may add their views to the marketplace of ideas. As other courts have noted, "the chilling effect alleged by [petitioners] is different in kind because it stems not from any fear of direct government censorship but rather from the realization that one group's speech will enable another to speak in response. In stark contrast to the licensing scheme challenged in *Lakewood* . . . matching funds is likely to result in more, not less, speech." *N.C. Right to Life Comm'n Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 437–38 (4th Cir. 2008). In similar fashion, the First Circuit found that a similar "public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures." *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000). The same is true here. Because Arizona's matching fund provisions only promotes more speech, and in no way limits the quantum or

content of speech engaged in by traditional candidates, it must be upheld.

D. The Arizona Law Does Not Lead Some Speech To Overwhelm Other Speech.

Petitioners finally suggest that Arizona's matching-funds provision – by expanding political speech – somehow threatens to inhibit or drown out the speech of others. (*See* Freedom Club PAC Br. 30-32.) But this Court has never accepted the "drown out" theory as a basis for restricting speech. *See, e.g.*, *Buckley*, 424 U.S. at 48–49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."). The Court should likewise reject it now.

The Arizona law is carefully calibrated to ensure that publicly financed candidates have a viable opportunity to compete. Petitioners have not remotely established that the publicly financed candidates will drown out privately financed candidates, nor could they. While the First Amendment surely protects the rights of all candidates to engage in political speech, the protection does not extend so far as to prevent their speech from being subject to a response. Privately financed candidates in Arizona remain free to spend as much money on elections as they see fit.

CONCLUSION

For the foregoing reasons, and those stated by Respondents, the judgment of the Court of Appeals should be upheld.

Respectfully submitted,

CHARLES FRIED*
1563 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4636
fried@law.harvard.edu

*Counsel of Record

CLIFFORD M. SLOAN
BRADLEY A. KLEIN
GEOFFREY M. WYATT
CORY C. BLACK
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000

Attorneys for Amici Curiae

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *ET AL.*,

Petitioners,

—v.—

KEN BENNETT, *ET AL.*,

Respondents.

JOHN MCCOMISH, ET AL.,

Petitioners,

—v.—

KEN BENNETT, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF FORMER OFFICIALS OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

NORMAN DORSEN
(*Counsel of Record*)
BURT NEUBORNE
40 Washington Sq. South
New York, New York 10012
(212) 998-6172
norman.dorsen@nyu.edu

Counsel for *Amici Curiae*

QUESTION PRESENTED

Whether Arizona's decision to provide candidates who voluntarily agree to forego private campaign contributions with an initial campaign subsidy, supplemented by additional funds up to a fixed amount keyed to the campaign spending of a privately-funded opponent, imposes an unconstitutional burden on the campaign speech of privately-funded candidates?

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KEN BENNETT, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTEREST OF *AMICI CURIAE* AND STATEMENT OF POSITION [1]

Amici have devoted much of their professional lives to the protection of the First Amendment and the advancement of the democratic process. Norman Dorsen is the Frederick I. and Grace A. Stokes

[1] This brief is filed pursuant to blanket consents filed with the Clerk of the Court by all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici*, make a monetary contribution to the preparation or submission of this brief.

Professor of Law and co-director of the Arthur Garfield Hays Civil Liberties Program at New York University Law School. He served as General Counsel of the American Civil Liberties Union (ACLU) from 1969-1976, and as President of the ACLU from 1976-1991. Aryeh Neier is President of the Open Society Foundations. He served as ACLU Executive Director from 1970-1978, and as Executive Director of Human Rights Watch from 1978-1990. Burt Neuborne is the Inez Milholland Professor of Civil Liberties at New York University Law School. He served as ACLU Legal Director from 1981-86, and as a member of the New York City Human Rights Commission from 1988-92.[2] John Shattuck is the President and Rector of Central European University in Budapest. He served as ACLU Legislative Director from 1976-1984, as Assistant Secretary of State for Democracy, Human Rights and Labor from 1993-98, and as Ambassador to the Czech Republic from 1998-2000. Morton H. Halperin is Senior Advisor to the Open Society Institute. He served as ACLU Legislative Director from 1984-1992, and as Director of Policy Planning at the State Department under President Clinton.

Amici respectfully submit this brief in support of the facial constitutionality of Arizona's matching fund program. *Amici* believe that public funding of

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[2] Burt Neuborne, one of the co-authors of this brief, enjoys an honorific title as founding Legal Director of the Brennan Center for Justice at NYU. Several lawyers associated with the Brennan Center appear as co-counsel for respondents in this Court. Mr. Neuborne exercised no supervisory authority in connection with this litigation, and is not counsel for a party in this proceeding.

electoral campaigns can play a significant role in improving the democratic process, and that matching funds provides an efficient, effective and equitable method of encouraging candidates to participate in public funding programs, while respecting the right of non-participating candidates to raise and spend unlimited sums seeking election.

STATEMENT OF THE CASE

In 1998, Arizona voters, reacting to an unfortunate series of political scandals, directly enacted a voluntary publicly-financed campaign program by voter initiative. Under the Arizona program, participating candidates receive an initial campaign subsidy, must agree to forego private contributions, and are obliged to respect an expenditure ceiling. Non-participating candidates are constitutionally free to raise and spend unlimited sums.

In seeking to establish a comprehensive and efficient voluntary public funding system at reasonable cost, Arizona confronted a well-recognized practical dilemma. In the years after this Court's foundational decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), candidates opposed by a privately-funded opponent often reluctantly declined to participate in public financing programs because they feared a severe campaign spending mismatch. In order to encourage broad candidate participation (and thereby obtain the multiple benefits associated with public financing recognized in *Buckley*, 424 U.S. at 92-96), Arizona elected to offer participating candidates an initial campaign subsidy,

supplemented by additional funds keyed to the campaign spending of a privately-financed opponent, up to three times the initial subsidy. Such a matching fund concept minimizes the prospect of severe public/private campaign spending mismatches, while efficiently deploying scarce public funds. Privately-funded candidates remain free to raise and spend unlimited and unmatched sums above the supplemental grant ceiling.

In its 13 year history, Arizona's matching fund program has been an unqualified success. It has bolstered widespread candidate participation in public funding without squandering scarce public resources, encouraged ordinary citizens to run for office, enhanced the flow of information to the electorate, relieved candidates and elected officials from the distraction of private fund-raising, and, most importantly, has restored public confidence in the democratic process by effectively combating the reality or appearance of electoral corruption.

SUMMARY OF ARGUMENT

The concept of matching funds is facially constitutional because it encourages widespread candidate participation in public funding, which, in turn, advances at least four important governmental interests: (1) combating corruption; (2) freeing elected officials and candidates to concentrate on public business; (3) stimulating ordinary citizens to run for office; and (4) enhancing the flow of useful information to the electorate. Moreover, it does so without imposing a significant or coercive burden on the speech of privately-funded candidates. Indeed,

the only incidental burden experienced by privately-funded candidates is the prospect of being rebutted in the marketplace of ideas.

Where, as here, Arizona seeks to advance its vital interests, not by coercively silencing a disfavored speaker, but by increasing the quantity of useful information available to hearers, this Court has wisely refrained from deploying the heavy artillery of First Amendment strict scrutiny. Rather, the Court requires a showing that Arizona's matching fund program: (1) advances a genuinely important government interest; (2) is unrelated to the suppression of ideas; (3) is even-handedly administered; and (4) is plausibly linked to the advancement of the government's interest.

Arizona's matching fund program clearly satisfies such scrutiny.

ARGUMENT

I

ARIZONA'S MATCHING FUND PROGRAM IS A FACIALLY CONSTITUTIONAL MEANS OF ENCOURAGING PARTICIPATION IN ITS PUBLIC CAMPAIGN FUNDING PROGRAM

A. The Relevant Legal Background

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court, applying First Amendment strict scrutiny, struck down Congressional efforts to impose ceilings on the campaign spending of privately-funded candidates

and their supporters (424 U.S. at 39-59), but rejected a First Amendment challenge to contribution ceilings, ruling that reasonable contribution ceilings advance a "compelling" governmental interest in combating the risk or appearance of electoral corruption (*Id* at 23-38). The *Buckley* Court then upheld stringent campaign disclosure and record-keeping provisions designed to combat corruption and to provide the electorate with useful information, despite the incidental burden imposed by mandatory disclosure on the First Amendment right to anonymous speech recognized in *Talley v. California*, 362 U.S. 60 (1960), and reaffirmed in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). (*Id* at 60-84)

Finally, despite the differential treatment of major and minor party candidates (*Id* at 290-94)(Rehnquist, J., dissenting in part)), the *Buckley* Court upheld the constitutionality of a voluntary public financing plan that concentrated scarce public funds on viable candidates as a permissible means of: (1) combating corruption (424 U.S. at 96); (2) freeing candidates and elected officials from being forced to expend disproportionate time and energy in seeking to raise private funds (*Id* at 96);[3] (3) encouraging ordinary citizens to run for office (*Id* at 92-93); and (4) enhancing the flow of useful information to the electorate (*Id* at 92-93, and n. 127). *Id* at 97-99.

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[3] See Vincent Blasi, *Free Speech and the Widening Gyre of Fundraising*, 94 Colum. L. Rev. 1281 (1995).

In upholding the Presidential public funding program despite the First and Fifth Amendment issues raised by differential treatment of major and minor candidates, the *Buckley* Court asked whether "Congress [had] enacted [the public funding program] in furtherance of sufficiently important governmental interests and ha[d] not unfairly or unnecessarily burdened the political opportunity of any candidate." 424 U.S. at 95-96. The *Buckley* Court traced that standard of review to Fifth and Fourteenth Amendment cases such as *American Party of Texas v. White*, 415 U.S. 767, 780-81 (1974), holding that restrictions on participation in the electoral process must advance important governmental interests without imposing undue burdens on candidates and voters. 424 U.S. at 95-96. Seven years later, in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Court recognized that cases like *American Party of Texas* should be measured by a First Amendment standard that is virtually identical to the Fifth Amendment standard applied in *Buckley* to uphold the Presidential public financing system.

In the end, therefore, all legal roads lead in this case to a First Amendment standard of review that asks whether the government interests advanced by Arizona's matching fund program are substantial, and whether "the political opportunity of any candidate" is "unfairly" or "unnecessarily" burdened. Indeed, no functional difference exists between the First and Fifth Amendment standards applied in *Buckley* to uphold disclosure and public financing, and the First Amendment standard of review utilized by this Court in speech-enhancing cases like *Turner Broadcasting System v. FEC*, 512 U.S. 622

(1994) (*Turner* I), *Turner Broadcasting System v. FEC*, 520 U.S. 180 (1997) (*Turner* II) (upholding FCC "must carry" rules), and *Citizens United v. FEC*, 558 U.S. ___ , 130 S.Ct. 876 (2010) (upholding disclosure provisions). In each setting, the Court examines the importance of the governmental interests advanced by the program, and assures that the incidental burdens, if any, placed on free speech are not unduly substantial.

B. Arizona's Matching Fund Program Enhances the Flow of Useful Information Without Unfairly Burdening Free Speech

Petitioners insist that Arizona's matching funds program must be subjected, not to the First Amendment standard of review used by this Court in cases like *Citizens United*, *Turner* I and *Turner* II, where government sought to enhance the flow of useful information without imposing substantial burdens on any speaker, but by First Amendment strict scrutiny, the more stringent test used to review coercive speech-diminishing censorship. See *Buckley*, 424 U.S. at 23-59 (applying strict scrutiny to expenditure ceilings); and *Citizens United*, 130 S.Ct. at 896-97 (applying strict scrutiny to ban on corporate electioneering).

Petitioners make three unsuccessful arguments in favor of strict scrutiny. First, they assert an empirical claim that matching funds diminish or "chill" the speech of privately-funded candidates, who will allegedly forego campaign speech rather than trigger a matching fund reply. Second, petitioners argue that, because their speech triggers an opponent's rebuttal, they are forced to engage in

"compelled" speech. Finally, petitioners argue that publicly-funded rebuttal speech imposes a substantial "penalty" or "burden" on their speech warranting the imposition of strict scrutiny.

1. There is No Credible Evidence That the Prospect of Matching Funds Actually Deters Private Campaign Spending

Apart from unsupported assertions by several petitioners, nothing in the record or in the experience of the numerous jurisdictions that have adopted a matching fund program supports the empirical assertion that matching funds operate to diminish the speech of privately-funded candidates. If such a "chill" actually existed in the real world, one would expect a pattern of campaign spending by privately-funded candidates up to the matching fund threshold, with a distinct fall-off above the threshold. No such pattern has been demonstrated in Arizona or anywhere else.

In fact, the experience of jurisdictions that have adopted matching funds teaches exactly the opposite. Instead of inducing a strategic silence, the prospect of rebuttal speech, however funded, induces viable candidates to redouble their efforts to persuade the electorate, setting off reciprocally-reinforcing cycles of increased debate to the benefit of the voting public. [4]

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[4] It is, of course, possible that some matching fund program somewhere may be so unfairly structured that it actually deters privately-funded speakers. But the possibility of such a future "as applied" challenge cannot justify petitioners' facial attack

Moreover, even if petitioners could, counterfactually, demonstrate that some privately-funded candidates remain silent strategically in order to deny an opponent access to matching funds, such purely strategic behavior would not constitute a cognizable First Amendment "chill." The mere prospect of being verbally answered in a peaceful manner has never been thought to impose an unconstitutional chill on a speaker. See *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001) (government obliged to fund full range of rebuttal courtroom speech by federally-funded Legal Services lawyers).

To the contrary, this Court's "chilling effect" cases require a showing of reasonable fear of tangible harm flowing from a credible threat of arrest, incarceration, or other significant sanction like private violence or the prospect of loss of employment. E.g., *Dombrowski v. Pfister* 380 U.S. 479 (1965); *Brown v. Socialist Workers Party '74 Campaign Committee*, 459 U.S. 87 (1982), *Doe v. Reed*, ___ U.S. __, 130 S. Ct. 2811(2010). Fear of being peacefully responded to in an election campaign hardly rises to such a tangible harm.

2. Matching Funds Do Not "Compel" Unwanted Speech

Alternatively, petitioners seek to analogize the provision of matching funds to the compelled speech

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on the very concept of matching funds. See *Doe v. Reed*, ___ U.S. ___, 130 S. Ct. 2811 (2010); *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008).

regulations invalidated in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977); and *Pacific Gas & Electric Co., v. Public Utilities Comm'n*, 475 U.S. 1 (1986). But, unlike genuine compelled speech cases like *Barnette* and *Wooley v Maynard*, Arizona's matching fund program in no way intrudes on petitioners' dignitary right to say only what they believe. Petitioners are not coerced by Arizona into personally affirming a belief they do not hold. See *Board of Regents of the University of Wisconsin v. Southworth*, 529 U.S. 217 (2000) (upholding student activities fee). Nor, as in cases like *Pacific Gas & Electric*, are petitioners forced to use their property to disseminate speech with which they disagree. While petitioners' privately-funded campaign spending may trigger the payment of matching funds, the matching funds do not come from petitioners' pocket. Petitioners remain free to devote 100% of their resources to the advancement of their beliefs, and are not compelled to devote a dime of their money or an iota of their time or property to the speech of anyone else.

In fact, the so-called "burden" on petitioners' speech and property caused by the prospect of rebuttal is far less onerous than the genuine intrusions on First Amendment interests deemed inconsequential in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), *Turner Broadcasting System, Inc., v. FCC*, 512 U.S. 622 (1994) (*Turner* I), and *Turner Broadcasting System, Inc., v. FCC*, 520 U.S. 180 (1997) (*Turner* II).

In *Pruneyard*, this Court ruled that California's recognition of a state-created right of physical access by speakers to the parking lot of a large shopping center did not abridge the First Amendment rights of the property owner. And, in *Turner* I and *Turner* II, this Court upheld the FCC's "must carry" rules requiring cable broadcasters to transmit the signals of over-the-air broadcasters.

Unlike *Pruneyard*, *Turner* I, and *Turner* II, the prospect of being answered involves no commandeering, physical taking, or diversion of petitioners' property to the advancement of another's ideas. Moreover, as in *Pruneyard*, *Turner* I, and *Turner* II, Arizona is seeking to "facilitate and enlarge public discussion and participation" (424 U.S. at 92-93). Finally, as in *Pruneyard*, *Turner* I, and *Turner* II, no possibility exists that petitioners will be erroneously deemed to support an opponent's ideas. There is, therefore, no basis whatever to treat the Arizona program as "compelling" anyone to speak.

3. Matching Funds Do Not Impose a Substantial Penalty or Burden on Petitioners' Speech

Finally, petitioners insist that Arizona's matching fund program should be subject to strict scrutiny because the provision of matching funds operates to "penalize" privately-funded speech. Petitioners ignore, however, that the sole "penalty" they experience is the prospect of voters hearing a response to their speech. While no one enjoys being

rebutted.[5] this Court noted as recently as *Citizens United* that providing voters with more speech is at the heart of the First Amendment. The incidental "burden" imposed on petitioners' speech by subjecting it to fair rebuttal is simply not a cognizable First Amendment injury.

Indeed, the so-called "penalty" of rebuttal is far less burdensome than genuine intrusions into First Amendment interests that have been upheld by this Court in the interest of increasing the flow of useful information in cases like *Buckley* (424 U.S. at 60-84) (loss of anonymity); *Citizens United* (130 S.Ct. at 913-16) (loss of anonymity); *Turner I* and *Turner* (512 U.S. at 653-57, and 520 U.S. at 214-16) (loss of broadcast autonomy); *Meese v. Keene*, 481 U.S. 465 (1987) (imposition of denigrating label); and *Christian Legal Society v. Martinez*, 561 U.S. ___, 130 S.Ct. 2971 (2010)(loss of associational autonomy).

In *Meese v. Keene*, *supra*, this Court upheld the constitutionality of a federal statute labeling as "political propaganda" moving pictures made with the financial support of a foreign government. The Court acknowledged that the negative connotation of the term vested the movie's distributor with First

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[5] The actual impact of rebuttal speech is, of course, impossible to predict. This Court has repeatedly recognized that the operation of a free market in ideas may reinforce, as well as undermine, the truth of the initial assertion. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes and Brandeis, JJ., dissenting); *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis and Holmes, JJ., concurring).

Amendment standing,[6] but ruled on the merits that the absence of any coercive restrictions on dissemination, coupled with the value of providing the public with useful information, rendered the relatively minor[7] First Amendment "burden" constitutional.

Turner I *and Turner* II, *supra*, presented a First Amendment challenge to the FCC's "must carry" regulations compelling unwilling cable broadcasters to transmit the signals of over-the-air broadcasters. Justice Kennedy, writing for the Court, reasoned that the burden on cable broadcasters' First Amendment rights was relatively slight since the transmissions would usually involve otherwise unused space on the cable network. On the other hand, reasoned Justice Kennedy, the government's interest in assuring viewers continued access to the signals of over-the-air broadcasters was substantial. Accordingly, the Court declined to invoke First Amendment strict scrutiny, and ultimately upheld the "must carry" regulations as a reasonable effort to advance an important governmental interest in providing more speech.

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[6] The precise movie at issue in *Meese v. Keene* was a documentary on acid rain that had been partially subsidized by the Canadian government and had won an Academy Award in 1983. 481 U.S. at 468, n.3.

[7] Justice Stevens, writing for the Court in *Meese*, claimed that the First Amendment burden was minimal because the term "propaganda" may carry a positive connotation of persuasive, well-delivered speech. 481 U.S. at 477-78. The dissenters challenged Justice Stevens' understanding that "political propaganda" carries a positive connotation. 481 U.S. at 486-88.

In *Citizens United*, Justice Kennedy, once again writing for the Court, upheld the facial constitutionality of broad campaign disclosure laws, reasoning that the "burden" on campaign speakers through loss of anonymity was relatively slight, while the benefits to voters of receiving additional useful information was substantial. *Citizens United*, 130 S Ct. at 913-16.

Most recently, in *Christian Legal Society v. Martinez*, 561 U.S. ___, 130 S.Ct. 2971 (2010), the Court considered a First Amendment challenge to a state university rule requiring that membership in a student organization receiving university recognition and support be open to all students. When the Christian Legal Society (CLS), a student organization at U.C. Hasting Law School, balked at admitting members who declined to pledge support for policies concerning homosexuality and pre-marital sex, Hastings withdrew its recognition of the organization, thereby ending its subsidized status.

This Court upheld the constitutionality of the "all comers" requirement for university recognition despite its adverse impact on associational freedom, reasoning that while the First Amendment "burden" on CLS was relatively slight (since an unrecognized organization was not forbidden from meeting or sponsoring events on campus), the university's educational interest in providing students with unconstrained access to all recognized student organizations was substantial. See 130 S Ct at 2998-3000 (Kennedy, J., concurring).

In this case, since the cognizable First Amendment "burden" imposed by matching funds is slight to nonexistent, and since Arizona's interest in combating corruption and enhancing speech and electoral participation is, at a minimum, substantial, the so-called "penalty" of being subjected to fair rebuttal does not trigger First Amendment strict scrutiny. Rather, Arizona's matching fund program must be measured by the standard of review applied by this Court to non-coercive, speech-enhancing regulations such as the public funding and disclosure provisions upheld in *Buckley*, the "must carry" rule in *Turner*, and the "all comers" regulation in *Christian Legal Society*.

4. Arizona's Matching Fund Program Clearly Satisfies the Applicable Level of First Amendment Scrutiny

In determining the facial validity of non-coercive, speech enhancing programs such as Arizona's matching fund plan, the Court applies a level of First Amendment scrutiny requiring Arizona to demonstrate: (1) the advancement of an important governmental interest; (2) a motive unrelated to the suppression of free expression; (3) facially non-discriminatory administration of the program; and (4) a plausible nexus between the matching fund program and the advancement of the government's interests. Compare *Citizens United*, 130 S.Ct. at 896-99 (reviewing ban on corporate electioneering), with *Citizens United*, 130 S.Ct. at 913-16 (reviewing campaign disclosure obligations). See also *Buckley*, 424 U.S. at 60-84, 97-99 (1976) (reviewing campaign

disclosure requirements and public funding of election campaigns).

Arizona's matching funds program clearly satisfies the applicable level of First Amendment scrutiny. First, the program, by encouraging broad candidate participation in public campaign funding, advances four important governmental interests characterized as "vital" or "compelling" by this Court in *Buckley*: (1) the prophylactic elimination of the appearance or reality of *quid pro quo* corruption from the electoral process (424 U.S. at 96);[8] (2) the "vital" interest in freeing candidates and elected officials from the time-consuming "grind" of raising private funds, thereby enabling them to concentrate on public business (*Id* at 96), and (3) and (4) the desire to "facilitate and enlarge public *discussion* and *participation* in the electoral process" (*Id* at 92-93) (emphasis added). Any one of the four *Buckley* interests would be sufficient to satisfy First Amendment scrutiny. Taken together, the four interests provide an overwhelming justification for Arizona's effort to encourage candidate participation in its public funding program without imposing coercive restrictions or other substantial burdens on privately-funded candidates.

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[8] In simultaneously upholding contribution ceilings, disclosure rules, and public funding, the *Buckley* Court implicitly rejected petitioners' argument that once contribution limits and disclosure rules are in place, public funding is no longer justified to fight corruption. As the *Buckley* Court realized, even with contribution ceilings and disclosure rules in place, public funding provides a level of prophylaxis and public reassurance concerning the risk of corruption that no combination of prohibitions and disclosure rules can match.

Second, the Arizona program is clearly not aimed at the suppression of ideas. To the contrary, it is open to all, and is designed to facilitate the broadest possible exchange of campaign speech.

Third, the concept of matching funds is facially non-discriminatory. Petitioners' effort to label the very idea of matching funds as a content-driven discrimination against privately-funded candidates is wholly unpersuasive. There is no substantive, content-based connotation to the purely descriptive labels "privately" or "publicly" funded. Candidates of every political stripe enjoy complete freedom to adopt either label and will fall into one or the other category of their own volition without regard to their political beliefs. Any public funding program will inevitably treat publicly and privately funded candidates differently – but that is not content-based discrimination. Rather, it is simply the consequence of this Court's ruling in *Buckley* that public funding programs must be voluntary, thereby creating the prospect of two categories of candidate subject to differing legal regimes.[9]

Petitioners' claim of a "multiplier effect" reveals the fallacy at the core of their content-based discrimination argument. Petitioners argue that when multiple candidates run against each other, as in a party primary, if most of the candidates have elected to participate in public funding, a single,

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[9] It is possible that a poorly designed matching fund system could so disadvantage privately-funded candidates as to discriminate against them. But such an as applied challenge cannot support a facial challenge to the very idea of matching funds.

privately funded candidate will trigger multiple payments to the publicly-funded candidates, thereby creating an alleged discrimination between publicly and privately funded candidates. But petitioners ignore the fact that the existence of public and private funding does not create rival blocs of candidates running against each other as if they were members of competing political parties. Rather, multiple candidates, however funded, run against each other in a Hobbesean "war of all against all." The matching funds available to multiple publicly funded candidates will be expended as much in opposition to other publicly funded candidates as they will be against the privately-funded candidate. What petitioners call discrimination is, therefore, merely the prevention of a campaign spending mismatch in a race with multiple candidates.[10]

Finally, Arizona may plausibly prefer the efficiency of a matching fund system to more expensive, less efficient, and less effective methods of encouraging candidate participation, like raising the public subsidy for all participating candidates even when the expenditure of additional scarce resources is unnecessary in a particular election, or

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[10] Petitioners' as applied challenge to the allegedly asymmetrical treatment of independent expenditures, as well as the allegedly inadequate 6% deduction for private fundraising costs, should be addressed on remand once the threshold question of the constitutionality of matching funds has been resolved. Since the parties and the lower courts concentrated almost exclusively on the facial constitutionality of the concept of matching funds, neither the record, nor the lower court opinions provides an appropriate foundation for the consideration of such as applied issues.

permitting subsidized candidates to seek private contributions, thereby diluting the reason for public financing in the first place. In *Buckley*, this Court recognized that the Constitution does not require scarce public resources to be squandered on non-viable candidates. Neither does it requires states to squander scarce public resources in electoral settings where no public benefit would result.[11]

II

ARIZONA'S MATCHING FUND PROGRAM IS FULLY CONSISTENT WITH THIS COURT'S DECISION IN *DAVIS v. FEC*

In *Davis v. FEC*, 554 U.S. 724 (2008), this Court struck down the so-called "Millionaire's Amendment," under which a self-funded candidate who expended more than $350,000 in personal funds was forced to endure a discriminatory contribution ceiling three times lower than the ceiling governing his opponent. *Davis* involved the confluence of two classic lines of First Amendment authority – hostility to regulations treating similarly-situated speakers differently (*Minneapolis Star and Tribune Company v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983)); and refusal to permit the government to coercively burden the speech of a powerful speaker

[11] Petitioners appear to concede that Arizona could provide far higher initial subsidies to all participating candidates, and then seek to recover unneeded funds in settings where the subsidy advanced no public purpose. It borders on the absurd, however, to require Arizona to elect a program that forces it to recoup unneeded costs, as opposed to paying out the funds only when needed.

in order to enhance a weaker voice (*Buckley*, 424 U.S. at 17; 48-49). Justice Alito, writing for the Court, ruled that a wealthy, self-funded candidate could not be subjected by law to harsher contribution limits than his or her opponent in an effort to enhance the opponent's speech.

Petitioners' argue that Justice Alito's observation in *Davis* that a wealthy, self-funded candidate would be unconstitutionally "penalized" for spending above the $350,000 trigger renders the Arizona plan similarly unconstitutional. They argue that privately-funded candidates in Arizona are equally "penalized" when they spend above the matching fund trigger. But, the "penalty" described by Justice Alito in *Davis* was the imposition of discriminatory fund-raising rules designed to coercively limit the speech of one candidate in order enhance the relative speech of the other candidate. No such constitutional flaw is present in the Arizona plan. Unlike *Davis*, Arizona places no coercive limits, relative or otherwise, on the freedom of a privately-funded candidate to raise and spend unlimited sums. The only "penalty" a privately-funded candidate experiences is the prospect that a wealth-related speech advantage will be diminished by a government-funded rebuttal. The prospect of being answered in a political campaign is, however, a far cry from the coercive imposition of differential contribution limits backed by criminal sanctions in *Davis*.

Nor is the provision of matching funds facially discriminatory. Unlike *Davis*, where the candidates were legally indistinguishable (except for personal

wealth), candidates in Arizona will have voluntarily elected different legal regimes governing campaign financing. Once candidates voluntarily opt for different legal regimes, they are inevitably subjected to different legal rules. Unlike *Davis*, where the mere existence of differential legal rules applied to similarly situated speakers triggered First Amendment strict scrutiny, the issue in this case is not whether differential legal rules apply to publicly and privately funded candidates – of course they do - but whether the rules actually violate the First Amendment rights of the privately-funded candidate.

Justice Alito answered that question in *Davis* when he noted that there would have been nothing unlawful in an alteration of the contribution limits governing both candidates designed to lessen the self-funded candidate's wealth-related speech advantage. There is, noted Justice Alito, no First Amendment right to the retention of a campaign speech advantage based solely on wealth. 554 U.S. at 737.

Thus, nothing in the holding of *Davis* suggests that Arizona's effort to render its system attractive to candidates by minimizing the likelihood of a public/private campaign speech imbalance, while leaving privately-funded candidates free to raise and spend unlimited sums, violates the First Amendment.

III

THE PROVISION OF MATCHING FUNDS IS A CONSTITUTIONALLY PERMISSIBLE MEANS OF REDUCING THE CORROSIVE EFFECT ON AMERICAN DEMOCRACY OF ELECTORAL ADVANTAGES PREMISED SOLELY ON WEALTH

A powerful metaphor rests at the heart of *Buckley*. In explaining why campaign spending should be treated as the equivalent of speech for the purposes of First Amendment analysis, the Court analogized money to the fuel in a car's gas tank, and a political campaign to the car. The Court asked rhetorically how far a car – or a candidate – could go without fuel. *Buckley*, 424 U.S. at 19, n.18. In one sense, however, the powerful metaphor is incomplete. A contested election is not a drive in the country. It is a long-distance race. And a race (or an election) where one party has most of the fuel is neither fair, designed to reward merit, nor particularly interesting to the spectators, especially when the suppliers of the needed fuel expect to be rewarded by the winner.

Not surprisingly, government officials have repeatedly urged this Court to recognize that American society, deeply committed to free speech, political equality and vibrant democracy, has a vital interest in minimizing the corrosive effect of wealth-based electoral advantages on both the fundamental fairness of the democratic process, and the confidence of ordinary Americans that their voices can be heard in the political marketplace. In cases

like *Buckley* and *Davis*, this Court recognized the cogency of the concern, but warned that the First Amendment forbids even well-intentioned efforts by government to strengthen weak voices by imposing coercive limits on strong ones. *Buckley*, 424 U.S. at 17; 48-49; *Davis*, 554 U.S. at 737. Instead, the Court noted that government may subsidize weak voices, rather than coercively censor strong ones. That is exactly what Arizona has done. For 35 years, this Court has invited government to deal with the corrosive impact of significant wealth disparity on American democracy by using subsidies to level the campaign playing field. Matching funds provide a cost-efficient, demonstrably successful means to do so, without imposing a coercive burden on a privately-funded candidate, other than the incidental "burden" of being rebutted. It would be a tragedy if this Court were to announce that the subsidy option is a blind alley down which cars and candidates without enough gas must disappear.

CONCLUSION

For the above-stated reasons, *amici* urge the Court to affirm the conclusion of the Court below that Arizona's matching fund program is facially constitutional, and to remand the case for further consideration of any as applied challenges to the actual operation of the Arizona program.

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New York, New York

Respectfully submitted,

Norman Dorsen
(Counsel of Record)
Burt Neuborne
40 Washington Sq. South
New York, N.Y. 10012
(212) 998-6172

Attorneys for *Amici Curiae*

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ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ET AL., and

JOHN MCCOMISH, ET AL., Petitioners

v.

KEN BENNETT ET AL., Respondents

On Writs of Certiorari To The United States Court of Appeals For the Ninth Circuit

Brief Amici Curiae of Four Former Chairmen and One Former Commissioner of the Federal Election Commission Supporting Petitioners

James Bopp, Jr.
Counsel of Record
Anita Y. Woudenberg
Josiah Neeley
JAMES MADISON CENTER FOR FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434 (telephone)
812/235-3685 (facsimile)
jboppjr@aol.com (e-mail)
Counsel for Amici Curiae

113
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Statement of Interest[1]

These Amici Curiae are five former commissioners of the Federal Election Commission ("FEC"), with FEC years and current affiliation indicated: **Lee Ann Elliott** (1982-2000, retired); **David Mason** (1998-2008, Visiting Senior Fellow, Heritage Foundation); **Bradley Smith** (2000-2005, Blackmore/Nault Designated Professor of Law, Capital University); **Hans von Spakovsky** (2006-2007, Visiting Legal Scholar, Heritage Foundation); **Darryl Wold** (1998-2002, private law practice emphasizing election and political law). All chaired the FEC during their tenure except for Commissioner von Spakovsky.

As former FEC commissioners with many years of experience in interpreting the Federal Election Campaign Act ("FECA"), implementing regulations, devising enforcement policy, and investigating violations, Amici have an interest in advising the Court of the complexities and difficulties of the practical application of federal campaign finance laws and the First Amendment to political speech and activity.

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[1] No party counsel authored any of this brief, and no party, party counsel, or person other than amici or their counsel paid for brief preparation and submission. The parties consented to the filing of this brief.

Summary of Argument

Government funding of elections can serve two purposes: preventing corruption, and limiting political discourse. This Court has only recognized the first purpose as a constitutional justification for such funding. However, data surrounding the use of government funding suggest it is the second purpose–speech suppression–that motivates government funding.

The most telling evidence of speech suppression is underfunding a candidate's campaign. If corruption were the concern, government funding would broadly match that raised through traditional, private funding. But as presidential government funding demonstrates, this is not the case. Such funding has not kept up with private funding, resulting in presidential candidates declining government funding–first in the primaries in 2000, and in 2008, in general elections. With presidential candidates able to raise hundreds of millions of dollars, government funding that does not even break $100 million is woefully inadequate.

Triggered matching fund schemes likewise suppress speech by imposing inadequate spending ceilings on their participants. But to prevent declining interest, matching funds are provided to participating candidates based on their privately-funded opponent's and third party spending. This introduces a new level of speech suppression, restricting not only participating candidates' speech but also chilling the speech of non-participating candidates and third parties. It also interjects substantial government discretion and oversight into all campaign spending. This burdensome effect, serving a speech-suppression interest, is unconstitutional.

Argument

I. Public Funding of Elections Is Unconstitutional If It Serves A Speech-Suppression Function.

A. Public Funding of Elections Can Serve Legitimate or Illegitimate Purposes.

All systems of public funding[1] for elections involve a transfer of taxpayer dollars from the government to a candidate for public office. In exchange for this funding, candidates typically must agree to limit their campaign expenditures either to the amount they receive in government funds, or to some other set amount. This arrangement could serve one of two different purposes. First, government funding might be seen as a method of paying candidates not to take private money for their campaigns. Since large private contributions are often seen as having a corrupting effect on candidates, paying candidates to take less private money could be seen as serving a legitimate anti-corruption interest. This type of government funding of candidates would function as a replacement for private funding, and the key effect of the system

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[1] Throughout this brief, "government funding" and "taxpayer funding" of elections will be used interchangeably with "public funding" in order to more accurately indicate the type of funding involved. All election campaigns are publicly funded in the sense that the money used to pay for them comes from the public at large. The question is whether the funds flow directly from the public to the candidate through traditional funding such as individual contributions or indirectly via taxation and government contributions.

would be to change the source of a candidate's spending, rather than its amount.

Another possibility, however, is that government funding might be used as a method by which the government pays candidates not to engage in political speech (or, to be more precise, which pays candidates to engage in less political speech than they would without the payment). Since candidates must agree to limit their spending as a condition of receiving taxpayer funds, the amount of speech that candidates are free to engage in may be substantially and illegitimately lessened by the system. This type of government funding of candidates would be directed not only towards the source of a candidate's funding, but also the amount.

For many supporters of government funding, limiting speech is not merely a potential by-product of funding, but one of its main purposes. As Common Cause argued in 1995, "[t]he public financing system has worked. Spending has been limited." Common Cause, *Presidential Public Funding FAQ*, *at* http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=1389223 (last visited Jan. 19, 2011). Likewise, in advocating for the challenged government funding scheme, Arizonans for Clean Elections repeatedly cited "limit[ing] campaign spending" as the first justification for the law, JA-93, 95, and argued that enacting taxpayer election funding "would **lower the cost and length of campaign** [sic]" JA-91 (emphasis in original); see also JA-104 ("To get big money out of state elections and reduce campaign spending, Clean Elections will cost less than 2 percent of the current budget surplus."); JA-110 ("**Matching funds limit spending.** A traditional candidate may think twice about raising

additional funds against a Clean Elections candidate.") (emphasis in original); JA-228-29 ("By limiting campaign spending and increasing disclosure requirements, [Proposition 200] will level the playing field").

B. *Buckley v. Valeo* Does Not Foreclose All Challenges to Government Funding of Candidates.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court viewed the system of government funding for presidential elections set up by the Federal Election Campaign Act of 1971[2] as serving an anti-corruption function, rather than a speech suppression one. In enacting taxpayer funding for presidential elections, the *Buckley* Court reasoned, "Congress was legislating for the 'general welfare' to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." The scheme was an "effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process." *Id.* at 92-93. According to the Court, because the taxpayer funds in question were being used for the anti-corruption purpose of replacing

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[2] While Congress had previously provided for taxpayer funding for presidential candidates in the Presidential Election Campaign Fund Act of 1966, this legislation was suspended in 1967 by a provision barring any appropriations until Congress adopted guidelines for the distribution of money from the Fund. In 1974, FECA was amended to add taxpayer funding for nominating conventions and primary campaigns. *Buckley*, at 85 n.114.

private contributions, the scheme was a valid exercise of Congress' authority under Art. I, s 8.[3]

However, while the Court concluded that government funding for election campaigns was not p[illegible] se unconstitutional, nothing in *Buckley* suggests that such schemes are exempt from all constitutional scrutiny. If a system of government funding for elections were designed not "to facilitate and enlarge public discussion and participation in the electoral process," *Id.* at 92-93, but to reduce the amount of campaign speech, this would raise serious constitutional concerns. The Court also made a point of noting that "[t]he scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree." *Id.* at 91 n.124.[4] The same cannot be said for government

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[3] The Court does not appear to have considered the possibility that contributions might continue to have a corrupting influence on candidates even where the contributions are made by the government, rather than by a private individual or group. If contributions to a candidate from a political advocacy group (for example, a group opposed to public funding for elections) are problematic because this might improperly influence the candidate's position on public funding, the fact that a candidate is being funded by a government funded election system, and thus may be influenced by this fact to support continued taxpayer funding for elections, would seem equally problematic.

[4] Unlike the Arizona scheme at issue here, the system in *Buckley* did not involve triggered matching funds based on spending by opposing candidates, individuals, or groups. While FECA did contain what it called "matching funds" for presidential primaries, the government funds in question matched funds raised by the candidates from non-govern-

funding systems that contain triggered matching funds.

C. Underfunding of A Government Funding Scheme Indicates It Serves A Speech-Suppression Function.

One way to determine whether a system of taxpayer funding for elections serves an anti-corruption or a speech-suppression function is to compare funding levels under the scheme with the levels of spending by traditionally funded candidates. If the purpose of government funding is simply to replace private contributions with government contributions, then the amount of funding granted to a candidate under the scheme ought to broadly match the amount of funding a candidate is likely to receive if his private contributions weren't being replaced with taxpayer funded ones. On the other hand, if reducing the level of spending is the goal, one would expect the level of government funding to be substantially and consistently less than what is typically spent by traditionally funded candidates. Taxpayer funding of presidential elections is illustrative of this distinction.

1. The Demise Of Government Funding of Presidential Campaigns.

In 1971, Congress adopted as part of FECA the Presidential Election Campaign Fund Act, which establishes government funding of major party presidential candidates, both during primary and general election campaigns. *See* 26 U.S.C. §§ 6096, 9001-9013, 9031-9042. The Act allows presidential candidates of

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mental sources, rather than matching them based on opposition speech.

major parties to receive government funding for their campaigns in exchange for limiting their campaign spending. To qualify for funding during their primary campaigns, candidates must raise over $5,000 in $250 increments in 20 states ($100,000 total). 26 U.S.C. § 9033(b)(3) and (4). If they qualify, they receive a dollar-for-dollar match on the first $250 of each contribution they receive. *Id.* § 9034(a). In exchange, they agree to limit their total spending to $10 million plus a cost-of-living adjustment, with a maximum of either $200,000 per state (also adjusted based on cost of living) or $0.16 per eligible voter in that state (adjusted for cost of living)–whichever is greater. *Id.* § 9035(a). To be eligible for government funding as a general election candidate, the major party presidential nominee must agree to limit her total expenditures to the amount given through government funding–$20 million plus the cost of living adjustment–and agree not to receive any contributions. *Id.* § 9003(b).[5]

From 1976-1996, each winning presidential candidate participated in both primary and general election government funding. WhiteHouseForSale.Org, *Facts About the Presidential Public Funding System*, *available at* http://www.whitehouseforsale.org/facts.cfm (last visited Jan. 19, 2011).

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[5] Minor party and new non-major party candidates are eligible for partial government funding based on the percentage of voter supporter in the prior election (for minor party candidates) or based on voter support during the current election, paid after the election is conducted (for new non-major party candidates). 26 U.S.C. § 9004(a)(3).

In 1996, Steve Forbes chose not to use government funding, running his primary campaign with $41 million. FEC Report, *Presidential Candidate Summary Report*, *at* http://www.fec.gov/pres96/presmstr.htm (last visited Jan. 19, 2011). This amount was on par with his Republican primary opponent Bob Dole, who financially led those accepting government funding, and spent $44 million in his primary. *Id.* Bill Clinton also participated in his primary race with $42 million available to him. *Id.* The respective winners of the 1996 primaries both participated in general election government financing, receiving $61 million each in funding, with third party candidate Ross Perot receiving $29 million. FEC Report, *Financing the 1996 Presidential Campaign*, *available at* http://www.fec.gov/pres96/presgen1.htm (last visited Jan. 19, 2011). Thus far, the amount of government funding appeared to be adequate.

This changed in 2000. In the 2000 primaries, numerous candidates declined government funding, most notably Republican George W. Bush, who raised just over $94 million, and Republican Steve Forbes, who raised just over $48 million. FEC Report, *Presidential Primary Campaign Receipts Through July 31, 2000*, at http://www.fec.gov/press/bkgnd/pres_cf/documents/presm82000rec.pdf (last visited Jan. 19, 2011). Those who did participate raised between $40 and $50 million: Republican John McCain, $48 million; Democrat Al Gore, $49 million; and Democrat Bill Bradley, $42 million. *Id.* And while the 2000 major party nominees Bush and Gore took general election government funding of $67.5 million each, Federal Election Commission, *Annual Report 2000*, at 17 (June 2001),

http://www.fec.gov/pdf/ar00.pdf, the insufficiency of government funding emerged. And the 2000 primary was only the beginning.

In 2004, now incumbent George W. Bush again declined government funding, this time raising $240 million in private funds. Federal Election Commission, *Presidential Pre-Nomination Campaign Receipts Through July 31, 2004, available at* http://www.fec.gov/press/bkgnd/pres_cf/documents/presreceiptsm82004.pdf (last visited Jan. 19, 2011). Democrats Howard Dean and John Kerry likewise declined government funding, raising $50 million and $221 million, respectively. *Id.* The leading participating candidates raised a comparatively paltry $29 million (John Edwards), $21 million (Dick Gephardt), and $18 million (Joe Lieberman)–out-raised $10 to $1 by their privately-funded counterparts. *Id.*

Yet government funding for the general election remained intact. In the 2004 general election, both major party candidates took government funding of $74.6 million. Federal Election Commission, *Press Release* (Feb. 3, 2005), http://www.fec.gov/press/press2005/20050203pressum/20050203pressum.html.

Unsurprisingly, for the 2008 primary, none of the front-running presidential candidates including Hillary Clinton, Barack Obama, John McCain, Mitt Romney, Rudy Guiliani, and Ron Paul–took government funding in their respective primaries. Clinton raised $207 million, Obama raised $336 million, McCain raised $120 million, Romney $50 million, Guiliani $55 million, and Paul $34 million. Federal Election Commission, *Presidential Pre-Nomination Campaign Receipts Through June 30, 2008,*

http://www.fec.gov/press/presssummary.pdf (last visited Jan. 19, 2011). And for the 2008 general election, for the first time, a presidential candidate declined government funding: Barack Obama, the Democratic presidential nominee, reported private contributions of over $748 million, well beyond any government funding he would have received. Federal Election Commission, *Presidential Campaign Finance*, *at* http://www.fec.gov/DisclosureSearch/mapApp.do?cand_id=P00000001&searchType=&searchSQLType=&searchKeyword= (last visited Jan. 19, 2011). Given these vast private resources raised, the demise of government funding for presidential campaigns is all but assured.[6] At least assuming no Congressional act to rectify the woefully inadequate amount afforded for such campaigns.

And there is no reason to think Congress will do so. To date, the only Congressional change to the Presidential Election Campaign Fund Act was in 1993, when it raised the $1 check-off on individual federal tax returns to $3 because public support through the check-off was declining. *See* Scott E. Thomas, *The Presidential Election Public Funding Program–A*

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[6] The increasingly later dates for major party conventions, which also receive government funding, underscores this demise. While historically, each party's conventions have been, at the latest, in mid-August, with the possibility of more funding due to lack of participation of presidential candidates, these conventions have been as late as early September. In 2004, the Republican National Convention was August 30-September 4. In 2008, it was September 1-September 4. The 2008 Democratic National Convention was August 25-August 28.

Commissioner's Perspective, at 4 (Jan. 31, 2003), http://www.cfinst.org/events/pdf/scott_thomas.pdf ("the number of taxpayers checking 'YES' on their tax return has declined slowly over the years from about 40 million for 1980 returns to about 20 million for 2000 returns."). That Congress did not raise the amount given to candidates suggests that speech-suppression rather than anti-corruption is the real purpose of the fund. While nothing precludes numerous candidates from seeking government funding, such funding cannot credibly fund those candidates adequately.[7]

2. The Rise of Triggered Matching Funds.

Mirroring their presidential counterpart, various states have adopted government funding schemes for state level elections that likewise seek to suppress speech. In order to entice participation, these state government funding schemes mitigate their low spending limit by controlling additional spending through matching funds, triggered at the expense of a privately-funded opponent. For example, the triggered matching funds scheme at issue in this case provide qualifying general election candidates in contested races with $638,222.50, subject to increase up to three times that amount based upon the spending of their

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[7] *See* David Wold, *The Federal Experience: Paradigm Or Paradox*, 34 Ariz. State L. J. 1161, 1173-1175 (2002) (comparing presidential campaign funding with advertising funds spent, and arguing that government funding's indexing for inflation is insufficient to keep up with media costs). The inadequacy of government funding advantages incumbents because they have already established name recognition and need less funding to campaign for their reelection.

nonparticipating opponent or third party expenditures.[8] Ariz. Rev. Stat. Ann. §§ 16-951(C), 16-952(C), 16-961(H). In Maine, a gubernatorial general election candidate is given $600,000 in the general election, with an additional $600,000 provided to them based upon their privately-funded opponent's spending.[9] Me. Rev. Stat. Ann. tit. 21-A, § 1125(8), (9). And in North Carolina, triggered matching funds allow for two times the initial outlay, which in 2008, was $233,625.[10, 11] N.C. Gen. Stat. § 163C278.67(b), (c). Such triggered

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[8] In comparison, McCain raised $21.6 million, his opponent Glassman $1.3 million, in Arizona's 2010 statewide race for U.S. Senate. OpenSecrets.Org, *Arizona Congressional Races In 2010*, at http://www.opensecrets.org/races/election.php?state=AZ (last visited Jan. 19, 2011).

[9] Candidates Collins and Allen spent $8 million and $5.9 million, respectively, for in their statewide campaigns for U.S. Senator. OpenSecrets.Org, *Maine Congressional Races In 2008, at* http://www.opensecrets.org/races/election.php?state=ME&cycle=2008 (last visited Jan. 19, 2011).

[10] Comparable statewide U.S. Senate races in 2008 show Dole raised and spent $19.5 million on her North Carolina race, and her Democratic opponent Hagan raised and spent $8.5 million. OpenSecrets.Org, *North Carolina Congressional Races In 2008, at* http://www.opensecrets.org/races/summary.php?cycle=2008&id=NC81 (last visited Jan. 19, 2011).

[11] Minnesota, Connecticut, and Florida also adopted triggered matching fund schemes, but these schemes were enjoined as unconstitutional. *See Day v. Holohan*, 34 F.3d 1356 (8th Cir. 1994); *Green Party of Conn. v. Garfield*, 616 F.3d 213 (2d Cir. 2010); *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010).

matching funds tacitly acknowledge the inadequacy of the initial funding offered. And their justification– limiting speech–is unconstitutional.

III. Triggered Matching Funds Unconstitutionally Suppress Speech.

As noted above, *Buckley* upheld FECA's government funding system for presidential elections on the grounds that it served "not to abridge, restrict, or censor speech, but rather [ ] use[d] public money to facilitate and enlarge public discussion and participation in the electoral process." *Id.* at 92-93. Depending on how a system is designed, however, government funding for elections may serve to reduce public discussion and participation, rather than enlarge it.

A candidate must decide at the outset of the campaign if he or she can raise more money than the size of the grant, and if doing so is beneficial to the campaign. If not, the decision is easy–the candidate will take the grant. A simple grant of the type approved in *Buckley* can therefore potentially increase speech by providing candidates with more funds than they could raise on their own. Candidates who think that outspending the grant will increase their chances of election may do so.

Triggered matching funds support participation in the system, however, not by helping candidates speak more than they otherwise might, but by discouraging non-participating candidates from speaking more than the grant level. Their purpose is to make the non-participating candidate's added speech ineffective in achieving its purpose–election to office. Because triggered matching funds require no time or fundraising

costs, the actual effect is not even to make spending equal, but to give participating candidates more financial resources for speech than non-participating candidates. In effect, the state says, "Spend more than the limit and we will contribute to your opponent to try to defeat you in the election." The state's goal is to convince candidates that speech above the "voluntary" limit will serve no purpose. Faced with this, future candidates will opt out of traditional private funding. When they do, the level of the grant will not settle at the higher level of the base grant plus matching grants, but at the lower level of the base grant. By making speech above the base grant relatively useless for candidates, the state seeks to limit the amount of political discourse.

Triggered matching funds limit not only the political discourse of the candidates, but total political discourse. They also chill the speech of individuals and groups who do not wish to indirectly fund the campaigns of candidates they oppose by supporting a privately funded candidate or opposing a government-funded one. *Buckley*, 424 U.S. at 91 n.124 (holding that FECA's funding scheme was constitutional because "[t]he scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree."); *see* David M. Primo, *What Does Research Say About Public Funding for Political Campaigns* (August 2010), *at* http://www.ij.org/about/3466 (discussing how triggered matching funds chill speech). Privately funded candidates and third party entities are more likely to reign in their own spending, rather than spend and trigger matching funding to an opponent.

Triggered matching funds also aid in limiting the

speech of candidates who accept government funding. Because government funding is conditioned on a candidate's accepting limits on other sources of funding, the government can reduce the amount of speech a taxpayer funded candidate can engage in by setting a low funding level. However, since participation in government funding schemes must be "voluntary" setting the spending level too low will just result in candidates not participating in the scheme. Triggered matching funds allow states to set base funding at very low levels, and to increase funding below the minimal amount necessary to keep candidates participating in the scheme.

Further, the use of triggered matching funds inevitably requires government actors to micromanage spending decisions of candidates and other parties, which can also have a chilling effect on speech. In *Buckley*, the Court addressed the parties concern "that public funding will lead to governmental control of the internal affairs of political parties, and thus to a significant loss of political freedom" by stating that "[t]he concern is necessarily wholly speculative and hardly a basis for invalidation of the public financing scheme on its face." *Id.* at 93 n.126. Based on our experience as Commissioners with the Federal Election Commission, however, we can state that such concerns are not mere speculation. Government funding of campaigns requires the use of campaign funds to be constantly investigated–and therefore second guessed–by the administering agency to ensure that funds are being spent for "legitimate" campaign purposes. That is "legitimate" in the opinion of government bureaucrats.

And where triggered matching funds are involved,

this second-guessing must extend not only to candidates who participate in the scheme, but to all candidates, individuals, or groups who choose to participate in an election. Because campaign speech may result in taxpayer funding to candidates it is directed against, government funding systems require some mechanism to determine 1) whether a given statement is or is not campaign speech, and 2) whether it is or is not directed against a particular candidate. Such an intrusive system is itself a burden on political speech, making individuals and groups less likely to get involved in the political process and more likely to face sanctions if and when their view of what constitutes opposing campaign speech differs from that of the administrating agency.

Speech can be discouraged and chilled not only by directly penalizing or banning it, but by regulations and programs intended to make certain that it serves no useful purpose. That states like Arizona have chosen this latter course rather than direct prohibitions does not mask the unconstitutional purpose at the heart of the program.

Conclusion

Because Arizona's triggered matching funds serve a speech suppression interest, they are unconstitutional. The Ninth Circuit decision to the contrary is erroneous and should be reversed.

Respectfully submitted,

James Bopp, Jr.
Counsel of Record
Anita Y. Woudenberg
Josiah Neeley
JAMES MADISON CENTER FOR FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434 (telephone)
812/235-3685 (facsimile)
Counsel for Amici Curiae

AMICUS CURIAE BRIEF

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No. 10-238

IN THE

Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *ET AL.*, *Petitioners*,

v.

KEN BENNETT, IN HIS OFFICIAL CAPACITY AS ARIZONA SECRETARY OF STATE, *ET AL.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, CITIZENS UNITED, CITIZENS UNITED FOUNDATION, U.S. JUSTICE FOUNDATION, ARIZONA STATE CHAPTER OF THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INSTITUTE ON THE CONSTITUTION, DOWNSIZEDC.ORG, INC., DOWNSIZE DC FOUNDATION, CAMPAIGN FOR LIBERTY, CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, POLICY ANALYSIS CENTER, THE LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, CONSTITUTION PARTY NATIONAL COMMITTEE, AND PUBLIC ADVOCATE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

HERBERT W. TITUS *
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com

*Counsel of Record
Attorneys for Amici Curiae

January 20, 2011

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INTEREST OF *AMICI CURIAE*[1]

Gun Owners of America, Inc. ("GOA") (www.gunowners.org) was incorporated in California in 1976, and is exempt from federal income tax under IRC section 501(c)(4). GOA is a citizens' lobby to protect and defend the Second Amendment.

Gun Owners Foundation ("GOF") (www.gunowners.com) was incorporated in Virginia in 1983, and is exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). GOF is an educational and legal defense organization defending the Second Amendment.

Citizens United ("CU") (www.citizensunited.org) was incorporated in 1988 in Virginia and is exempt from federal tax under IRC section 501(c)(4). CU is an organization dedicated to restoring our government to citizens' control through a combination of education, advocacy, and grass roots organization.

Citizens United Foundation ("CUF") (www.citizensunitedfoundation.com) was established in 1992 in Virginia, and is exempt from federal income tax under IRC section 501(c)(3). CUF is a non-partisan, non-profit research and education foundation, dedicated to informing the American

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[1] It is hereby certified that the parties have consented to the filing of this brief, as counsel for all parties have filed blanket consents, that no counsel for a party authored this brief in whole or in part, and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

people about public policy issues which relate to traditional American values.

U.S. Justice Foundation ("USJF") (www.usjf.net) was incorporated in California in 1979, and is exempt from federal income tax under IRC section 501(c)(3). USJF is a nonprofit public interest, legal action organization dedicated to instruct, inform and educate the public on, and to litigate, significant legal issues confronting America.

Arizona State Chapter of the Association of American Physicians and Surgeons ("AAPS") (www.aapsonline.org) was incorporated in Arizona in 1993, and is exempt from federal income tax under IRC section 501(c)(6). AAPS is a non-partisan professional association of physicians in all types of practices and specialties in Arizona, dedicated to preserving and promoting the practice of private medicine.

Institute on the Constitution (www.iotconline.com) is an unincorporated educational association established in Maryland in 2000, intended to reconnect Americans to the history of the American Republic and to their heritage of freedom under law.

DownsizeDC.org, Inc. ("DDC") (www.downsizedc.org) was incorporated in Virginia in 2001, and is exempt from federal income taxation under IRC section 501(c)(4). DDC is an educational organization primarily educating both citizens and legislatures in favor of legislation and legal reform.

Downsize DC Foundation ("DDCF") (www.downsizedcfoundation.org) was incorporated in Virginia in 2000, and is exempt from federal income taxation under IRC section 501(c)(3). DDCF is a public charity whose mission is to foster human progress by reducing state coercion.

Campaign for Liberty ("CFL") (www.campaignforliberty.com) was incorporated in Delaware in 2008 and is exempt from federal income taxation under IRC section 501(c)(4). CFL is dedicated primarily to educating the American citizenry on important issues of public policy, including raising public awareness of the actions of public officials.

Conservative Legal Defense and Education Fund ("CLDEF") (www.cldef.org) was incorporated in the District of Columbia in 1982, and is exempt from federal income taxation under IRC section 501(c)(3). CLDEF is dedicated to the correct construction, interpretation, and application of the law.

Policy Analysis Center ("PAC") was established in 1994 in Virginia and is exempt from federal income taxation under IRC section 501(c)(3). PAC promotes the concepts of limited government, personal freedom, and respect for the individual, private property, and privacy.

The Lincoln Institute for Research and Education ("Lincoln") (www.lincolnreview.com) was incorporated in the District of Columbia in 1978, and is exempt from federal income tax under IRC section

501(c)(3). Lincoln focuses primarily on public policy issues that impact the lives of black middle Americans.

Constitution Party National Committee ("CNPC") (www.constitutionparty.com) is a qualified national party committee, incorporated in the Commonwealth of Pennsylvania in 2001, and exempt from federal income tax under IRC section 527. CNPC is organized, operated, and dedicated to attempting to influence the selection, nomination, election, or appointment of individuals to federal, state, and local public office.

Public Advocate of the United States (www.publicadvocateusa.org) was incorporated in the District of Columbia in 1981, and is exempt from federal income tax under IRC section 501(c)(4). PA is an educational, advocacy organization, informing the citizenry on important public policy issues and dedicated to the conviction that political decisions should begin and end with the best interests of American families and communities in mind.

These *amici curiae* were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research, to inform and educate the public on important issues of national concern, such as the construction of state and federal constitutions and statutes related to the right of citizens to bear arms, and related issues.

In the past, each of the *amici* has conducted research on issues involving the U.S. Constitution, and

each has filed *amicus curiae* briefs in other federal litigation involving such issues, including *amicus curiae* briefs to this Court.

It is hoped that the perspective of the *amici curiae* on the issues in the present case will be of assistance to the Court.

SUMMARY OF ARGUMENT

The court below assumed that, because this Court found in Buckley v. Valeo that the public financing system for presidential election campaigns was compatible with the First Amendment, the public financing system of Arizona's Citizens Clean Elections Act was equally compatible. The court was mistaken. Buckley approved a public financing scheme funded fully by a taxpayer's voluntary check-off system. Arizona's public financing system receives a majority of its funds from a 10 percent assessment on civil penalties and criminal fines paid by individual "law breakers."

In Buckley this Court took special note of the fact that the contributions to the presidential campaign fund were wholly voluntary and, therefore, did not implicate the First Amendment because "[t]he scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree." That is not true of the Arizona public financing scheme which singles out a discrete class of persons — those liable to pay a civil penalty or criminal fine — and imposes a special assessment for the sole purpose of

raising funds to support campaigns for elective office in the state.

From the nation's founding, it has been a well-settled principle of First Amendment jurisprudence that the government cannot compel a man to furnish a contribution of money to support opinions of others. The Arizona public financing scheme does just that, to the prejudice of the petitioners and, therefore, the Citizens Clean Elections Act is an abridgment of the privileges and immunities guarantee of Fourteenth Amendment.

The court below also assumed that the Buckley Court found that the system of financing presidential elections furthered and enlarged, rather than abridged, First Amendment values. A careful review of Buckley on this point reveals, however, a deeply flawed opinion — one that not only disregarded the discriminatory bias favoring major party candidates, but one that was based on a constitutional premise recently discredited by this Court in Citizens United v. FEC. In Citizens United, this Court reaffirmed that the First Amendment is based upon the premise that the people are sovereign — that the government is accountable to the people, not the people to the government.

Public financing of campaigns for elective office generally, and the Arizona public financing system in particular, require licensure by the government of candidates and accountability to the government for campaign expenditures, thereby undermining the sovereignty of the people. Additionally, the Arizona

public financing system is specifically designed to "level the playing field" among candidates, a purpose thoroughly discredited by the decision in Citizens United, which overruled Austin v. Michigan State Chamber of Commerce. Entry into the marketplace of ideas, as secured by the First Amendment, limits the power of government not only from keeping speakers out of that marketplace, but subsidizing their entry into that market.

The people's sovereignty over market entry is deeply imbedded in American political and legal history. By establishing its system of public financing, the Arizona Citizens Clean Election Act abridges petitioners' privileges and immunities in violation of the Fourteenth Amendment.

ARGUMENT

I. THE PUBLIC FINANCING SYSTEM APPROVED IN BUCKLEY V. VALEO DOES NOT GOVERN THIS CASE.

The court below assumed that Buckley v. Valeo, 424 U.S. 1 (1976), resolved the question as to whether the Arizona system of public financing of campaigns for election to public office was compatible with the First and Fourteenth Amendments. *See* McComish v. Bennett, 605 F.3d 720, 730-31 (9th Cir, 2010). The court of appeals premised its decision upon the proposition that, since the Buckley Court found that "the public financing scheme" for presidential elections was constitutional, then "the public financing of elections **itself** does **not** create any **burden** on

speech." *Id.* (emphasis added). Having concluded that Buckley reigns, the court below dismissed in one paragraph the petitioners' claim that the constitutionality of the "matching funds" provision of the Arizona public financing scheme was governed by the standard of strict scrutiny applied by this Court in Citizens United v. FEC, 558 U.S. ___, 130 S.Ct. ___, 175 L. Ed. 2d 753 (2010) and in Davis v. FEC, 554 U.S. 724 (2008), as the Arizona law was said to have placed only a "minimal burden on fully protected speech." *See* McComish, 605 F.3d at 731-35.

On petition to this Court, petitioners appear to have assumed *sub silentio* that there is nothing *per se* unconstitutional with the public financing of election campaigns, as they have limited their constitutional attack to the "matching fund" provisions of the Arizona law. Thus, the candidate petitioners have argued that it is "the punitive linkage between the exercise of First Amendment rights and the issuance of public financing to political opponents [which] distinguishes Arizona's matching funds system from the public financing system upheld in [Buckley]." Brief of Petitioners McComish, *et al.* (hereinafter "Cand. Pet."), pp. 57-58. Similarly, the independent group petitioners have asserted that "[b]y operation of the Matching Funds Provision, the Act does far more than simply provide funding resources to candidates who wish to minimize or eliminate their reliance on private funds, as did the public financing system at issue in *Buckley*." Brief of Petitioners Arizona Free Enterprise Club's Freedom Club PAC (hereinafter "PAC Pet."), p. 39.

While these *amici* agree with petitioners' constitutional analysis insofar as it goes, they believe that the Arizona public financing scheme is unconstitutional to its core, and that the court below erred in its analysis of its matching fund provisions, because it mistakenly relied upon Buckley for the proposition that public financing of elections generally, and thus, the Arizona public financing system specifically, does not "**itself** ... create any burden on speech." *See* McComish, 605 F.3d at 730-31 (emphasis added).

A. Buckley Permits Only Voluntarily-Funded Public Financing of Elections.

The Buckley Court approved a public financing system exclusively funded by taxpayers who were permitted, but not compelled, to designate that one dollar (or two dollars on a joint return) of their federal income tax liability be deposited for use by qualified candidates and parties in campaigns for election to the office of President of the United States. *See id.*, 424 U.S. at 86. The Buckley plaintiffs objected to this "dollar check-off provision" because it did not "permit taxpayers to designate particular candidates or parties as recipients of their money." *Id.*, 424 U.S. at 91. The Court dismissed this objection on the ground that the taxpayer's decision was, in effect, "like any other appropriation from the general revenue" and that the plaintiffs' objection was no different from that of any taxpayer who might object to a particular use of monies appropriated by Congress. *Id.*

In a footnote, the Buckley Court emphasized that the voluntary check-off system "involves **no compulsion** upon individuals to finance" anyone's presidential campaign, but "is simply a means by which Congress determines the amount of its appropriation." *Id.*, 424 U.S. 91 n.124 (emphasis added). By emphasizing this distinction between the voluntary funding scheme before it, and one with a compulsory feature, the Buckley Court signaled that the constitutionality of an involuntarily-funded system would be decidedly different, because the latter would compel individuals "to finance the dissemination of ideas with which they disagree." *Id.* Indeed, just a year after Buckley, and consistent with the position stated therein, this Court ruled unconstitutional a law "compelling certain individuals to pay subsidies for speech to which they object." *See* United States v. United Foods, Inc., 533 U.S. 405, 410 (2001), citing the landmark case of Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977).

B. A Ten Percent Surcharge on Civil Penalties and Criminal Fines Unconstitutionally Funds the Arizona Public Financing System.

Unlike the presidential campaign fund approved in Buckley, the system of public financing of elections in Arizona is only partially funded by a voluntary check-off and tax credit scheme. Instead, the system gets a majority (53 percent) of its funds from a 10 percent surcharge on "every fine, penalty and forfeiture imposed and collected by the courts for criminal offenses and any civil penalty imposed and collected

for a civil traffic violation, and fine, penalty, or forfeiture for a violation of the motor vehicle statutes, for any local ordinance relating to the stopping, standing or operation of a vehicle or for a violation of the game and fish statutes in Title 17."[2] *See* Ariz. Rev. Stat. § 16-954(C). *See also* Arizona's Citizens Clean Elections Commission ("CCEC"), "Funding," http://www.azcleanelections.gov/about-us/funding.aspx.

Thus, unlike the scheme in Buckley, the Arizona public financing system is not funded exclusively by general tax revenues as voluntarily designated by state taxpayers. Rather, the Arizona scheme extracts a majority of its funds from direct assessments upon individuals adjudicated guilty of specified criminal or civil behavior. And the very purpose of such assessments is to help provide "**full public funding** to qualified candidates who agree to abide by [CCEC] guidelines." *See, e.g.*, CCEC Press Release (Nov. 18, 2010) ("The Commission does not receive any funding from the state legislature.").

Prior to Buckley, the Supreme Court wrestled with two cases involving statutes that compelled certain classes of individuals to pay dues, a portion of which were being used to promote causes opposed by some dues payers. In dissent in International Machinists v. Street, 367 U.S. 740 (1961), Justice Hugo Black squarely addressed a hypothetical situation not unlike the instant case:

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[2] Ariz. Rev. Stat. § 12-116.01.

> Probably **no one would suggest that Congress could, without violating th[e] [First] Amendment, pass a law taxing workers ... to create a fund to be used in helping certain political parties or groups favored by the Government to elect their candidates or promote their controversial causes.** Compelling a man by law to pay his money to elect candidates or advocate laws or doctrines he is against differs only in degree, if at all, from compelling him by law to speak for a candidate, a party, or a cause that he is against. The very reason for the First Amendment is to make the people of this country free to think, speak, write, and worship as they wish, not as the Government commands. [*Id.*, 367 U.S. at 788 (Black, J., dissenting) (emphasis added).]

In the same year in the similar case of Lathrop v. Donahue, 367 U.S. 820 (1961), Justice William O. Douglas joined Justice Black to condemn a law that (a) singled out a class of people (lawyers) as "somehow different from other people" (*id.* at 875 (Black, J., dissenting)), and (b) compelled members of that class to "pay[] dues to support activities that are offensive to him" (*id.* at 878 (Douglas, J., dissenting)), as violating "the First Amendment ... strictures designed to keep our society from becoming moulded into patterns of conformity which satisfy the majority." *Id.* at 885 (Douglas, J., dissenting).

Although these were dissenting views, they prompted the Buckley Court to observe that the constitutionality of the public financing of presidential

election campaigns would be quite different if compulsorily funded. Buckley, 424 U.S. at 91 n.124. One year later, in Abood, the Supreme Court sided with Justices Black and Douglas, ruling that a class of persons cannot be singled out and "compelled to make ... contributions for political purposes [without] work[ing] ... an infringement of their constitutional rights." Abood, 431 U.S. at 234. Since Abood, this Court has never wavered from this established principle. Thus, there is simply no government interest, compelling or otherwise, that can trump the constitutional principle prohibiting any law that compels individuals to subsidize speech with which they disagree. As Justice Kennedy recently explained in United Foods:

> First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it [the government] favors.... [*Id.*, 533 U.S. at 411.]

Yet, the Arizona Citizens Clean Elections Act does just that. It punitively targets a discrete class of persons — "those that break the law"[3] — to pay into

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[3] *See* CCEC, "Funding," *supra* (**I hear people say that this program is nothing more than 'tax dollars for politicians.' Is this true?** No. The candidates who apply for clean election funding do not receive money from the general fund. The only tax dollars they receive come from individuals who voluntarily donate to the Commission and from *those that break the law*.) (Bold original; italics added).

the so-called "citizens clean elections fund,"[4] the state's preferred way for the funding of election campaigns. *See* Ariz. Rev. Stat. § 16-940(A) ("Campaigns will become more issue-oriented and less negative because there will be no need to challenge the sources of campaign money.") And it is the CCEC — not "those who break the law" — that decides which candidates are "qualified" to receive funding by initially agreeing to abide by CCEC guidelines. Ariz. Admin. Rule, § R2-20-104(C). *See also* CCEC Press Release (Nov. 18, 2010).

Those persons who are compelled to fund the Arizona public financing system are not the only ones harmed by the compulsory nature of the system. Petitioners, like all those who choose not to participate in the public financing system, are not only prejudiced by the "matching funds" provisions, as they have so ably demonstrated,[5] but their campaigns are placed under an official cloud of suspicion. The Findings and Declarations provision of the Act,[6] coupled with the several provisions identifying the "clean elections fund,"[7] gives rise to the obvious inference that those candidates who rely on private funding for their campaigns are, by statutory definition, "unclean." Indeed, on its official website the CCEC promotes that

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[4] *See* Ariz. Rev. Stat. § 16-950(A).

[5] *See, e.g.*, Cand. Pet., pp. 55-58; PAC Pet., pp. 4-8.

[6] Ariz. Rev. Stat. § 16-940.

[7] *See, e.g.*, Ariz. Rev. Stat. §§ 16-950(B), (D), and (E); 16-951(A), and 16-954(B).

public perception. For example, the CCEC has posed the question: **"Has Clean Elections been successful in increasing the number of 'participating' candidates?"** To which, CCEC has answered:

> Yes. The percentage of people running as participating candidates rather than as traditional candidates has increased every election cycle. In 2000 only 26% of the primary candidates ran using **clean elections funding**. In 2008 participation increased to 65%. [CCEC, "Funding," *supra* (emphasis added).]

By using an unconstitutional means of obtaining funds to make the public financing system work, the Arizona Citizens Clean Elections Act injures petitioners' exercise of their own constitutional rights. Additionally, the means chosen may never be directly challenged by those subject to the 10 percent surcharge. Thus, petitioners have standing not only to contest those provisions that directly chill their First Amendment rights, but also to contest the unconstitutional means of compelling others to support candidacies and ideas with which they disagree. *See* Secretary of State of Maryland v. Joseph H. Munson, Co., 467 U.S. 947, 956 (1984).

C. The Arizona Act Unconstitutionally Abridges Petitioners' Privileges and Immunities in Violation of the Fourteenth Amendment.

Both Abood and Keller v. State Bar of California, 496 U.S. 1 (1990), traced the "no compulsion" principle to the earliest days of America's founding. Preeminent among those earliest authorities were James Madison and Thomas Jefferson. *See* Abood, 431 U.S. at 234 n.31 and Keller, 496 U.S. at 10. Indeed, it was Jefferson who supplied the memorable phraseology of the right, one oft-repeated not only by this Court, but even by "[t]he Senate Watergate Committee [which] recommended that Congress stay away from public financing of presidential campaigns"[8]:

> Thomas Jefferson believed "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." The Committee's opposition is based like Jefferson's upon the fundamental need to protect the voluntary right of individual citizens to express themselves politically as guaranteed by the First Amendment. [*Id.*]

Jefferson based his belief on the twofold premise that "Almighty God hath created the mind free" and that even the "holy author of our religion, who being Lord of body and mind, yet chose not to propagate it by

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[8] John Samples, The Fallacy of Campaign Finance Reform 185 (U. Chi. Press: 2006).

coercions on either."[9] Thus, Jefferson concluded "that the opinions of men are not the object of civil government, nor under its jurisdiction."[10] *Id.*

In his great "Memorial and Remonstrance Against Religious Assessments," James Madison explained that this limit upon civil power was based upon the "fundamental and undeniable truth" that every man was accountable only to "the Creator" for his "opinions."[11] This duty, he asserted, was "precedent, both in order of time and in degree of obligation, to the claims of Civil Society." *Id.* Therefore, Madison continued, it was the duty of "every man who becomes a member of any particular Civil Society, do it with a saving allegiance to the Universal Sovereign." *Id.* Thus, Madison concluded "that Religion," that is, those duties owed exclusively to the Creator, "is wholly exempt from [the] cognizance" of any "free Government constituted by "[t]he People." *Id.*, ¶¶ 1-2.

To secure this freedom, the People of the United States, by the amendment process prescribed in Article

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[9] Thomas Jefferson, "A Bill for Establishing Religious Freedom" (June 12, 1779), reprinted in 5 Founders Constitution, p. 77 (P. Kurland & R. Lerner, eds., U. Chi. Press: (1987).

[10] The no-compulsion principle applies to all opinions, not just religious ones, and thus, "prohibit[s] a State from compelling any individual to affirm his belief in God ... or to associate with a political party...." Abood, 431 U.S. at 235.

[11] James Madison, "Memorial and Remonstrance Against Religious Assessments," reprinted in 5 Founders Constitution, *supra*, at 82, ¶ 1.

V of the Constitution, ratified the First Amendment linking the freedom of religion to the freedoms of speech, press, assembly, and petition, and thereby secured to the People of the United States the "privilege and immunity" from any action of the federal government that would compel support of the propagation of opinions — religious, scientific, political, or otherwise. To further secure this freedom, the People of the United States adopted the Fourteenth Amendment to prohibit the States from abridging this privilege and immunity of United States citizenship in that the right not to be compelled to support the opinions of others, religious, political, or otherwise, lay at the very foundation of a republican form of government. The Arizona Citizens Clean Election Act betrays this principle.

II. THE BUCKLEY RATIONALE FOR PUBLIC FINANCING OF ELECTION CAMPAIGNS IS FLAWED AND DISCREDITED.

In support of its opinion that the Arizona Citizens Clean Elections Act is constitutional, the court below relied on the Buckley Court's statement that:

> [T]he public financing scheme in that case was "a congressional effort, not to **abridge, restrict, or censor** speech, but rather to use public money to **facilitate and enlarge** public discussion and participation in the electoral process, goals vital to a self-governing people. Thus [it] **furthers, not abridges**, pertinent First Amendment values." [McComish, 605 F.3d at 731 (emphasis added).]

However, the Buckley Court provided not one concrete illustration to demonstrate that the presidential fund "furthered" rather than "abridge[d] ... First Amendment values." *See* Buckley, 424 U.S. at 92-93. Similarly, the Buckley Court failed to show how any of the operational features of the presidential campaign financing scheme would "facilitate and enlarge public discussion and participation in the electoral process." *Id.* To the contrary, Chief Justice Burger and Justice Rehnquist, both of whom dissented from the Buckley ruling, convincingly demonstrated that the presidential fund was structured to hinder and restrict — not to further, facilitate and enlarge — the public debate concerning the election of the president. *Id.*, 424 U.S. at 249-52 (Burger, C.J., concurring and dissenting); 424 U.S. at 290-94 (Rehnquist, J., concurring and dissenting).

A. The Buckley Rationale for Public Financing Is Fundamentally Flawed.

The Buckley majority found that one of Congress' goals in establishing the public funding of presidential campaigns was "to free candidates from the rigors of fundraisers." Buckley, 424 U.S. at 91. In the pursuit of that goal, the Court found it perfectly permissible for Congress to:

- "[R]egard[] public financing as an appropriate means of relieving **major-party** Presidential candidates from the rigors of soliciting private contributions." [*Id.*, 424 U.S. at 96 (emphasis added).]

- "[P]rovid[e] both **major parties full funding** and **all other parties** only a percentage of the major-party entitlement." [*Id.*, 424 U.S. at 98 (emphasis added).]

These provisions, and others like them, prompted Justice Rehnquist to write in dissent:

> Congress, of course, does have an interest in not "funding hopeless candidacies with large sums of public money...." But Congress ... has done a good deal more than that. It has **enshrined** the **Republican and Democratic Parties** in a **permanently preferred position**, and has established requirements for funding minor-party and independent candidates to which the major parties are not subject. [*Id.*, 424 U.S. at 293 (Rehnquist, J., concurring and dissenting) (emphasis added).]

Chief Justice Burger agreed, "see[ing] grave risks in legislation, **enacted by incumbents** of the major political parties, which distinctly disadvantages minor parties or independent candidacies." *Id.*, 424 U.S. at 251 (Burger, C.J., concurring and dissenting) (emphasis added).

As superficial and inadequate as the Buckley Court's First Amendment analysis was, Chief Justice Burger found an even more fundamental flaw in its treatment of the constitutionality of the public financing of elections. The Court simply did not address the question of first impression as to whether any public financing system — not just the one before the Court — could be tailored in such a way to be compatible

with the First Amendment. The Chief Justice faulted his colleagues for "treat[ing] this **novel** public financing of political activity as simply another congressional appropriation whose validity is 'necessary and proper' to Congress' power to regulate and reform elections and primaries."[12] Buckley, 424 U.S. at 247 (Burger, C.J., concurring and dissenting)

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[12] Actually, the Buckley Court relied primarily on the General Welfare Clause, as "enlarge[d] by the Necessary and Proper Clause." *See id.*, 424 U.S. at 90. And it was the Court's "expansive" view of the General Welfare Clause that enabled the Court to justify Congress in establishing a system of "public financing of Presidential elections as a means to reform the electoral process." *Id.* To reach that conclusion, the Court ruled that the General Welfare Clause empowered Congress to "legislat[e] for the 'general welfare,'" a proposition that had been rejected in United States v. Butler, 297 U.S. 1 (1936). Indeed, if Congress were so empowered, there would have been no need for the long list of enumerated powers in Article I, Section 8 of the Constitution, the General Welfare Clause having endowed the Congress with plenary power over the welfare of the whole nation. Even the Commerce Clause would be placed into a constitutional wayside if Congress had the power "to promote the general welfare." The Court's misstatement and misuse of the General Welfare Clause is especially egregious when applied to legislation the purpose of which is to "reform the electoral process" with respect to the selection of the President. Article II, Section 1 specifically vests in the state legislature the "manner" by which the president is selected, and limits the authority of Congress to setting only the "time." In McPherson v. Blacker, 146 U.S. 1 (1892), the Supreme Court ruled that the "manner" by which presidential electors are selected "belong[s] exclusively to the states under the Constitution of the United States." *Id.* at 35. In short, in its haste to justify public financing of presidential elections, the Buckley Court played fast and loose, not only in disregard of the constitutional text, but of its own precedents.

(emphasis added). Thus, the Chief Justice faulted the majority:

> for not adequately analyzing and meeting head on the issue **whether public financial assistance to the private political activity of individual citizens and parties is a legitimate expenditure of public funds.** [Buckley, 424 U.S. at 248 (Burger, C.J., concurring and dissenting) (emphasis added).]

As if answering his own question, the Chief Justice recounted Senator Howard Baker's contention that there was "something politically **incestuous** about Government financing" the political debate. *Id.* (emphasis added). And then in a burst of insight, the Chief Justice put his finger on the constitutional pulse: that there is a jurisdictional divide that — like the separation of church and state — prohibits government financial subsidies of the "political dialogue of the people — the process which begets the Government itself." *Id.* After all, as would be the case if the Government subsidized the church, with Government financing comes control and surveillance, inspections and audits, and with them — the loss of freedom itself. *Id.*, 424 U.S. at 249-50. Indeed, instead of the Government answering to the people, under any kind of public financing scheme, the people answer to the government.

Under the First Amendment, the relationship is just the opposite. In Citizens United, this Court reaffirmed the that "[s]peech is an essential mechanism of democracy, for it is the means to hold officials

accountable to the people." *Id.*, 175 L. Ed. 2d at 781. It also vindicated the views of three dissenting justices (in United States v. Automobile Workers, 352 U.S. 567, 593 (1957)) who declared that a ban on independent expenditures undermined the sovereignty of the people: "The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation." *Id.* at 785.

Thus, the Citizens United Court found that the "First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the salient political issues of our day." *Id.* at 772. And this Court was appalled by the Federal Election Commission's adoption of "568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975." *Id.* at 778. In short, as a practical matter, the Citizens United Court found that "given the complexity of the regulations and the deference courts show to administrative determinations," speakers feel compelled to "ask a governmental agency for prior permission to speak," and thus, the FEC exercises "power analogous to licensing laws implemented in 16th- and 17th-century England, laws and government practices of the sort that the First Amendment was drawn to prohibit." *Id.* at 779. *See* Brief for Appellants Congressman Ron Paul, *et al.*, pp. 32-39 (http://www.lawandfreedom.com/site/election/PaulApp.pdf) in McConnell v. FEC, 540 U.S. 93 (2003).

B. The Arizona Public Financing Scheme Is Antithetical to First Amendment Principles.

In Citizens United, this Court announced that the First Amendment was "[p]remised on mistrust of government power" (*id.*, 175 L. Ed. 2d at 782) and, quoting Davis, added that "it is dangerous business for Congress to use the election laws to influence the voters' choices," when the Constitution "confers upon voters, not Congress, the power to choose Members of the House of Representatives." Citizens United, 175 L. Ed. 2d at 789. On these two premises, Citizens United overruled Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990), and that part of McConnell v. FEC, 540 U.S. 93 (2003), relying on Austin.

Austin had been based upon opposite constitutional premises. Instead of mistrusting government power, the Austin Court mistrusted the power of private entities in the marketplace. *See* Citizens United, 175 L. Ed. 2d at 787. Instead of keeping a wary eye on the dangers of government regulation, the Austin Court focused on undoing the "unfair advantage" that some private entities had in the marketplace. *See* Citizens United, 175 L. Ed. 2d at 788. Instead of ensuring that the government remains accountable to the people, the Austin Court favored silencing the voice of millions of people seeking to hold their government accountable to them. *See* Citizens United, 175 L. Ed. 2d 191-92.

In this case, the Arizona Citizens Clean Elections Act purports to "promote freedom of speech under the

U.S. and Arizona Constitutions." But the Arizona law rests on the discredited premises of Austin. *See* Ariz. Rev. Stat. § 16-940(A) and (B). As both groups of petitioners point out in their briefs, the Arizona law rests upon the premise — rejected even in Buckley[13] — that the government has a legitimate interest to intervene into the marketplace of ideas to "level the playing field." *See* Cand. Pet., pp. 63-66; PAC Pet., pp. 8-12. But Citizens United put a halt to any such collectivist purpose, ruling that the First Amendment protects an "open marketplace" where "ideas 'may compete' ... 'without government interference.'" *Id.*, 175 L. Ed. 2d at 792. Indeed, Citizens United reaffirmed the First Amendment's "'uninhibited marketplace of ideas,'"[14] rooted in the long-standing recognition of America's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times v. Sullivan, 376 U.S. 254, 270 (1964).[15]

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[13] *See* Citizens United, 175 L. Ed. 2d at 789.

[14] *Id.*, 175 L. Ed. 2d at 779.

[15] *Accord* Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for the acceptance of an idea.").

The Arizona law commits the state to quite a different marketplace, one that is designed to be "nicer" — more "issue-oriented," "less negative" — user-friendly safe for the faint-hearted, secure in the knowledge that they have no responsibility to raise funds to support their campaign. *See* Ariz. Rev. Stat. § 16-940(A).

To attain this ideal of civility and security in political discourse, a candidate must first get a license[16] from the CCEC demonstrating that he is entitled to public funds. *See* Ariz. Rev. Stat. § 16-947. But with public funds comes government surveillance and control. At the time of "certification," the candidate becomes oath-bound to the CCEC (a) to "use all Clean Elections funding for direct campaign purposes only" and (b) to assume "the burden of proving that expenditures made by or on behalf of the candidate are for direct campaign purposes." 2 Ariz. Admin. Code § R2-20-104(C)(1) and (5). Additionally, the candidate swears an oath to keep and furnish all records required by the CCEC and permit CCEC to conduct audits and examinations. 2 Ariz. Admin. Code § R2-20-104(6) and (7). Such participating candidates are subject to civil penalties and even forfeiture of office. Ariz. Rev. Stat. § 16-942.

Such rules and regulations as these demonstrate the utter incompatibility of Arizona's 'public financing

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[16] According to Citizens United, such a license requirement imposed "at the outset" of the speech process would be invalid. *Id.*, 175 L. Ed. 2d at 780, citing Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002).

system of election campaigns. Although candidates are not required to participate in the system, they are nonetheless subject to reporting requirements that, as petitioners demonstrate in their briefs, have a serious chilling effect upon the campaign speech of such nonparticipating candidates. Under a public financing system such as Arizona's, even those candidates not licensed by CCEC must file reports of their fund raising activities, and thereby are accountable to the CCEC. *See* Ariz. Rev. Stat. § 16-952.

C. The Arizona Act Unconstitutionally Abridges Petitioners' Privileges and Immunities in Violation of the Fourteenth Amendment.

The express purpose of Arizona's Citizens Clean Elections Act is to amass public funds and inject those funds into the free marketplace of political campaigns, thereby "diminishing the influence of special-interest money," on the one hand, and "encourag[ing] citizen participation in the political process," on the other. *See* Ariz. Rev. Stat. § 16-940(A). Had the Act chosen to accomplish this purpose by restricting access to the market by "special interests," there would be no question that the Act would be unconstitutional. Even Buckley rejected the "'concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others.'" *See* Citizens United, 175 L. Ed. 2d at 788. The question raised by the Arizona law is whether the government may enhance "the voice of others," not by a direct restriction of some, but by a subsidy to those whom the government believes to be economically challenged.

According to Citizens United, it is not the restrictive means by which voices may be equalized in the political marketplace that is forbidden by First Amendment principles, it is "the **premise** that the Government has an interest 'in **equalizing** the relative ability of individuals and groups to influence the outcome of elections." *Id.*, 175 L. Ed. 2d at 789 (emphasis added). Under this view, it does not matter whether the regulation at issue excludes some speakers, or limits them in some way more than others, or whether the regulation is designed to enhance entry into the political marketplace by the government's providing them with the economic wherewithal to compete. To have freedom of speech, there must be freedom from government intrusion not only with respect to the content and identity of the speech and speaker, but freedom from government intrusion in the economic aspect of the marketplace of ideas. *See generally* Citizens United, 175 L. Ed. 2d at 788-89.

As Citizens United ruled, the First Amendment is premised upon the proposition that "[f]actions should be checked by **permitting** them all to speak.... and by entrusting the people to judge what is true and what is false." *Id.*, 175 L. Ed. 2d at 792 (emphasis added). In such a free market regime, there is no room for entrusting the Government with power to **enable** factions to enter the market, it is enough that the government is forbidden from keeping any faction out. That is the fundamental principle vindicated in Citizens United – it is the people, not the government who is the sovereign of the political marketplace, with respect not only to content of the communications, but

with respect to the communicators, themselves: "All speakers, including individuals and the media, use money **amassed** from the **economic marketplace** to fund their speech." *Id.*, 175 L. Ed. 2d at 789 (emphasis added).

As Citizens United points out, "[a]t the founding, speech was open, comprehensive, and vital to **society's definition of itself**; there were no limits on the sources of speech and knowledge." *Id.*, 175 L. Ed. 2d at 791 (emphasis added). As was true of the no-compulsion principle discussed in Part I, popular sovereignty in the marketplace was succinctly stated by Thomas Jefferson in his Bill for Establishing Religious Freedom:

> That to suffer the Civil Magistrate **to intrude his powers** into the field of **opinion** ... is a dangerous fallacy ... because he ... will make his own opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with his own: That it is time enough for the **rightful purposes of civil government** for its officers to interfere when principles break out into **overt acts** against the peace and good order: And finally that **truth** is great and **will prevail if left to herself**. [*Id.*, reprinted in 5 Founders Constitution, p. 77 (emphasis added).]

The Arizona Act does just the opposite. It assumes that unless the government actively subsidizes the electoral marketplace, "truth" does not stand a chance against "special-interests," "negative [ads]," and

"incumbents." As John Samples has argued in The Fallacy of Campaign Finance:

> Progressives are rather clear about who speaks falsely: the economically powerful and wealthy, who promote views that distort the political process. They expect that repressing conservative views will advance nonconservative views, leading in the end to different outcomes and policy making. We should not be surprised to find two leading political theorists arguing that deliberate democracy requires taxpayer financing of campaigns, which would then cause a redistribution of wealth from the advantaged to the disadvantaged. [*Id.* at p. 72.]

The First Amendment, however, does not embrace the modern progressive view, but the Madisonian view of a republican form of government as set forth in *Federalist No. 10*. *See id.* at pp. 26-31. *See also* Citizens United, 175 L. Ed. 2d at 792.

The Arizona Act betrays the principle of popular sovereignty over the political marketplace and, thereby, abridges petitioners' privileges and immunities in violation of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com

Attorneys for Amici Curiae
**Counsel of Record*

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AMICUS CURIAE BRIEF

Nos. 10-238, 10-239

In The Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, et al.,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

JOHN MCCOMISH, et al.,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF IOWA, CONNECTICUT, MARYLAND, NEW MEXICO AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

OFFICE OF THE IOWA ATTORNEY GENERAL
1305 E. Walnut Street
Des Moines, IA 50319
Tel. (515) 281-5164
Mark.Schantz@Iowa.gov

THOMAS J. MILLER
Attorney General of Iowa
MARK E. SCHANTZ*
Solicitor General
MEGHAN LEE GAVIN
Assistant Attorney General
*Counsel of Record
Counsel for Amici States

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

ADDITIONAL COUNSEL

GEORGE JEPSEN
Attorney General
State of Connecticut

DOUGLAS F. GANSLER
Attorney General
State of Maryland

GARY K. KING
Attorney General
State of New Mexico

WILLIAM H. SORRELL
Attorney General
State of Vermont

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INTERESTS OF THE *AMICI* STATES

Amici states confront significant issues of citizen confidence in both state and national governments. We wish to share our view that public financing of state elections should remain available as a tool to restore public confidence.

While specific sources of discontent vary from state to state, at the root of the problem is a sense of powerlessness among the citizenry, powerlessness in the face of large governments and other ever larger financial and business institutions. Whatever one may think of changes proposed by the Tea Party movement, its existence may be traced rather directly to the frustration of ordinary people concerning the sources of and responses to the recent financial crisis.

In Arizona, a number of well-documented cases of corruption in government spurred its citizenry to initiate this matching fund form of public financing to address a central source of public discontent. Such problems have not been unique to Arizona.

In Iowa and other states whose judiciary face one form of election or another, the courts may confront a similar lack of confidence. In states with elected judges, campaigns heavily financed by the plaintiffs' bar on the one hand, and the defense bar, insurance companies and other large organizations with important business before the courts on the other, have surely eroded public confidence in the fundamental concept of equal justice before the law. *See, e.g.*,

Caperton v. A.T. Massey Coal Co., ___ U.S. ___, 129 S. Ct. 2252 (2009); John Grisham, *The Appeal* (2008).

Iowa is among the states with a nonpartisan, merit system of judicial selection and the justices of the Iowa Supreme Court stand for periodic retention elections. From the 1960s until 2010, no Iowa justice had been voted off the high court. Indeed, there had never been what one could consider a "campaign." In 2010, all three justices standing for retention were ousted by a campaign with the latest versions of negative attack ads, financed by well over one million dollars, largely from non-Iowa sources. The response to the campaign by the organized bar and other citizens in support of the justices was clearly too little and too late. While Iowa's judges do have the First Amendment right to speak out in support of their record, solicitation of funds to spend on such speech is not only troubling as a matter of judicial ethics, it can only further erode citizen confidence in equality before the law.

Whether Iowa will follow the lead of other states that provide public financing in judicial elections is unclear, but some form of it might well be considered an appropriate means of restoring confidence. Iowa and other states with concerns about judicial elections should retain some flexibility to generate constitutional solutions to these substantial problems. *See cf.* Deborah Goldberg, Brennan Center for Justice, *Public Funding of Judicial Elections: Financing Campaigns for Fair and Impartial Courts* (2002);

American Bar Association, *Report of the Commission on Public Financing of Judicial Campaigns* (2002).

Beyond the problems of the current era and the specific issue of public financing for state elections, amici states are concerned for the larger implications for federalism presented here. This case plainly involves the citizens of a state addressing the basic structure of their government. If federalism means anything, it surely means the judgment of a state's people about how they are to be governed ought to be heard and considered by the courts of our nation.

SUMMARY OF THE ARGUMENT

Numerous states, including Arizona, have enacted schemes to publicly finance elections in order to combat the threat of actual or apparent corruption in the political process. As part of that effort, Arizona's statute provides for matching funds triggered upon an opponent's or a third party's independent expenditures. This provision does not implicate First Amendment concerns. The statute does not curtail the right of a nonparticipating candidate to solicit contributions or make expenditures. Nor does the statute place a ceiling on the amount of independent expenditures allowed by or in favor of nonparticipating candidates. Assuming a nonparticipating candidate's First Amendment right to free speech is implicated, any burden placed on the nonparticipating candidate is highly indirect and minimal. As a result,

the Act should be analyzed under the exacting scrutiny standard of review. Amici agree with the Ninth Circuit that the Act does not offend the First Amendment as Arizona's interest in combating corruption or the appearance thereof is substantially related to its public financing scheme.

ARGUMENT

I. Arizona's Citizens Clean Elections Act.

In the wake of numerous political scandals, the people of Arizona adopted the Citizens Clean Elections Act in 1998 by statewide referendum. Ariz. Rev. Stat. §§ 16-940–16-961 (2009). The Act's stated purpose is "to create a clean elections system that will improve the integrity of Arizona state government . . ." *Id.* § 16-940.

The Arizona Act, like many other similar acts, creates a multi-tiered system of public financing. A candidate who wishes to participate in the system must collect a threshold number of $5 contributions during a specified period in order to demonstrate his or her electoral viability. *Id.* § 16-946. The threshold necessarily changes depending upon the office the candidate is seeking. *Id.* § 16-950(D). Upon reaching the threshold, the participating candidate will receive a lump sum grant of funds for use in the primary campaign. *Id.* § 16-951. The amount of the lump sum is again dependent on the office sought. *Id.*

Another round of funding is available to a participating candidate if (1) his or her nonparticipating opponent spends more in the primary than the initial grant, or (2) the opponent's expenditures combined with the value of independent expenditures in opposition to his or her candidacy, or in support of his or her nonparticipating opponent, exceed the amount of the initial grant. *Id.* §§ 16-952(A), (C). If eligible, the participating candidate receives "matching funds" in the amount of the opponent's combined spending, plus the value of independent expenditures, reduced by six percent and reduced by the amount of "early contributions" raised by the nonparticipating candidate during the preprimary fundraising period. *Id.* § 16-952.

This process – the initial lump sum plus the possibility for future matching funds – is repeated during the general election. *Id.* In both the primary and general election, however, the amount of the matching funds is strictly capped. *Id.* § 16-952(E). "Matching funds" cannot exceed three times the amount of the initial grant. *Id.* In exchange for the initial lump sum and the possibility of future matching funds, participating candidates agree to forego the right to finance their campaign through private contributions. Candidates who choose not to participate in the system remain free to raise unlimited contributions from private sources, subject only to individual limits on contributions and disclosure requirements, which existed prior to the Act. Nonparticipating candidates, therefore, are free to raise

contributions far exceeding those available to participating candidates through matching fund contributions.

Six past and future candidates for political office in Arizona, who have or plan in the future to run privately-financed campaigns, along with two political action committees who fund such candidates, sued to enjoin operation of the Act's matching funds provision. The plaintiffs alleged the Act violated their rights under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Although the district court made factual findings adverse to the plaintiffs, the district court granted the plaintiffs' motion for summary judgment, issued a declaratory judgment that the matching funds provision of the Act violates the First Amendment, and enjoined its enforcement. The State of Arizona appealed. The Court of Appeals for the Ninth Circuit joined the prevailing circuit view and reversed the decision of the district court, finding no First Amendment violation. *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010); *see also N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008); *Daggett v. Comm'n on Govern. Ethics & Elec.*, 205 F.3d 445, 455 (1st Cir. 2000). This Court granted certiorari and stayed enforcement of the Act pending appeal. *McComish v. Bennett*, ___ U.S. ___, 130 S. Ct. 3408 (2010); *McComish v. Bennett*, ___ U.S. ___, 131 S. Ct. 644 (2010).

II. Arizona's System of "Matching-Fund" Public Financing Presents No First Amendment Issues.

The First Amendment precludes Congress from making laws "abridging" the freedom of speech. U.S. Const. amend. I. Since the Civil War, one or another provision of the Fourteenth Amendment has restricted state laws in a similar manner. *See, e.g., Gitlow v. New York*, 268 U.S. 652, 666, 45 S. Ct. 625, 630 (1925).

Neither the text of the First Amendment nor the history surrounding its adoption provides a comprehensive guide to its interpretation. We do know, however, that the amendment, like many other provisions of the Constitution, was designed to remedy problems or concerns presented by the colonial experience. Forms of "prior restraint," such as the licensing regimes operating for several centuries in England, were not to be utilized by the United States. *See generally* Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 Va. L. Rev. 53 (1984). Persuasive evidence indicates that the founders also objected to sedition laws, which enforced by criminal punishment the notion that the monarch was beyond criticism. In short, the central concern was *censorship* of views critical of those in positions of power. Censorial intent, then, would seem to be a key to the concept of "abridging."

There is nothing in the Arizona law that serves to suppress *any* viewpoint, much less criticism of state

government. There are no criminal laws, no licensing schemes, no authorization of injunctive relief or other civil remedies that might "chill" expression, and no restrictions on the independent expenditures of private funds in the political arena. Not directly, not indirectly. As Judge Kleinfeld so clearly stated below, "Since this law does not limit speech, it does not violate the First Amendment." *McComish*, 611 F.3d at 529 (Kleinfeld, J., concurring).

On the contrary, public financing will generally make more funds available for speech and thus create *more* speech. As Justice Scalia concludes, "Given the premises of democracy, there is no such thing as *too much* speech." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 259 (2003) (Scalia, J., dissenting in part). Or, as the first great champion of First Amendment rights, Justice Louis Brandeis, put the point, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377, 47 S.Ct. 641, 649 (1927) (Brandeis, J., concurring).

Plaintiffs below sought to invoke the First Amendment by claiming Arizona's public financing law "burdens" their exercise of protected political speech by "punishing them for making, receiving or spending campaign contributions." Amici states will demonstrate that claim is both insubstantial and unsubstantiated.

Before coming to that, however, amici would like to share their perhaps larger concern about the use of the term "burden" as a surrogate for "abridge." There are compelling reasons to believe the term "burden" is rather too squishy to perform good analytic service.

Since this Court's decision in *Citizens United v. Federal Election Commission*, ___ U.S. ___, 130 S. Ct. 876 (2010), many states have in good faith revised their campaign financial laws, including provisions relating to disclosure. A flurry of lawsuits, many from the same source, have challenged these revised laws claiming, for example, that requiring completion of a one-page disclosure form – a 10-minute task – imposes "PAC-like burdens." Such challenges have generally been rejected by the district courts, but they illustrate the difficulties in using an analytic tool that can range from spurious to serious.

It perhaps bears recalling another context in which this Court once utilized the "burden" concept – but now has largely abandoned it – namely, in dormant Commerce Clause jurisprudence. In *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671-76, 101 S. Ct. 1309, 1316-19 (1981), for example, the plurality opinion purported to engage in ad hoc balancing of incommensurates, safety and efficiency. Five justices, led by Justice Rehnquist, abandoned that approach. *Kassel*, 450 U.S. at 687-706, 101 S. Ct. at 1325-34 (Rehnquist, J., dissenting). There, as here, ad hoc balancing fails to yield "judicially manageable" standards, principles, or rules of decision, that produce reasonable consistency of results or helpful

guidance to state lawmakers. Federalism will not thrive in such an environment. It may be useful to recall the words of Justice Harlan,

> It has often been said that one of the greatest strengths of our federal system is that we have, in the forty-eight states, forty-eight experimental social laboratories. "State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation."

Roth v. United States, 354 U.S. 476, 505, 77 S. Ct. 1304, 1320 (1957) (Harlan, J., concurring in part and dissenting in part) (quoting Henry M. Hart, *The Relations Between State and Federal Law*, 54 Col. L. Rev. 489, 493 (1954)).

Plaintiffs' claim that the Arizona law "punishes" them is empty rhetoric, unsupported by either logic or evidence. There is nothing in the statute that purports to regulate independent expenditures and no basis for thinking that was the lawmakers' – the people of Arizona – intention. Intent would be required to make "punish" a remotely apt verb. Plaintiffs' evidence also falls short of demonstrating any "unintended consequence" of the law that negatively affects independent expenditures. Indeed, what evidence was produced tended to support the intuition that adding public funds to some campaigns would increase the total money available for political speech.

As Judge Kleinfeld so perceptively noted, the plaintiffs' claims reduce to a concern that their election strategies might need revision. *McComish*, 611 F.3d at 528 (Kleinfeld, J., concurring). But that is not a First Amendment problem. *Id.* The First Amendment protects the expression of ideas; First Amendment jurisprudence is and ought to be entirely neutral concerning which candidates win elections.

Amici would also call this Court's attention to Judge Coffin's well-reasoned conclusion in *Daggett*. Judge Coffin determined:

> Moreover, the provision of matching funds does not indirectly burden donors' speech and associational rights. Appellants misconstrue the meaning of the First Amendment's protection of their speech. They have no right to speak free from response – the purpose of the First Amendment is "'to secure the "widest possible dissemination of information from diverse and antagonistic sources."'" . . . The public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures. These facts allow us comfortably to conclude that the provision of matching funds based on independent expenditures does not create a burden on speakers' First Amendment rights.

Daggett, 205 F.3d at 464 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49, 96 S. Ct. 612, 649 (1976)); *see also*

Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 14, 106 S. Ct. 903, 910 (1986) (holding there exists no right to speak "free from vigorous debate").

III. Were the Matching Funds Provision to be Considered a "Burden" on Plaintiffs' Speech, It Does Not Violate the First Amendment.

Assuming, *arguendo*, that Arizona's law does implicate First Amendment concerns, the Court must first determine what level of scrutiny applies to the Act's matching funds provision. Amici assert that the proper standard is "exacting" or intermediate scrutiny.

A. Exacting Scrutiny Applies to the Matching Funds Provision of Arizona's Citizens Clean Elections Act as it is at Most an Indirect Burden on Fully-Protected Speech.

Determining which level of scrutiny applies to a law which implicates the First Amendment involves a two-step analysis, dictated by the type of speech implicated and the degree of burden placed on that speech. The result is three-fold: (1) laws that place a severe burden on fully protected speech are subject to strict scrutiny; (2) laws that place a minimal burden on fully protected speech are subject to intermediate scrutiny; and (3) laws that apply to speech and associational freedoms that are not fully protected are subject to intermediate scrutiny regardless of the

level of burden. *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934, 938 (9th Cir. 2002); *see also Citizens United*, ___ U.S. ___, 130 S. Ct. at 914 (applying intermediate or "exacting" scrutiny to disclaimer and disclosure provisions even though the act infringed upon fully protected speech because such provisions "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking"); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386-89, 120 S. Ct. 897, 903-05 (2000); *Buckley*, 424 U.S. at 20-21, 96 S. Ct. at 635-36.

Where no one's speech is curtailed, the standard for constitutionality is one of "exacting" or intermediate scrutiny. The standard is whether the public financing scheme burdens the political opportunity of a candidate in a way that is unfair or unnecessary. *Green Party of Conn. v. Garfield*, 616 F.3d 213, 228 (2d Cir. 2010). The substantive question in this appeal, therefore, is whether the Act's matching funds provision amounts to an undue burden. Amici asserts that even under the most robust interpretation it does not.

First, any infringement or burden on the non-participating candidate's right to free expression is highly indirect. Contrary to Plaintiffs' assertions, the Act does not directly limit or curtail a nonparticipating candidate's speech. In fact, it places no restrictions on the nonparticipating candidate's speech. Nonparticipating candidates are free to raise by contributions as many funds as they can and expend whatever funds they deem necessary throughout the

course of the primary and general election. At most, such candidates are indirectly affected – the Act provides for more funds and presumably more speech by someone other than the nonparticipating candidate. *See Buckley*, 424 U.S. at 21, 96 S. Ct. at 636 (applying intermediate scrutiny to campaign contributions in part because "the transformation of contributions into political debate involves speech by *someone other than the contributor*") (emphasis added).

At its root, therefore, Petitioners are claiming that the *potential* exercise of *another's* First Amendment right chills the exercise of their own right to free speech. *See infra* part II. Such a claim is both unprecedented and highly attenuated. *See Citizens United*, ___ U.S. at ___, 130 S. Ct. at 914 ("Disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' . . . 'and do not prevent anyone from speaking. . . .' The Court has subjected these requirements to exacting scrutiny, which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' government interest.") (internal citations omitted).

This attenuation is illustrated in *Buckley*. In *Buckley*, the Court analyzed whether the *denial* of public financing violated Equal Protection. *Buckley*, 424 U.S. at 94, 96 S. Ct. at 670. The Court reasoned that access to public financing need only serve an important governmental interest and not unfairly or unnecessarily burden the political opportunity of any party or candidate. *Id.* at 95, 96 S. Ct. at 671. Less

searching scrutiny was justified as the denial of public financing was merely a "denial of the *enhanced* opportunity to communicate with the electorate" and is not an undue burden per se – as potential candidates remained free to raise money from private sources. *Id.* at 95-96, 96 S.Ct. at 671 (emphasis added). Applying that same analysis to the Petitioners' First Amendment claim, it is evident that Petitioners' claim does not amount to a severe burden on their First Amendment rights. If the *direct* denial of access to a public financing scheme is not a severe burden, the *indirect* grant of access to another cannot constitute a severe burden. In other words, granting the opportunity for enhanced speech to your opponent because your speech has already been enhanced is not an undue burden.

Second, any burden on the nonparticipating candidate stemming from the matching funds provision is minimal. Petitioners make no allegation that the allocation of the initial lump sum chills their First Amendment rights. Such an assertion is foreclosed by *Buckley*. Nor have Petitioners challenged the *amount* of the initial lump sum payment. Arizona remains free to increase the amount of the initial lump sum and could increase said amount to the current total cap of initial plus matching funds without offending the First Amendment. Petitioners' argument, therefore, can be distilled to a challenge of the *timing* of the State's public financing and not a challenge to the financing itself. The timing of the matching funds

is not unduly burdensome to the nonparticipating candidate.

Under Arizona's scheme, it is the nonparticipating candidate who is empowered, not the participating candidate. Unlike the initial lump sum grant, a participant's access to and the timing of matching funds is wholly beyond their control. It is the nonparticipating candidate who decides whether to exceed the contribution/expenditure threshold. It is also the nonparticipating candidate who decides when to exceed the contribution/expenditure threshold. Presumably, nonparticipating candidates could use this empowerment for their own benefit and to the detriment of their participating opponents.

Simply because the Arizona scheme provokes a strategic decision on the part of the nonparticipating candidate, however, does not make the Act unduly burdensome. If that were enough, all public financing schemes would contravene the First Amendment because their very existence provokes a strategic decision. This Court, however, has declared that this type of decision does not offend the First Amendment. In *Buckley* the Court noted, "Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forego private fundraising and accept public funding." *Buckley*, 424 U.S. at 57 n.65, 96 S. Ct. 653 n.65. Furthermore, the plaintiffs' claim assumes that the nonparticipating candidate's decision to accept contributions or make expenditures is not already a strategic decision regardless of the existence of the matching funds

provision. When and how a candidate speaks during the course of an election is always a strategy decision. At most, the Arizona Act informs this decision, it does not dictate it.

The record developed before the district court substantiates this claim. Although the plaintiffs assert that the scheme has a "chilling effect" on the exercise of their First Amendment rights, the district court found the opposite. The district court concluded that it was "illogical to conclude that the Act creating more speech is a constitutionally prohibited 'burden' on Plaintiffs." The district court based this determination in large part on the Plaintiffs' own testimony, which failed to reveal a *single* instance where a candidate or PAC had refused to accept a contribution or expend funds. The mere fact that the Plaintiffs were aware of the matching funds scheme is not enough of a burden to invalidate the statute.

This Court, moreover, has already rejected the notion that facilitating the speech of some will necessarily curtail the speech of others. In *Citizens United*, Justice Kennedy noted, "This [idea] is inconsistent with any suggestion that the electorate will refuse 'to take part in democratic governance' because of additional speech made by a corporation or any other speaker." *Citizens United*, ___ U.S. at ___, 130 S. Ct. at 910 (internal citations omitted). Any claim of a chilling effect without supporting evidence, therefore, is purely speculative. Speech is not finite. *See Daggett*, 205 F.3d at 464 (noting there is "no right to speak free from response – the purpose of the First

Amendment is to secure the widest possible dissemination of information from diverse and antagonistic sources").

Third, in evaluating the degree of burden implicated by the Act it is important to remember what the Act is not. It is not an outright or categorical ban on speech based on the speaker's identity. *See Citizens United*, ___ U.S. at ___, 130 S. Ct. at 876. It is not a discriminatory scheme of campaign financing. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 128 S. Ct. 2759 (2008). It is not a direct limitation on the nonparticipating candidate's right to speak or make expenditures. *Buckley*, 424 U.S. at 1, 96 S. Ct. at 612. As a result, the challenged Act does not create a preferential system under which the right to speak is taken from some so that it may be given to others. The Act is designed to *maximize* potential speech.

Contrary to the district court's view, the Ninth Circuit correctly distinguished *Davis*. In *Davis*, this Court invalidated the so-called Millionaires' Amendment of the Bipartisan Campaign Reform Act (BCRA), which increased campaign contributions based on an opponent's expenditure of his or her personal finances. *Davis*, 554 U.S. at 724, 128 S. Ct. at 2759. First, the Millionaires' Amendment served no government interest. *Id.* at 738, 128 S. Ct. at 2771; *see also Day v. Holahan*, 34 F.3d 1356, 1361 (8th Cir. 1994) (invalidating Minnesota's campaign financing scheme because it served no governmental purpose). As the Court recognized in *Buckley*, a candidate's expenditure of personal funds actually furthers, not hinders, the

government's interest in preventing corruption or the appearance of corruption. *Buckley*, 424 U.S. at 52-53, 96 S. Ct. at 651. Attaching a statutory consequence to "the vigorous exercise of [Davis'] right to use personal funds to finance campaign speech," therefore, presumably would have failed even under rational basis review. *Davis*, 554 at 739, 128 S. Ct. at 2772. Unlike *Davis*, it is undisputed that public financing schemes, like the one at issue here, serve the government's compelling interest in preventing corruption.

Second, the statutory choice presented in *Davis* was illusory. Davis had the option either (1) to curtail his First Amendment privileges and be treated equitably, or (2) to exercise his First Amendment rights and consent to a discriminatory contribution scheme. The choice presented by the Act at issue here is not illusory. The Act does not ask nonparticipating candidates to make Solomon's choice — plaintiffs are not asked to forego certain constitutional privileges in order to exercise others. Instead, like the system at issue in *Buckley*, candidates in Arizona have the right to accept or reject public financing. Those that reject public financing retain the right to raise and spend as much money as they desire.

Because the Act does not place a ceiling on a nonparticipating candidate's expenditures or otherwise amount to an undue burden, the Act is subject only to intermediate scrutiny. *See Leake*, 524 F.3d at 427 (applying intermediate scrutiny to matching funds statute); *Daggett*, 205 F.3d at 455 (same).

B. Arizona's Interest in Preventing Corruption and the Appearance of Corruption is Substantially Related to the Act's Matching Funds Provision.

In order to survive intermediate scrutiny there must be a substantial relation between the Act's matching funds provision and a sufficiently important government interest. Amici asserts that the Ninth Circuit correctly determined that the Act's matching funds provision survives intermediate scrutiny.

This Court has repeatedly "recognized a 'sufficiently important' governmental interest in 'the prevention of corruption and the appearance of corruption'" in the political process. *Citizens United*, ___ U.S. at ___, 130 S. Ct. at 901 (quoting *Buckley*, 424 U.S. at 25, 96 S. Ct. at 638; *Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 456, 121 S. Ct. 2351, 2366 (2001); *Nixon*, 528 U.S. at 387-88, 120 S. Ct. at 905. This Court has also recognized that public financing schemes are substantially related to achieving this end. In *Buckley*, the Court reasoned that a candidate lacking immense personal or family wealth would necessarily be dependent on private contributions in order to effectively communicate his or her message to the electorate. *Buckley*, 424 U.S. at 26, 96 S. Ct. at 638. "To the extent that large contributions are given to secure a political quid pro quo from the current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.* at 26-7, 96 S. Ct. at 638. So, too, the appearance of

impropriety associated with large contributions. *Id.* Public financing of elections negates the potential for actual or apparent corruption by eliminating the participating candidate's dependence on large, private contributions. *Id.* at 96, 96 S. Ct. at 671 (holding "[i]t cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest").

As a result, states have a substantial interest, if not a compelling one, in enticing candidates to participate in public financing. *See Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996). The Act achieves this end while maintaining fiscal prudence by balancing the need to provide incentives for participation with the need to make the system affordable. If Arizona limited its public financing scheme to an initial lump sum payment, the Act could potentially overly finance some participating candidates making the scheme less financially-viable. Without a tie to the expenditures in a given race, moreover, the state could potentially underfund participating candidates thereby undercutting the candidates' electoral viability. The latter result would likely deter participation by other candidates in the future. The existence of public financing is of little use unless it is affordable and the state makes participation reasonably attractive.

Because Arizona has a compelling interest in eliminating corruption and the appearance of corruption, which is furthered by its public financing

scheme and matching funds provision, the Act does not offend the First Amendment.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

MARK E. SCHANTZ*
Solicitor General

MEGHAN LEE GAVIN
Assistant Attorney General

*Counsel of Record
Counsel for Amici States

AMICUS CURIAE BRIEF

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In The
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ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ET AL.,
Petitioners,

v.

KEN BENNETT, IN HIS OFFICIAL CAPACITY
AS ARIZONA SECRETARY OF STATE, ET AL.,
Respondents.

JOHN MCCOMISH, ET AL.,
Petitioners,

v.

KEN BENNETT, IN HIS OFFICIAL CAPACITY
AS ARIZONA SECRETARY OF STATE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* SUPPORTING PETITIONERS

DEBORAH J. DEWART
620 E. SABISTON DRIVE
SWANSBORO, NC 28584
(910)326-4554
debcpalaw@earthlink.net

JAMES L. HIRSEN
Counsel of Record
505 S. VILLA REAL DRIVE
SUITE 208
ANAHEIM HILLS, CA 92807
(714)283-8880
hirsen@earthlink.net

Counsel for Amicus Curiae

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Becker Gallagher · Cincinnati, OH · Washington, D.C · 800.890.5001

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INTEREST OF AMICUS[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Ninth Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation*, released in 2010.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment has its "fullest and most urgent application" to speech uttered during a political campaign. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). This core political speech embraces both issues and candidates. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("*Buckley*").

Independent groups are often passionate about particular issues and work to help elect candidates who share their positions. When the government squelches independent expenditures, even without imposing a direct ceiling on what may be spent, it is like leaving someone "free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Buckley* 424 U.S. at 19 n. 18. For independent advocacy groups as well as candidates, Arizona's matching funds trigger "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. In spite of viewpoint neutrality, the program stifles speech "at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). The law also burdens the right to associate—and even issue advocacy may fall within its clutches.

As applied to independent associations, the matching funds provision serves no legitimate state interest—let alone the compelling purpose mandated by strict scrutiny. These groups pose no threat of quid pro quo corruption—they are *independent*. And this Court has found it improper for government to equalize campaign speech and thus "level the playing field."

ARGUMENT

I. PUBLIC FUNDING SCHEMES ARE PATENTLY UNCONSTITUTIONAL AS APPLIED TO INDEPENDENT GROUPS.

Small independent groups can inadvertently fall prey to complex campaign finance regulations. *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009) (small church in Montana had to engage in protracted litigation to escape regulation as political committee); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 284-285 (4th Cir. 2008) ("*NCRTL v. Leake*") (vague, overly broad "political committee" definition threatened to chill issue advocacy); *id.* at 291 (striking down limits on contributions to independent groups). The "matching funds" trigger is the latest link in a chain of challenges to the First Amendment rights of independent groups.

Public funding programs strangle independent speech. These schemes raise grave constitutional concerns even for *candidates*—who may choose whether to participate. Although some courts have upheld public funding, "such benefits could conceivably snowball into a coercive measure upon a non-participating candidate. *See Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993) (There is a point at which [public financing] incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive.)." *Gable v. Patton*, 142 F.3d 940, 948 (6th Cir. 1998) (internal quotation marks omitted).

The *Buckley* dissent highlighted serious deficiencies in public campaign funding, including the long-

standing concern that "the use of funds from the public treasury to subsidize political activity of private individuals would produce substantial and profound questions about the nature of our democratic society." *Buckley*, 424 U.S. at 247 (Burger, C.J., dissenting). It may not be appropriate for the government "to finance a segment of the political debate itself." *Id.* at 248 (Burger, C.J., dissenting). It may even be "politically incestuous" for government to finance and eventually regulate the procedures by which its own representatives are selected. *Id.*, quoting Senator Howard Baker's remarks during debate on the legislation at stake in *Buckley*. 120 Cong. Rec. S8202 (1974). The "inappropriateness of subsidizing...the actual political dialogue of the people" may be "as basic to our national tradition as the separation of church and state" [*Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)] or "the separation of civilian and military authority" [*Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953)]. *Buckley*, 424 U.S. at 248-249 (Burger, C.J., dissenting).

When the government funds political speech, it "tak[es] the right to speak from some and giv[es] it to others." *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010). If an independent group spends money during a campaign, its voice is muffled by state funding of opposing voices. That financing "deprives the [group] of the right to use speech to strive to establish worth, standing, and respect for [its] voice" and "deprive[s] the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Id.*

The matching funds provision "imposes an unprecedented penalty on any [association that]

robustly exercises [its] First Amendment right[s]." *Davis v. FEC*, 128 S. Ct. 2759, 2771 (2008). Speech requires money. Arizona's law deters independent spending—a form of protected speech. *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994); *Scott v. Roberts*, 612 F.3d 1279, 1284 (11th Cir. 2010) ("Scott explains that he has a constitutional right to avoid providing his opponents 'with a competitive advantage and in turn permitting them to counteract and diminish [his] campaign speech.'")

When speakers spend money to persuade voters, they "presuppos[e] that the people have the ultimate influence over elected officials." *Citizens United*, 130 S. Ct. at 910. In *Citizens United*, this Court affirmed that "We The People...are sovereign" and thus it is "vitally important...that all channels of communications be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community." *Id.* at 901, citing *United States v. Auto. Workers*, 352 U.S. 567, 593 (1957) (dissenting opinion of Douglas, J., joined by Warren, C. J., and Black, J.). *Citizens United* catalogued hypothetical examples of nonprofit advocacy groups whose speech would be restrained by the broadcast electioneering restraints at issue: Sierra Club (disapproving of Congressman who favors logging); National Rifle Association (urging vote against incumbent senator who supports handgun ban); American Civil Liberties Union (website urging vote for candidate who defends free speech). *Citizens United*, 130 S. Ct. at 897. Groups like these need breathing space to reach the voting public with their concerns.

II. THE STATUTE BURDENS THE ASSOCIATION RIGHTS OF INDEPENDENT ADVOCACY GROUPS.

Independent groups emerge when people band together to pool their resources and amplify the effect of their individual voices. Association enhances effective advocacy. *Buckley*, 424 U.S. at 15; *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). It amplifies "the voices of those of modest means" that might otherwise be drowned out by wealthier speakers who can afford expensive media. *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 495 (1985); *see also NCRTL v. Leake*, 525 F.3d at 295 ("[I]ndependent expenditure political committees offer an opportunity for ordinary citizens to band together to speak on the issue or issues most important to them...they allow ordinary citizens to receive the benefits that result from economies of scale in trying to convince the electorate of a political message."); *Citizens Against Rent Control/Coalition for Fair Hous. v. City of Berkeley, Cal.*, 454 U.S. 290, 294 (1981) ("By collective effort individuals can make their views known, when, individually, their voices would be faint or lost.").

Political association encompasses the right to pool money. "The right to join together 'for the advancement of beliefs and ideas'...is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Buckley*, 424 U.S. at 65-66. Arizona's statutory scheme muffles speech and infringes the rights of associations because their political expenditures will trigger public funding of candidates and views they oppose. The North Carolina Right to Life would not wish to trigger

funding for a pro-choice candidate—nor would an abortion rights group want to facilitate financing for a pro-life candidate's campaign. The matching funds provision silences independent voices. As in *Buckley*, "[t]he Act's constraints on the ability of independent associations...to expend resources on political expression 'is simultaneously an interference with the freedom of [their] adherents,' *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion)." *Buckley*, 424 U.S. at 22; *see also Day v. Holahan*, 34 F.3d at 1360 n. 3.

Political association is a core First Amendment right (*Rutan v. Republican Party*, 497 U.S. 62, 69 (1990)), as this Court has recognized for decades:

> "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. *NAACP v. Button*, 371 U.S. 415, 430; *Bates v. Little Rock*, 361 U.S. 516, 522-523 (1960); *NAACP v. Alabama*, 357 U.S. 449, 460-461. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

Elrod v. Burns, 427 U.S. 347, 356-357 (1976). Association is "closely allied to freedom of speech" and is "a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960).

Arizona's interference with association rights must be strictly scrutinized. "In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.' *NAACP v. Alabama*, *supra*, at 460-461." *Buckley*, 424 U.S. at 25. This is even true for contributions limits, which are more easily sustained than restrictions on expenditures. These must be "closely drawn" to serve a "sufficiently important interest" if they significantly interfere with associational rights. *Davis*, 128 S. Ct. at 2772, citing *McConnell v. FEC*, 540 U.S. 93 (2003). In the sphere of contributions, individual association members at least remain free to make their own contributions even if the corporation cannot do so. *FEC v. Beaumont*, 539 U.S. 146, 163 n. 8 (2003). But when expenditures are at stake, effective advocacy mandates the ability to pool resources.

In the past, this Court restricted the ability of corporations to participate in the political process, "recogniz[ing] a state interest in combating a broader form of corruption"—"the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." Esenberg, Richard M., *Article: The Lonely Death of Public Campaign Financing*, 33 Harv. J.L. & Pub. Pol'y 283, 302 (2010) ("*Lonely Death*"), quoting *McConnell v. FEC*, 540 U.S. 93 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)). The Court carved out a narrow exemption for certain nonprofit organizations in *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 263-264 (1986) ("*FEC v. MCFL*"). MCFL successfully brought an as-applied challenge, because it was formed solely to

advocate political ideas and not to accumulate wealth. Its resources reflected the support of its own donors rather than economic success in the marketplace. *Lonely Death*, 33 Harv. J.L. & Pub. Pol'y at 295; *FEC v. MCFL*, 479 U.S. at 260-261. But in spite of the exemption crafted for MCFL-type corporations, this Court in *Austin* upheld a Michigan statute that prohibited the use of corporate funds for express advocacy—even as applied to a nonprofit membership corporation. The Chamber of Commerce, unlike MCFL, was not formed for strictly political purposes and it accepted contributions from for-profit corporations. *Lonely Death*, 33 Harv. J.L. & Pub. Pol'y at 295-296.

But just months ago, this Court loosened the stranglehold on corporations, overruling *Austin* and portions of *McConnell*. "First Amendment protection extends to corporations." *Citizens United*, 130 S. Ct. at 899. In making this decree, the Court revived its judicious reasoning of prior years:

> Corporations and other associations, like individuals, contribute to the "discussion, debate, and the dissemination of information and ideas" that the First Amendment seeks to foster.

Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 8 (1986) ("*PG&E*"), quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) ("*Bellotti*"). *Bellotti's* restatement of the issue is worth repeating:

> We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party

> seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect. We hold that it does.

Id. at 776. If the speakers had been *individuals* rather than *corporations*, "no one would [have] suggest[ed] that the State could silence their proposed speech." *Id.* No matter who the speaker is—individual or association—the government may not dictate the appropriate subjects or the speakers who may address the public. *Id.* at 784-785; *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972). "If a legislature may direct business corporations to 'stick to business,' it also may limit other corporations—religious, charitable, or civic—to their respective 'business' when addressing the public." *Bellotti*, 435 U.S. at 784-785. The First Amendment forbids such censorship, which could squelch "an informal neighborhood group that solicits contributions and spends money on a Presidential election" as easily as it could regulate a wealthy, professionally managed corporation. *FEC v. Nat'l Conservative PAC*, 470 U.S. at 496.

Association, like most other constitutional rights, is "not absolute." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 454 (1st Cir. 2000) ("*Daggett*"). But it is short-sighted to claim that the association rights of independent groups are "not burdened" merely "because their names and messages

are not associated—in any way indicative of support—with the candidate they oppose." *Id.* at 465. Although not as direct as a ceiling on expenditures or a fine or criminal sanction, the matching funds trigger deters vigorous advocacy—it "abridges expression that the First Amendment was meant to protect." *Bellotti*, 435 U.S. at 776. Independent groups expend funds at their peril, knowing that every dollar spent to advocate for their side of a campaign will result in a dollar—or two or three—to fund the opposition.

III. THIS CONTENT-BASED STATUTE IS FATALLY OVERBROAD BECAUSE IT ENCOMPASSES INDEPENDENT EXPENDITURES THAT POSE NO THREAT OF CORRUPTION.

Independent advocacy is "expression 'at the core of our electoral process.'" *FEC v. MCFL*, 479 U.S. at 251, quoting *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (quoting *Williams v. Rhodes*, 393 U.S. at 32); see also *FEC v. National Conservative PAC*, 470 U.S. at 493. Arizona has imposed a content-based restriction on this core speech that captures only one side of a pending campaign and is far too broad in scope—even if it did serve the asserted government interest in eliminating corruption.

A. The Statute Is Content-Based Because It Burdens Only One Side Of The Political Debate.

Ariz. Rev. Stat. § 16-952 singles out political expression that supports a privately financed candidate or opposes a publicly financed candidate—contrary to this Court's recent edict "that

government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010), quoting *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002). Content-based restrictions are "presumptively invalid." *United States v. Stevens*, 130 S. Ct. at 1584; *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817 (2000); *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). The government must show that the law is "narrowly tailored to promote a compelling Government interest"—even if it can be "described as a burden rather than outright suppression." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. at 826.

These principles are even more compelling where core political speech is involved. As the Eighth Circuit observed in striking down a similar law, the statute "singles out particular political speech...for negative treatment that the state applies to no other variety of speech." *Day v. Holahan*, 34 F.3d at 1360-61. The *Day* Court noted that "[i]ndependent expenditures of any other nature, supporting the expression of any sentiment other than advocating the defeat of one candidate or the election of another, do not trigger the statute's limit-increasing and money-shifting provisions." *Id.* at 1361. The same is true of Ariz. Rev. Stat. § 16-952. "This kind of favoritism goes well beyond the fundamentally content-neutral subsidies that [this Court] sustained in *Buckley* and in *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983)." *PG&E*, 475 U.S. at 14-15.

Content-based restrictions on political speech violate the established principle that "the State cannot advance some points of view by burdening the

expression of others." *PG&E*, 475 U.S. at 20. *See also Buckley*, 424 U.S. at 48-49, *Bellotti*, 435 U.S. at 785-786. Arizona advances the campaign speech of publicly financed candidates by burdening the expression of privately financed candidates and the independent groups that support them. As one of the Petitioners observes, an independently financed ad *against* a privately financed candidate will trigger matching funds—but an ad in *favor* of that same candidate will not. Opening Brief of Petitioner Arizona Free Enterprise Club's Freedom Club PAC, 43. The content—opposing or favoring a particular candidate—is the critical factor.

B. Independent Expenditures Pose No Threat Of Corruption.

Far from generating corruption, independent advocacy may actually help guard against it.

> [G]eneral evidence of corruption hardly justifies the specific regulation of independent expenditure committees. In fact, some may argue that free political speech is the best remedy for, rather than a cause of, corruption. Indeed, independent expenditure committees may be the very ones to take up the lance against corrupt public practices.

NCRTL v. Leake, 525 F.3d at 306.

This Court "held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC*

v. Nat'l Conservative PAC, 470 U.S. at 496-497. In *Buckley*, that solitary state interest could not salvage a ceiling on independent expenditures—which "heavily burden[ed] First Amendment expression." *Buckley*, 424 U.S. at 45, 48.

Buckley's ruling applies with equal force to independent associations. This Court confirmed "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption"—rejecting dicta in a *Bellotti* footnote suggesting that "a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office." *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010), citing *Bellotti*, 435 U.S. at 788 n. 26.

Restricting independent expenditures does not serve the government's interest in halting corruption because "an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more." *FEC v. Nat'l Conservative PAC*, 470 U.S. at 498. The connection is too tenuous. Since there is neither prearrangement nor coordination with a candidate or campaign agent, there is "substantially diminished potential for abuse" and little danger that the expenditures will be paid "as a *quid pro quo* for improper commitments from the candidate." *Citizens United*, 130 S. Ct. at 908, quoting *Buckley*, 424 U.S. at 47.

This Court's analysis of expenditures differs from its treatment of political *contributions*. *Citizens United*, 130 S. Ct. at 909. ("[C]ontribution limits...unlike limits on independent expenditures,

have been an accepted means to prevent *quid pro quo* corruption."); *Buckley*, 424 U.S. at 47 ("Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive."); *FEC v. MCFL*, 479 U.S. at 259-260 ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 195 (1981) ("[T]he 'speech by proxy' that CMA seeks to achieve through its contributions to CALPAC [a multicandidate political committee receiving contributions from multiple sources] is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection.")

The constitutionality of expenditure limitations varies depending on the source and circumstances. In *Davis*, this Court rejected limits on a candidate's own funds, "reason[ing] that reliance on personal funds *reduces* the threat of corruption, and therefore [the statute], by discouraging use of personal funds, disserves the anticorruption interest." *Davis*, 128 S. Ct. at 2773; *see also Scott v. Roberts*, 612 F.3d at 1292 (accord); *Green Party of Conn. v. Garfield*, 616 F.3d 213, 245 (2d Cir. 2010) (accord). However, expenditures of a political party, coordinated with a candidate, are not truly independent and may be limited even though "limits on political expenditures deserve closer scrutiny than restrictions on political contributions." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001).

But truly independent expenditures—even for express advocacy—cannot jump the constitutional hurdle. In the case of a PAC supporting Reagan's

presidential campaign, this Court struck down limits on independent group expenditures—even those of a nonprofit corporation formed primarily to influence elections. *FEC v. Nat'l Conservative PAC*, 470 U.S. at 493. "The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." *Id.* at 498. The Court explained that the criminal sanctions in question applied *only* where political views were propagated using money—"much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system." *Id.* at 493.

A particular burden falls on independent groups. In *FEC v. MCFL*, 479 U.S. 238, this Court sustained as-applied challenge to the "Special Newsletter" of a non-profit group that did not accept contributions from business corporations, even though it fell within the statutory definition of "express advocacy." The Court noted the integral relationship between candidates and the issues independent groups typically advocate:

> [The] distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.

FEC v. MCFL, 479 U.S. at 249, quoting *Buckley*, 424 U.S. at 42.

The Fourth Circuit explained that "independent expenditure political committees do not serve as mouthpieces for political candidates" but rather "offer an opportunity for ordinary citizens to band together to speak on the issue or issues most important to them." *NCRTL v. Leake*, 525 F.3d at 295. The Circuit Court cited the example of a hypothetical group, "Farmers for Fairness," sponsoring an ad for the hog industry financed by hog producers and suppliers. If that ad "was successful in convincing voters to oust their targeted candidates it can hardly be termed corruptive." *Id.* at 294. In fact, "[i]f robust advocacy alone [were] sufficient to demonstrate corruption, the term corruption would cease to have meaning." *Id.*

C. Extending The Matching Funds Trigger To *Independent* Expenditures Renders The Statute Fatally Overbroad.

Arizona's matching funds statute (Ariz. Rev. Stat. § 16-952) is overbroad because "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 130 S. Ct. at 1587, quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, n. 6 (2008) (internal quotation marks omitted). Even if the statute were constitutional as applied to candidates—a questionable assumption—its inclusion of independent expenditures fails to serve the state's interest in preventing corruption—the *only* interest this Court has recognized as legitimate. Even if some large associations held multimillion dollar war chests and perhaps posed a

potential for corruption, the statute is "a fatally overbroad response to that evil" because "its terms [Ariz. Rev. Stat. § 16-901(14)] apply equally to informal discussion groups that solicit neighborhood contributions to publicize their views about a particular Presidential candidate." *FEC v. Nat'l Conservative PAC*, 470 U.S. at 498. Moreover, there is a "realistic danger" the statute "will significantly compromise recognized First Amendment protections of parties not before the Court" (*Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984))—the many nonprofit advocacy groups that participate in political campaign debates in order to advance particular issues.

IV. THE STATUTE ATTEMPTS TO LEVEL THE ELECTORAL PLAYING FIELD.

Arizona law impermissibly restricts the speech of independent groups in order to equalize the voices of the candidates—a purpose this Court has soundly rejected. "Most such [asymmetrical public financing] systems cannot be reconciled with *Davis*'s suggestion that measures designed to 'counter' the constitutionally protected speech of one side of a campaign are unconstitutional burdens upon that speech." *Lonely Death*, 33 Harv. J.L. & Pub. Pol'y at 289. Even the title of Ariz. Rev. Stat. § 16-952—"Equal Funding of Candidates"—exposes its illicit purpose.[2]

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[2] The purpose of the Act is transparent. See Opening Brief of Petitioner Arizona Free Enterprise Club's Freedom Club PAC, 38, citing JA 95, 106, 228-29, 236, 240, 248, 263-4, 308, 457, 809-54, 840, 854-55; Opening Brief of Petitioner McComish, 66, citing JA 95, 106, 107, 109, 110, 213, 228-29, 236, 240, 248, 257, 263-64,

Buckley long ago rejected the equalization of political voices as a rationale for restricting expenditures: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48-49. In *Davis*, this Court "reasserted *Buckley's* long-neglected declaration that equalizing interests are 'wholly foreign' to the First Amendment." Gedge, Samuel, *Recent Development: "Wholly Foreign to the First Amendment": The Demise of Campaign Finance's Equalizing Rationale in Davis v. FEC, 128 S. Ct. 2759 (2008)*, 32 Harv. J.L. & Pub. Pol'y 1197, 1209 (2009) ("*Wholly Foreign*"); *see Davis*, 128 S. Ct. at 2773 ("[I]n *Buckley*, we held that '[t]he interest in equalizing the financial resources of candidates' did not provide a 'justification for restricting' candidates' overall campaign expenditures, particularly where equalization 'might serve...to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.' *Buckley*, 424 U.S., at 56-57.")

Between *Buckley* and *Davis*, scholars and litigants have proposed a variety of equalizing theories suggesting that the anti-corruption rationale is not the only state interest that justifies campaign finance regulations. *Wholly Foreign*, 32 Harv. J.L. & Pub. Pol'y at 1197 n. 4. Beginning in the mid-1980s, the Court "appeared amenable to stretching the anticorruption rationale almost beyond recognition, at times

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308, 457, 809-54, 885. Respondent CCEC, Clean Elections proponents, and an administrative law judge all openly acknowledge that the Act was designed to "level the playing field."

implicitly acknowledging an equalizing interest in campaign finance jurisprudence." *Id.* at 1198.

Shortly after *Buckley*, the *Bellotti* Court expressed alarm that a statute's suppression of speech "suggest[ed] an attempt to give one side of a debatable public question an advantage in expressing its views to the people." *Bellotti*, 435 U.S. at 785. This concern "play[ed] a central role in the outcome of *Davis* three decades later." *Wholly Foreign*, 32 Harv. J.L. & Pub. Pol'y at 1204. Meanwhile, the Court strayed from *Buckley's* decree in *FEC v. MCFL*, 479 U.S. 238—sustaining the as-applied challenge of a nonprofit corporation yet finding that "concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas." *FEC v. MCFL*, 479 U.S. at 257. Four years later, the concentrated wealth rationale reached its apex in the now-overruled *Austin*, a case that seems to endorse an equalizing rationale. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum. L. Rev. 1369, 1369 n.1 (1994) (asserting that the Court in *Austin* "defined 'corruption' in a way that made it essentially equivalent to inequality"); Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 Wm. & Mary L. Rev. 587, 628 (1991) ("[T]he rationale for the Court's holding...boils down to a determination that eliminating corporate speech will tend to level the playing field...").

But the equalization rationale came to a screeching halt in *Davis*—and if that case left any doubt, *Citizens United* cut through the fog, overruling *Austin* and rejecting its "anti-distortion rationale as a means to

prevent corporations from obtaining 'an unfair advantage in the political marketplace.'" *Citizens United*, 130 S. Ct. at 904, citing *Austin*, 494 U.S. at 659. This Court restored *Buckley's* proclamation that the government has no interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections." *Citizens United*, 130 S. Ct. at 904, citing *Buckley*, 424 U.S. at 48.

The Second and Eleventh Circuits followed this Court's precedents, acknowledging that the state cannot lawfully level the campaign playing field. *Green Party of Conn. v. Garfield*, 616 F.3d at 245. ("[I]nsofar as the excess expenditure provision is the result of a desire 'to level electoral opportunities,' they are, under *Davis*, clearly unconstitutional."); *Scott v. Roberts*, 612 F.3d at 1293 ("[T]he Florida public campaign financing...levels the electoral playing field, and that purpose is constitutionally problematic."). Several years before *Davis*, the First Circuit upheld the Maine Clean Election Act, which provided a roughly proportionate combination of benefits and detriments to candidates seeking public funding. The Court upheld the inclusion of independent expenditures in the scheme, reasoning that "if the state structured public funding with a blind eye to independent expenditures, such expenditures would be capable of defeating the state's goal of distributing roughly proportionate funding...to publicly funded candidates." *Daggett*, 205 F.3d at 469-470. But in light of *Davis* and *Citizens United*, the state's goal cannot be sustained:

> The argument that a candidate's speech may be restricted in order to "level electoral opportunities" has ominous implications

> because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office.

Davis, 128 S. Ct. at 2773-2774. This declaration – about *candidates* – is even more germane to independent expenditures, which are only loosely linked to any legitimate government interest and certainly cannot be sustained as a means to equalize political speech.

V. THE STATUTE THREATENS TO CHILL GENUINE ISSUE ADVOCACY—ONE OF THE MAJOR PURPOSES OF MANY INDEPENDENT GROUPS.

The First Amendment does not merely protect against outright censorship, but "'any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.' 2 Cooley's Constitutional Limitations, 8th ed., p. 886." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 248-249 (1936). The Constitution protects the right to discuss public issues, and that discussion "cannot be suppressed simply because the issues may also be pertinent in an election. Where the *First Amendment* is implicated, the tie goes to the speaker, not the censor." *FEC v. Wis. Right to Life*, 551 U.S. 449, 474 (2007) ("*FEC v. WRTL*") (WRTL's ads addressed the filibuster of Bush administration judicial nominees).

Arizona defines "independent expenditures" in terms of *express* advocacy (Ariz. Rev. Stat. § 16-901(14)) rather than *issue* advocacy, which "conveys

information and educates." *FEC v. WRTL*, 551 U.S. at 470. Issue ads typically "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter." *Id.* at 470. Voters may later factor the information into their voting decisions. *Id.*

But "[w]hat separates issue advocacy and political advocacy is a line in the sand drawn on a windy day." *Id.* at 499 (Scalia, J., concurring), quoting *McConnell v. FEC*, 540 U.S. at 126 n. 16. Political candidates "are intimately tied to public issues involving legislative proposals" and "campaigns themselves generate issues of public interest." *Buckley*, 424 U.S. at 42. "[I]t would be an extraordinarily cramped view of an issue ad that limited it to calling for advocacy without setting forth the position of the officeholder to whom that advocacy is to be directed." *Lonely Death*, 33 Harv. J.L. & Pub. Pol'y at 312. Lines drawn in sand are easily washed away, and the result can be devastating for independent groups formed primarily for issue advocacy.

Independent associations face a variety of dangers that their speech will be suppressed—even if it concentrates on issues rather than naming candidates. Arizona's broad definition of "political committee" brings within its clutches "any association or combination of persons that is organized, conducted or combined for the purpose of influencing the result of any election"—even if the group is "part of a larger association...not primarily organized...for the purpose of influencing the result of any election...." Ariz. Rev. Stat. § 16-901(19). The Fourth Circuit sustained a challenge to a similar statute, finding that it

"threaten[ed] to regulate the ordinary political speech that is democracy's lifeblood." *NCRTL v. Leake*, 525 F.3d at 284. The defective North Carolina statute was too broad because it burdened organizations that had only "a" major purpose of influencing elections, not "the" major purpose. *Id.* at 288-189 ("Permitting the regulation of organizations as political committees when the goal of influencing elections is merely one of multiple 'major purposes' threatens the regulation of too much ordinary political speech to be constitutional.") Moreover, this Court has rejected the use of a subjective, intent-based test to ascertain a speaker's purpose. "An intent-based standard 'blankets with uncertainty whatever may be said,' and 'offers no security for free discussion.'" *FEC v. WRTL*, 551 U.S. at 468, citing *Buckley*, 424 U.S. at 43. "It compels the speaker to hedge and trim." *Thomas v. Collins*, 323 U.S. 516, 535 (1945).

Another grave danger is that these broad definitions will engender extensive as-applied challenges, leaving "political speakers...at sea" in the meantime. *NCRTL v. Leake*, 525 F.3d at 284 ("Nothing in *McConnell*, *WRTL*, or any First Amendment tradition that we know of forces political speakers to incur these sorts of protracted costs to ascertain nothing more than the scope of the most basic right in a democratic society—the right to engage in discussion of issues of unquestioned public importance.") The danger here is not that express advocacy will masquerade as issue advocacy, but that core political speech will be chilled because some regulator fears it might possibly relate to a campaign. *Id.* at 306. *See FEC v. WRTL*, 551 U.S. at 479 (rejecting the idea that "an expansive definition of 'functional equivalent' is needed to ensure that issue

advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions").

In *McConnell*, the majority reasoned that there was "little difference between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *McConnell v. FEC*, 540 U.S. at 193. But *WRTL* significantly narrowed the scope of regulable express advocacy, finding that the restrictions at issue could only be applied to ads that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *FEC v. WRTL*, 551 U.S. at 469-470. The Court affirmed a First Amendment right to communicate with the public about issues, even during election time and even if a political candidate is named. *Id.* at 481-482. This landmark decision seems to create a "rather large safe harbor for independent expenditures mentioning candidates but purporting to focus on issues." *Lonely Death*, 33 Harv. J.L. & Pub. Pol'y at 310. Now that *Citizens United* has overruled *Austin*, that "safe harbor [should] include not only issue advocacy but uncoordinated express advocacy" as well. *Id.* at 315.

This Court recently affirmed *Buckley's* pronouncement that "'the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.' *Buckley v. Valeo*, 424 U.S. 1, 42 (1976)." *Citizens United*, 130 S. Ct. at 909. This inherent imprecision jeopardizes the ability of independent associations to educate and persuade the people about public issues—and "it is not the

government but the people—individually as citizens and candidates *and collectively as associations and political committees*—who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley*, 424 U.S. at 57 (emphasis added). *Citizens United* reversed the ban on independent corporate expenditures—even for what was admittedly *express* advocacy (documentary film regarding the qualifications of candidate Hillary Clinton). Arizona's matching funds scheme threatens to wind back the clock—and because of the often murky line between candidates and issues, it may unwittingly deter issue advocacy in spite of statutory language that identifies "independent expenditures" only with "express" advocacy.

VI. THE STATUTE COMPELS INDEPENDENT GROUPS TO FACILITATE THE SPEECH OF OPPONENTS AS A CONDITION OF MAKING INDEPENDENT POLITICAL EXPENDITURES.

"Laws enacted to control or suppress speech may operate at different points in the speech process." *Citizens United*, 130 S. Ct. at 896. Arizona's statutory scheme has a negative impact on independent groups at multiple points. It deters the spending of independent associations that have not voluntarily agreed to participate in the program—and the indirect nature of the burden fails to cure the defect. It imposes harsh penalties on associations that do make expenditures by subsidizing one or more political opponents.

A. The Matching Funds Trigger Is Not Merely A *Subsidy* To Amplify The Voices Of Political Opponents Or Express The Government's Perspective—But A *Penalty* On The Exercise Of Core First Amendment Rights.

Under certain circumstances, the government may use its own resources to subsidize speech. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540. The government can disseminate its own message, express indirect support through selective funding, or fund a viewpoint neutral forum for speech. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

The language of *penalty* and *subsidy* is one way to "characteriz[e] the impact of a selective subsidy or a different set of rules on the disfavored party." A speaker has no absolute right to a subsidy but does have the right to be free from government-imposed penalties on the exercise of free speech. *Lonely Death*, 33 Harv. J.L. & Pub. Pol'y at 324. Subsidization "cannot justify interference with the speech of others." *PG&E*, 475 U.S. at 24 (Marshall, J., concurring); *see Buckley*, 424 U.S. at 48-49, *Bellotti*, 435 U.S. at 790-792. Arizona selectively subsidizes the speech of candidates who elect to participate in its program and applies a different set of rules to candidates who opt out. Those rules penalize non-participants—candidates *and* independent associations.

Arizona's program, like the "Millionaire's Amendment" struck down in *Davis*, imposes an "unprecedented penalty" on any association that

"robustly exercises [its] First Amendment right" to make political expenditures. *Davis*, 128 S. Ct. at 2771. Associations must "shoulder a special and potentially significant burden" if they choose to exercise their rights. *Id.* at 2772. *See Day v. Holahan*, 34 F.3d at 1359-1360 (concluding that a Minnesota law that increased a candidate's expenditure limits and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures).

Arizona's penalty parallels the unconstitutional burdens struck down in *Mills v. Alabama*, 384 U.S. 214 (1966) and *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). These two cases "held that legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Buckley*, 424 U.S. at 50. In *Mills*, a newspaper editor was arrested for publishing an editorial—on election day—urging the people to vote a certain way. "It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." *Mills v. Alabama*, 384 U.S. at 216. In *Miami Herald*, newspaper editorials triggered a right-of-reply statute. "The statute purported to advance free discussion, but its effect was to deter newspapers from speaking out in the first instance: by forcing the newspaper to disseminate opponents' views, the statute penalized the newspaper's own expression." *PG&E*, 475 U.S. at 10. This Court also found an unconstitutional penalty where a tax assessor denied a veterans' property tax exemption to claimants who refused to execute an oath on the exemption form. *Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("To deny an exemption to claimants who engage in certain forms of speech is in effect to

penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.")

The Second and Eighth Circuits followed this Court's rationale in striking down matching fund triggers for independent expenditures. *Green Party of Conn. v. Garfield*, 616 F.3d at 246 ("[T]he independent expenditure provision clearly acts as a 'penalty'...[a]s the resident spends more and more money advocating against the candidate he opposes...the state will give more and more money to that candidate."); *Day v. Holahan*, 34 F.3d at 1359-62 (striking down a similar law penalizing independent expenditures).

The distinction between government subsidies and penalties cannot salvage Arizona's asymmetrical funding scheme. Arizona has neither created a viewpoint neutral forum nor engaged in government speech that it may subsidize. The subsidy to participating candidates and the corresponding penalty imposed on political opponents are both "triggered...by the decision to speak." *Lonely Death*, 33 Harv. J.L. & Pub. Pol'y at 325. The state subsidizes private speech only in response to the speech of opposing candidates and associations. "Particularly in the context of an election, the effect and intent of such a scheme is to dissuade constitutionally protected speech and to do so in a way that the *Davis* majority regarded with extreme skepticism." *Id.*

B. The Indirect Nature Of The Burden Does Not Ease The Statute's Constitutional Deficiencies.

Decades of precedent confirm that:

> When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression.

United States v. Playboy Entm't Grp., Inc., 529 U.S. at 826.

The Fourth Circuit found the Eight Circuit's *Day* decision flawed because "it equate[d] the potential for self-censorship created by a matching funds scheme with 'direct government censorship.'" *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 438 (4th Cir. 2008), citing *Day v. Holahan*, 34 F.3d at 1360. But the Fourth Circuit's dismissive treatment of the burden departs from this Court's precedents. The First Amendment forecloses government attempts to accomplish indirectly what it is constitutionally prohibited from commanding directly. *Rutan v. Republican Party*, 497 U.S. at 77-78; *Laird v. Tatum*, 408 U.S. 1, 11 (1972) ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. *E.g.*, *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967);

Lamont v. *Postmaster General*, 381 U.S. 301 (1965); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964).").

Although Arizona's matching funds provision does not eliminate all opportunities for independent spending, its "practical effect [is] to discourage protected speech" and that is "sufficient to characterize [the law] as an infringement on First Amendment activities." *FEC v. MCFL*, 479 U.S. at 255.

C. Independent Groups Have The Right To Be Free From Government Restrictions That Abridge Their Own Rights In Order To "Enhance The Relative Voice" Of Opponents.

The First Circuit strayed off course with its assertion that a matching funds subsidy imposes no burden because speakers "have no right to speak free from response." *Daggett*, 205 F.3d at 464. The same logic emerged in a case upholding Arizona's matching funds provision. *Ass'n of Am. Physicians & Surgs. v. Brewer*, 363 F. Supp. 2d 1197 (D. Ariz. 2005) (nonprofit physicians association challenged the scheme because it had a chilling impact on its independent expenditures). The Court relied on *Daggett*, 205 F.3d at 465: "We cannot adopt the logic of *Day*, which equates responsive speech with an impairment to the initial speaker." *Id.* at 1202. The Court thus concluded that the law was not coercive and did not burden the association.

No speaker has "the right to be free from vigorous debate"—to be free of responsive speech. *PG&E*, 475 U.S. at 14. *But every speaker does have "the right to be free from government restrictions that abridge its*

own rights in order to 'enhance the relative voice' of its opponents." *Id.*, citing *Buckley*, 424 U.S. at 49 and n. 55 (emphasis added). There may be no right to escape the *privately financed private* speech of opponents—but there is a right to be free from *government* funding of that speech. The government has no business becoming entangled in funding one side of a political debate.

D. Unlike Participating Candidates, Independent Groups Have Not Voluntarily Agreed To Restrictions On Their Rights In Order To Receive A Government Benefit.

Arizona violates the well established principle that "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *PG&E*, 475 U.S. at 16 n. 13, quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Although neither a candidate nor an association is forced to directly sponsor opposing speech, the deterrent impact of the matching funds provision has exactly that effect—advancing concepts the speakers decline to foster. The asymmetrical funding program collides with this Court's precedents concerning compelled speech.

Buckley approved the concept that Congress "may engage in public financing of election campaigns" because of the voluntary nature of the program. Public funds can be conditioned on a candidate's agreement to certain monetary limitations. *Buckley*, 424 U.S. at 57 n. 65. Although a mandatory limit on a candidate's own expenditures violates the First Amendment, a voluntary system does not. *Rosenstiel v. Rodriguez*,

101 F.3d 1544, 1549 (8th Cir. 1996) cert denied, 520 U.S. 1229 (1997), citing *Buckley*, 424 U.S. at 85-109.

Independent associations are in an entirely different position. The Fourth Circuit rejected challenges to matching funds provisions brought by independent entities, reasoning that "[t]hey will not be jailed, fined, or censured if they exceed the trigger amounts. The only (arguably) adverse consequence that will occur is the distribution of matching funds to any candidates participating in the public financing system." *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d at 437. This truncated rationale highlights the lack of outright censorship but eschews the involuntary nature of the scheme for independent entities that cannot opt out of the program. These associations can only avoid facilitating opposing speech by muting their own voices. The statute "forces speakers to alter their speech to conform with an agenda they do not set." *PG&E*, 475 U.S. at 9.

CONCLUSION

Arizona has created a statutory scheme that is constitutionally suspect as applied to candidates—and patently unconstitutional in the way it impacts independent advocacy groups. As a consequence of exercising the most basic rights to political speech in a democratic society, these associations are forced to assist candidates and concepts they oppose. The state's curtailment of their rights serves no legitimate government interest. There is virtually no connection to the anticorruption interest that justifies valid campaign finance laws, and the interest in "leveling the playing field" is illegitimate under this Court's

precedents. This Court should reverse the Ninth Circuit's decision and reaffirm the right of the people—unencumbered by chilling government regulations—to evaluate the candidates and issues.

Respectfully Submitted,

James L. Hirsen
Counsel of Record
505 S. Villa Real Drive
Suite 208
Anaheim Hills, CA 92807
(714) 283-8880
hirsen@earthlink.net

Deborah J. Dewart
620 E. Sabiston Drive
Swansboro, NC 28584
(910) 326-4554
debcpalaw@earthlink.net

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

No. 10-238

IN THE

Supreme Court of the United States

JOHN MCCOMISH *et al.*,
Petitioners,

v.

KEN BENNETT, IN HIS OFFICIAL CAPACITY AS ARIZONA SECRETARY OF STATE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* JUSTICE AT STAKE, 13 FORMER CHIEF JUSTICES AND JUSTICES, AND ONE FORMER TRIAL JUDGE IN SUPPORT OF RESPONDENTS

JAMES E. SCARBORO
Counsel of Record
JESSICA A. SHOEMAKER
PAUL W. RODNEY
ARNOLD & PORTER LLP
370 Seventeenth Street,
Suite 4500
Denver, CO 80202
(303) 863-1000
James.Scarboro@aporter.com

Counsel for Amici Curiae

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IN THE

Supreme Court of the United States

No. 10-238

JOHN MCCOMISH *et al.*,
Petitioners,

v.

KEN BENNETT, IN HIS OFFICIAL CAPACITY AS ARIZONA SECRETARY OF STATE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* JUSTICE AT STAKE, 13 FORMER CHIEF JUSTICES AND JUSTICES, AND ONE FORMER TRIAL JUDGE IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST[1]

This brief is filed by Justice at Stake, 13 former chief justices and justices of state supreme courts, and one former state court trial judge.

[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici curiae* or their counsel, make a monetary contribution to the preparation or submission of this brief.

Justice at Stake is a nonpartisan campaign of more than 50 organizations working to keep courts fair and impartial. Justice at Stake and its partners educate the public and work for reforms to keep special interest pressure out of the courtroom.[2]

Amici curiae include former or retired judges from 10 states:

Arkansas:	Justice David Newbern
Georgia:	Chief Justice Norman Fletcher
Indiana:	Justice Theodore R. Boehm
Louisiana:	Justice Harry T. Lemmon
Michigan:	Chief Justice Conrad L. Mallett, Jr.
	Justice Charles Levin
Montana:	Justice John Sheehy
North Carolina:	Chief Justice James Exum, Jr.
	Justice Willis P. Whichard
Pennsylvania:	Chief Justice Emeritus John P. Flaherty
Washington:	Chief Justice Richard Guy
	Chief Justice Robert Utter
	Judge Robert H. Alsdorf
Wisconsin:	Justice Janine P. Geske

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[2] The arguments expressed in this brief do not necessarily express the opinion of every Justice at Stake partner or board member. Members of Justice at Stake's board of directors who are sitting judges did not participate in the formulation or approval of this brief.

Amici curiae are all committed to preserving judicial independence and integrity.

The majority of state judges are subject to some election process, and *amici curiae* believe that public financing of judicial elections is one of the best ways to eliminate corruption and the perception of corruption from judicial campaigns. Public financing thereby protects the government's compelling interest in maintaining an independent and well-respected judiciary. Because this Court's decision could directly affect the ability of states to implement fully functioning public financing systems in judicial elections, *amici curiae* write to underline the risks posed to the judiciary if the portion of Arizona's Citizens Clean Elections Act at issue in this case is overturned.

Justice at Stake and its partners believe that democracy depends on fair and impartial courts that can protect individual rights, guarantee equal justice, and make decisions based solely on the facts and the law—without fear of intimidation or demands for special treatment. Justice at Stake partners and allies have come together to help Americans keep special interests and political pressure out of the courtroom.

SUMMARY OF ARGUMENT

In response to the rising tide of money flooding into judicial elections, Justice at Stake and its allies write to emphasize that invalidating the triggered matching funds provision of Arizona's Citizens Clean Elections Act may lead to the collapse of public financing systems for judicial elections that have been implemented in other states.

A deluge of special interest money is eroding public trust in America's courts. Judges in the majority of the states are elected, and the cost of these elections has reached unprecedented levels. The public is increasingly skeptical of justice rendered by a system where the litigants are often the primary donors to the judges' campaigns. The public believes that campaign contributions directly impact the way judges decide cases, and the data indicate that this perception may be accurate. As a result, many litigants feel that they must contribute to judges' campaigns, lest their opponents obtain an advantage. The flood of money in judicial elections has dangerously politicized judicial races and has threatened the integrity of the judiciary.

Public financing eliminates the need for judges to "dial for dollars" from major contributors, many of whom appear before them in court. It is therefore one of the most powerful reforms in shielding courts from special-interest influence. In states where it has been used, there is no evidence that public financing has chilled anyone's free speech rights. There is evidence, however, that candidates and voters alike find that public financing of judicial elections provides an indispensible mechanism for combating the erosion of trust in America's courts.

ARGUMENT

Public concern over the effects of skyrocketing judicial election spending has risen along with the costs of those elections. As a result, in recent terms this Court has seen numerous cases dealing with state and federal laws that seek to mitigate the harmful effects of campaign contributions in elections generally, *see, e.g.*, *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010); *Davis v. Federal*

Election Comm'n, 128 S. Ct. 2759 (2008), and with corruption concerns arising from substantial contributions to judicial campaigns in particular. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). These cases have helped highlight concerns uniquely associated with the rising tide of money in judicial elections.[3]

Public financing systems seek to minimize corruption and the appearance of corruption by eliminating or reducing the amount of money elected judges must raise from potential litigants. Minimizing corruption and the appearance of corruption remains, more than ever, an important government interest. *See Citizens United*, 130 S. Ct. at 901 (citing *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)). Striking down the triggered matching funds provision of Arizona's Citizens Clean Elections Act will threaten the viability not only of Arizona's public financing framework, but also the public financing systems for judicial elections in other states whose laws are similar to Arizona's.[4]

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[3] *See, e.g.*, Brief of Justice at Stake *et al.* as *Amici Curiae* Supporting Appellee, *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010), No. 08-205, 2009 WL 2365225 (July 31, 2009); Brief for the Conference of Chief Justices as *Amici Curiae* Supporting Neither Party, at 4, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), No. 08-22, 2009 WL 45973 (Jan. 5, 2009); Brief of Justice at Stake *et al.* as *Amici Curiae* Supporting Petitioners, *Caperton*, 129 S. Ct. 2252, No. 08-22, 2009 WL 45976 (Jan. 5, 2009); Brief *Amici Curiae* Of 12 Organizations Concerned About the Influence of Money on Judicial Integrity, Impartiality, and Independence in Support of Petitioners, *Avery v. State Farm Mut. Ins. Co.*, No. 05-842, 2006 WL 295175 (Feb. 3, 2006) (*cert. denied*, 547 U.S. 1003 (2006)).

[4] Four states have implemented systems of public financing for judicial elections. *See infra* Part II.A.

I. COSTS OF JUDICIAL ELECTIONS ARE SKYROCKETING NATIONALLY, AND WITH INCREASED COSTS COME INCREASED POTENTIAL FOR CORRUPTION AND THE APPEARANCE OF CORRUPTION.

A. Judicial Elections Occupy a Unique Position in the American Political Landscape.

Although rejected by the Framers for Article III Courts, judicial elections at the state level are not a recent innovation.[5] Thirty-nine states currently use some form of judicial election for their appellate or trial courts,[6] and the majority of the country's approximately 10,000 state judges are selected or retained through some variety of election.[7] Judicial

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[5] When the Federal Constitution was adopted in 1789, all state constitutions provided for the appointment of judicial officers. Starting with Georgia in 1812, states began adopting varying systems for electing judges. By the time the Fourteenth Amendment was ratified, 24 of 34 states elected some or all judges. *See* Larry C. Berkson, American Judicature Society, *Judicial Selection in the United States: A Special Report*, at 2–3 (1980) (updated by Rachel Caufield in 2004), *available at* http://www.ajs.org/selection/docs/Berkson.pdf; E. Haynes, *Selection and Tenure of Judges* 99–135 (1944).

[6] *See generally* American Judicature Society, *Methods of Judicial Selection*, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm; *see also* American Bar Ass'n Standing Comm. on Judicial Independence, *Public Financing of Judicial Campaigns* 5 (2002); Berkson, *supra* note 5, at 1; Deborah Goldberg, Brennan Center for Justice at NYU School of Law, *Public Funding of Judicial Elections: Financing Campaigns for Fair and Impartial Courts* 4–5 (2002), *available at* http://www.brennancenter.org/page/-/d/pj3.pdf.

[7] Roy Schotland, *Republican Party of Minn. v. White: Should Judges Be More Like Politicians?*, 41 JUDGES' J. 7, 9 (2002).

selection processes vary among the states. Looking just at each state's highest court, nine states select high-court judges through traditional partisan elections, in which candidates may associate themselves with a political party.[8] Thirteen states use nonpartisan elections, in which judicial candidates cannot associate themselves with a political party.[9] Sixteen states appoint high-court judges and then use retention elections after a specified term, allowing voters to choose whether to retain each judge; if judges are not retained, the state appointment commission typically nominates replacements.[10]

Judicial elections were originally intended, even as conceived in the early nineteenth century, to be different from elections for representative offices. Judicial elections sought to secure a judiciary that was "free from the corrosive effects of politics and able to restrain legislative power."[11] Judges, unlike legislators, are not advocates who represent constituents, and they are not free to make campaign promises about how they will rule.[12] Rather than being partisan actors, judges are "independent constitutional officers" who "must make decisions based

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[8] American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts: Initial Selection: Courts of Last Resort*, *available at* http://www.judicialselection.us/uploads/documents/Summary_Initial_Selction_1196092501390.pdf.

[9] *Id.*

[10] *Id.*

[11] Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860*, 44 HISTORIAN 337, 338–39 (1983).

[12] Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 LOY. L.A. L. REV. 1489, 1490–91 (2001).

only on the Constitution and law, applied to the facts of each case."[13] While voters expect legislators to be partisan advocates interested in specific outcomes, they expect judges to be fair and impartial arbiters of the law. In the words of one Tennessee state representative, judges should be "decision makers" rather than "policy makers," and judges must therefore be able to participate in elections free of partisan rancor.[14] Indeed, judges are asked to apply the law impartially even when the result may not be popular with voters.[15]

B. Spending in Judicial Elections Has Skyrocketed in the Last Decade.

Despite these ideals, spending in judicial elections has skyrocketed in recent years, creating the appearance that many judges are beholden to the interests of those who helped them reach the bench. The increased costs of campaigning compel judges to solicit and accept donations from current and potential litigants, augmenting concerns over corruption and the appearance of corruption. Nationally, state supreme court candidates raised and spent over $206.9 million in judicial elections from 2000 to 2009.[16] That is

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[13] Robert K. Rouse, Jr., *My Word: Judicial Election Ideas Flawed*, ORLANDO SENTINEL, Sep. 9, 2010, http://articles.orlandosentinel.com/2010-09-09/news/os-ed-judicial-elections-myword-09091201009O8_1_judicial-elections-circuit-judge-endorsements-of-judicial-candidates.

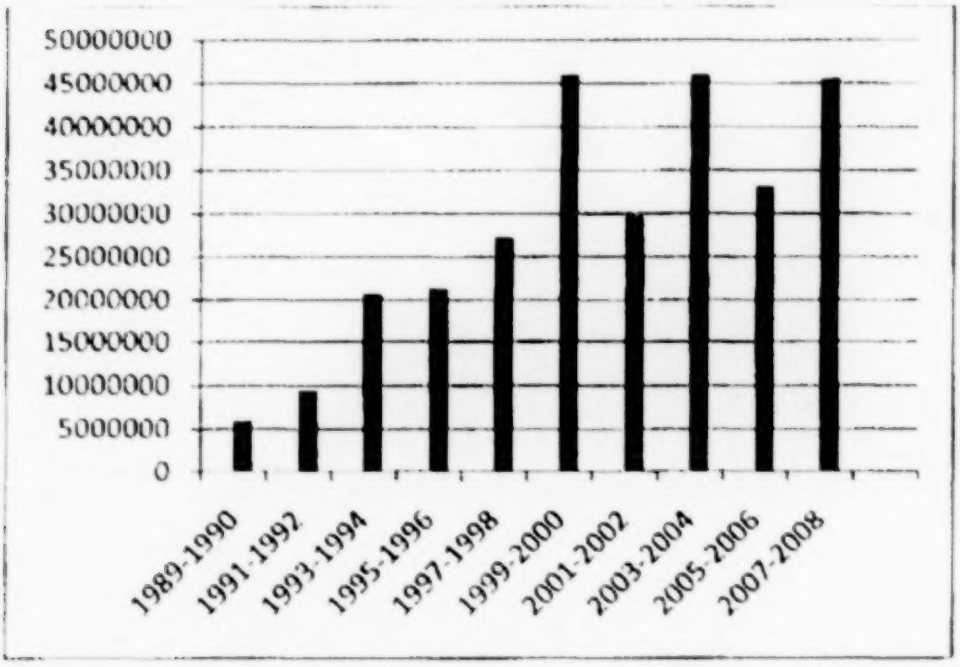
[14] Matt Wilson, *Public funding studied for judge elections*, CHATTANOOGA TIMES, Jan. 25, 2007.

[15] Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1472 (2001).

[16] James Sample *et al.*, Justice at Stake, *The New Politics of Judicial Elections 2000-2009* 1 (2010), *available at*

more than double the $83.3 million raised for the same purpose from 1990 to 1999.[17]

Figure 1: Increasing Fundraising in State Supreme Court Elections[18]



State-specific judicial election spending records also have been smashed during the past decade. All but two of the 22 states with contestable supreme court elections had their costliest-ever contests in the

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http://www.justiceatstake.org/resources/new_politics_of_judicial_elections_20002009.

[17] *Id.* at 8.

[18] *Id.* at 5. The figures in this chart are based on Justice at Stake's analysis of contribution data maintained by the National Institute on Money in State Politics. *See* Nat'l Inst. on Money in State Politics, *Industry Influence Search Tool*, http://www.followthemoney.org/database/IndustryTotals.phtml. Data collection for the 2009-2010 judicial campaign cycle has not yet been completed.

2000-2009 decade.[19] For example, in 2004, $9.3 million was spent in the Illinois Supreme Court election, exceeding the spending in 18 United States Senate contests that year.[20] It was the most expensive contested judicial election in American history.[21] On election night, even the victor, Justice Lloyd Karmeier, called the spending "obscene for a judicial race" and asked, "What does it gain people? How can people have faith in the system?"[22]

More recently, several other states followed the trend set in Illinois. In 2009, a total of $8.7 million was spent on judicial elections in Pennsylvania, Wisconsin, and Louisiana. More importantly, candidates in each race accused their opponents of being ethically tainted.[23] For example, in the 2008 Wisconsin Supreme Court race, Michael Gableman's campaign ran television advertisements suggesting incumbent Justice Louis Butler had helped free a child rapist on a technicality when he worked as a

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[19] Sample, *supra* note 16, at 1.

[20] Deborah Goldberg *et al.*, Justice at Stake, *The New Politics of Judicial Elections 2004*, vi (2004), *available at* http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections_2004.

[21] Jesse Rutledge, ed., Justice at Stake, *The New Politics Of Judicial Elections in the Great Lakes States, 2000–2008* 1 (2008), *available at* http://www.followthemoney.org/press/Reports/NPJEGreatLakes2000-2008.FINAL.pdf.

[22] Tort Reformers Score Victories in Midwest Judicial Races, INSURANCE J., Nov. 22, 2004, http://www.insurancejournal.com/magazines/midwest/2004/11/22/features/49934.htm.

[23] Sample, *supra* note 16, at 2.

public defender.[24] In reality, Butler lost an appeal on behalf of the client, and unrelated to Butler's representation, the client was later released on parole.[25] It was then that Butler's former client assaulted an eleven-year-old girl.[26] Justice Butler was ultimately unseated.[27] And the ad run by Gableman's campaign shows that increases in spending on judicial campaigns have been accompanied by a decrease in civility. The corrosive effect of politics has seeped into judicial races.

Independent expenditures by special interest groups frequently have exceeded spending by judicial candidates themselves. For example, in the 2008 Wisconsin Supreme Court election, third-party interest groups outspent candidates four-to-one.[28] Furthermore, 95% of television advertising was paid for by outside interest groups.[29] Special interest groups were responsible for almost nine out of every ten dollars spent during the campaign.[30] One corporate

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[24] Stacy Forster, *WMC Ad Takes On "Loophole Louie," Campaign Watchdog Raps It*, MILWAUKEE J. SENTINEL, Mar. 26, 2008, http://www.jsonline.com/blogs/news/31985659.html.

[25] Sample, *supra* note 16, at 32.

[26] *Id.*

[27] Patrick Marley & Stacy Forster, *Gableman Victorious*, MILWAUKEE J. SENTINEL, Apr. 2, 2008, http://www.jsonline.com/news/wisconsin/29406414.html.

[28] *See* Stacy Forster, *Spending in Supreme Court Race Just Under $6 Million*, MILWAUKEE J. SENTINEL, Jul. 22, 2008, http://www.jsonline.com/blogs/news/31992584.html.

[29] Press Release, Brennan Center for Justice *et al.*, *Special Interests Dominate Wisconsin Airwaves in High Court Race* (Mar. 20, 2008), *available at* http://brennan.3cdn.net/6dd3e14a629d0584f3_d3m6bhjqu.pdf.

group mimicked the message of Michael Gableman's campaign, attacking incumbent Justice Louis Butler in television advertisements by referring to him as "Loophole Louie" and accusing him of preferring criminals over the police.[31]

Recently, skyrocketing judicial election spending spilled into retention elections. In 2010, high-court retention elections in Illinois, Iowa, Colorado, and Alaska resulted in approximately $4.6 million in total costs—more than twice the $2.2 million raised nationally for all retention elections in the entire 2000-2009 decade.[32] Much of this spending came from special interest groups seeking to unseat judges who disagree with their views. Like elections to fill judicial vacancies, retention elections have become costly and politicized.

Of these recent high-court retention elections, Iowa's 2010 supreme court election received the most national attention. There, out-of-state organizations poured money into a successful campaign to remove three supreme court justices who had joined a unanimous decision that legalized same-sex

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[30] Press Release, Brennan Center for Justice, *Buying Time—2008: Wisconsin* (May 12, 2008), *available at* http://www.brennancenter.org/content/resource/buying_time_2008_wisconsin.

[31] Forster, *supra* note 24.

[32] Press Release, Justice at Stake, *2010 Judicial Elections Increase Pressure on Courts* (Nov. 3, 2010), *available at* http://www.justiceatstake.org/newsroom/press_releases.cfm/2010_judicial_elections_increase_pressure_on_courts_reform_groups_say?show=news&newsID=9129.

marriage.[33] Groups involved in the campaign included National Organization for Marriage, the American Family Association, the Family Research Council, the Campaign for Working Families and Citizens United.[34] Fueled by almost $1,000,000 from these groups, television ads attacked the justices as being "liberal" and "activist" and accused them of "becom[ing] political [and] ignoring the will of voters."[35] Not wanting to politicize the judiciary in Iowa, the justices did not raise campaign money and made few public appearances during the election. After the election, they released a statement that decried what they called "an unprecedented attack by out-of-state special interest groups" and noted that "[t]he preservation of our state's fair and impartial courts will require more than the integrity and fortitude of individual judges, it will require the steadfast support of the people."[36]

That is exactly why some states have turned to public financing. Public financing may not eliminate independent expenditures by special interest groups, but it does reduce the opportunity for actual corrup-

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[33] A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 3, 2010, http://www.nytimes.com/2010/11/04/us/politics/04judges.html.

[34] Justice at Stake, *supra* note 32.

[35] Linda Casey, National Institute on Money in State Politics, *Independent Expenditure Campaigns in Iowa Topple Three High Court Justices*, http://www.followthemoney.org/press/ReportView.phtml?r=440&PHPSESSID=537afaf30e26c5e5fbaed362439dd2e9; Press Release, Brennan Center for Justice, *New Web Site Details Spending, TV Ads for 2010* (Sep. 23, 2010), *available at* http://www.brennancenter.org/content/resource/new_web_site_details_spending_tv_ads_for_2010.

[36] Sulzberger, *supra* note 33.

tion and the appearance of corruption that emerges when donors give money to judges in front of whom they may appear as litigants.

C. The Skyrocketing Costs of Judicial Elections Erode Judicial Integrity and Independence.

This Court has recognized that "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989). That reputation, as well as due process of law, relies upon the absence of actual and perceived bias or corruption. As this Court also observed, "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968). The relevance of that observation was reaffirmed in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2264-65 (2009), in which this Court concluded that "there is a serious risk of actual bias...when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case. . . ."

Dramatic increases in spending in judicial elections invite suspicions of bias and corruption. As the tide of money has risen in judicial elections, so too have perceptions that contributions to judicial campaigns affect judicial decision-making.

1. The Public Believes That Money Spent on Campaigns Influences Judges' Decisions in Particular Cases.

Data repeatedly show that the public firmly believes that judicial outcomes are in fact influenced by campaign contributions:

- A 2010 Harris poll found that 71% of those surveyed thought campaign contributions had at least some influence on judges' decisions.[37]
- A February 2009 USA TODAY/Gallup poll found that 89% of those surveyed believed that the influence of campaign contributions on judges' rulings is a problem and 52% considered it a "major" problem.[38]
- A survey conducted in 2007 for the Annenberg Public Policy Center showed that 69% of the public believe that raising money for elections affects a judge's rulings to a moderate or great extent, and over 90% of those surveyed thought judges should be removed from cases involving an individual or group that contributed to the judge's campaign.[39]

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[37] *The Harris Poll National Quorum Justice at Stake Campaign, June 9–13, 2010* at 6, 12, *available at* http://www.justiceatstake.org/media/cms/The_Harris_Poll_National_Quorum_Jus_F847FF6BF6CD0.pdf.

[38] Joan Biskupic, *Supreme Court Case With The Feel of a Best Seller*, USA TODAY, Feb. 16, 2009, http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm.

[39] Annenberg Public Policy Center, *Public Understanding of and Support for the Courts* 3 (2007), *available at* http://www.law.georgetown.edu/Judiciary/documents/finalversionJUDICIALFINDINGSoct1707.pdf.

These concerns have been voiced consistently throughout the last decade. For example, in 2004, 70% of those surveyed believed that judicial campaign contributions have at least some influence on judges' decisions in the courtroom, and in 2001, 76% of those surveyed believed campaign contributions influence judges' decisions.[40]

The results of these national surveys have been confirmed by the results of surveys within specific states:

- A 2011 poll showed that 79% of North Carolina registered voters thought it was a very serious problem when a judge receives campaign contributions from parties who have cases pending on which the judge might ultimately rule. Moreover, 83% of voters thought it was at least somewhat likely that campaign contributions influence the judges' rulings.[41]
- A 2010 poll found that 78% of West Virginians thought campaign contributions to state supreme court candidates have at least some influence on the court's decisions, and 68% thought that state supreme court candidates receiving campaign contributions from

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[40] Justice At Stake Campaign, *March 2004 Survey Highlights: Americans Speak Out On Judicial Elections* (2004), *available at* http://faircourts.org/files/ZogbyPollFactSheet.pdf. Greenberg Quinlan Rosner Research Inc. & Am. Viewpoint, *Justice At Stake Frequency Questionnaire* 4 (2001), *available at* http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F9927204.pdf

[41] 20/20 Insight LLC, North Carolina Registered Voter Survey, Feb. 8–10 2011, *available at* http://www.justiceatstake.org/media/cms/JAS_NC_Poll_8F8BA04EDD15A.pdf

private citizens, businesses, and interest groups whose cases they may hear is a serious or very serious problem.[42]

- A 2008 survey in Wisconsin found that 78% of voters thought campaign contributions have at least some influence on judges' decisions.[43]
- A 2008 statewide survey in Minnesota found that 59% felt that campaign contributions to judges have some influence on judges' decisions, and 78% were concerned about judicial candidates having to raise money, run television advertising, and potentially seek political party and special interest group support.[44]

These results should not be surprising. Perceptions of a biased judiciary lead to public distrust, which in turn undermines the effective administration of justice. Justice Ming W. Chin of the California Supreme Court explained, "When judges have to rely on campaign donors to get or keep their jobs, there is

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[42] Anzalone Liszt Research, Inc., *Justice at Stake West Virginia 2010 Poll* 2, *available at* http://www.justiceatstake.org/media/cms/West_Virginia_Poll_Results_674E634FDB13F.pdf

[43] American Viewpoint, Inc., *Justice at Stake Wisconsin Statewide Poll* (January 2008), at 4, *available at* http://www.justiceatstake.org/media/cms/AmView_Wisconsin_Statewide_Toplines_48AC7C24F248C.pdf

[44] Decision Resources, Ltd., *Justice at Stake Study Minnesota Statewide Final* 5 (January 2008), *available at* http://www.justiceatstake.org/media/cms/MinnesotaJusticeatStakesurvey_717C253F67D9B.pdf

an inevitable public perception of judicial bias or favoritism."[45]

The perception that positive outcomes are being bought by litigants diminishes the integrity of all judicial decisions. Even James Bopp, Jr., a frequent critic of campaign finance reform, has noted that "[b]ecause courts have neither the power to levy taxes nor to command armies, the only way for their decisions to have effect is if they are widely perceived as being impartial arbiters of justice rather than mere political actors."[46] *See also Republican Party of Minn. v. White*, 536 U.S. 765, 789 (2002). The erosion of public confidence in the judiciary is more than an academic issue; it reflects a fundamental concern with the ongoing viability of the judicial system as we know it. Public financing systems for judicial elections seek to restore that confidence and safeguard the impartiality of the judiciary.

2. There Is a Substantial Risk That Money Spent on Campaigns Actually Affects Judicial Decisions.

The effects of judicial campaign contributions extend beyond public perception. Judges in fact remain very aware of the political pressures upon them. Former California Supreme Court Justice Otto Kaus famously observed that setting aside the political consequences of high-profile judicial decisions as an elected judge is "like ignoring a crocodile in your bathtub." *White*, 536 U.S. at 789 (O'Connor, J.,

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[45] Justice Ming W. Chin, *Judicial Independence Under Attack Again?*, 61 HASTINGS L. J. 1345, 1348 (July 2010).

[46] James Bopp, Jr. and Josiah Neeley, *How Not to Reform Judicial Elections: Davis, White, and the Future of Judicial Campaign Financing*, 86 DEN. U. L. REV. 195, 198 (2008).

concurring) (citing Julian Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 UNIV. COLO. L. REV. 733, 739 (1994)). With increased pressure to raise enormous campaign war chests and renewed efforts to unseat judges over particular rulings, the jaws of that crocodile loom larger than ever.

Reports show that some campaign contributions result in positive procedural and substantive outcomes for donors, raising significant judicial integrity issues. An empirical study of state supreme court judges' voting patterns conducted by Joanna Shepherd of Emory Law School determined that "there is a strong relationship between campaign contributions and judges' voting."[47] For example, data showed that contributions from pro-business groups increased the probability that judges would vote for the business litigant in a business-versus-individual or a products liability case.[48] The study was consistent with other academic studies that "have shown that the behavior of elected judges changes as reelection approaches. The judges deviate from earlier voting patterns, impose longer criminal sentences, and side with the majority in death penalty cases."[49]

An analysis of the voting patterns of the Louisiana Supreme Court confirmed these findings.[50] The

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[47] Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 669 (2009).

[48] *Id.* at 669.

[49] *Id.* at 648.

[50] Vernon V. Palmer, *The Recusal of American Judges in the Post Caperton Era: An Empirical Assessment of the Risk of Actual Bias in Decisions Involving Campaign Contributors*, 10

report evaluated the voting patterns of the seven justices over 14 years and included 177 cases in which at least one of the parties had been a campaign contributor to one of the justices.[51] The report found that "judicial voting patterns sharply favored the contributors' interests."[52] The data showed that three of the justices voted in favor of their contributors on average 65%–70% of the time.[53] Moreover, the data showed that the odds that one particular justice would vote for the defendant's position increased by nine percent with each donation of $1000 to his campaign.[54]

Other studies have shown similar results at various stages of litigation. One report demonstrated the likelihood that the Texas Supreme Court would grant certiorari to a given petition rose in conjunction with the amount the petitioner donated to the justices' campaigns.[55] A *New York Times* report reviewed 12 years of Ohio Supreme Court merits decisions and found that Ohio justices routinely sat on cases after having received campaign contributions from the parties involved. More importantly, those justices

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GLOBAL JURIST 1 (2010), *available at* http://www.bepress.com/gj/vol10/iss3/art4/.

[51] *Id.* at 7.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 8.

[55] Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court* 10 (2001), *available at* http://www.tpj.org/docs/2001/04/reports/paytoplay/paytoplay.pdf.

then voted in favor of their contributors 70% of the time.[56]

Anonymous surveys of judges mirror the public's fear of financial influences on judicial outcomes and evince a recognition of the effect of money on judicial decision-making. For example, a 2001 survey of state judges revealed that almost half agreed that campaign donations influence courtroom decisions by some judges, and most elected high court justices reported experiencing pressure to raise campaign money during their election years.[57]

Occasionally, judges have forthrightly confirmed as much. One retired West Virginia Supreme Court justice admitted:

> As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.[58]

This pressure was put particularly plainly by Ohio Justice Paul E. Pfeifer: "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race. They mean to be

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[56] Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, http://www.nytimes.com/2006/10/01/us/01judges.html

[57] Bert Brandenburg, *Big Money And Impartial Justice: Can They Live Together?*, 52 ARIZ. L. REV. 207, 210 (Summer 2010)

[58] Joshua C. Hall and Russell S. Sobel, *Is the 'Missouri Plan' Good for Missouri? The Economics of Judicial Selection*, 15 POLICY STUDY 7, n.44 (May 21, 2008) (quoting Justice Richard Neely)

buying a vote. . . . Whether they succeed or not, it's hard to say."[59] The studies cited above indicate that they do, in fact, succeed.

The political realities of judicial elections risk shifting judges' focus from the merits of cases to the practicalities of job security. In the words of two North Carolina judges, contributors are cognizant of these realities and send judges an explicit message: "Play ball, or risk losing your job."[60] Public financing systems for judicial elections realign the focus on the administration of justice and seek to distance judges from the effects on campaign contributions.

3. Litigants Feel Pressure to Spend Money on Judicial Campaigns.

The pressures created by contributions to judicial campaigns extend to potential litigants as well. Parties feel they must contribute to judicial campaigns, lest their failure to contribute affect the outcome of cases.

Businesses in particular have felt obligated to contribute to judges' election war chests:

- A 2007 Zogby International poll of 200 business leaders found that 79% thought campaign contributions had at least some influence on judges' decisions.[61]

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[59] Liptak & Roberts, *supra* note 56, at A1 (quoting Justice Paul E. Pfeifer).

[60] Ames Alexander, *Donations pose risks, judge says Campaign contribution can create perception of judicial influence*, CHARLOTTE OBSERVER (NC), May 18, 2005, *available at* 2005 WLNR 15731813.

[61] Zogby Int'l, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions*

- In an *amicus* brief filed in this Court in 2006, 39 national corporations explained that they "often have reasons for concern about—and many of them have had at least one experience of—receiving what appears to be less than fair and impartial justice in jurisdictions where they are not located and have not contributed to or been solicited by judicial candidates."[62]

Regardless of whether contributions actually have such an effect, the perception that they can affect an outcome directly influences individual behaviors and experiences with the judicial system. Attorneys and interested parties are mindful of the practical effects of this perception:

- A Texas lawyer worried: "With our partisan elections today, given a hard but close case, which even a biased judge couldn't be criticized for holding either way, the judge is going to decide for the party who gave him the $10,000 donation for his campaign chest."[63]
- Wallace Jefferson, Chief Justice of the Texas Supreme Court, warned in 2009: "In a close race, the judge who solicits the most money

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to Judges 4 (May, 2007), *available at* http://www.justiceatstake.org/media/cms/CED_FINAL_report_ons_14MAY07_BED4DF4955B01.pdf.

[62] Brief of Amicus *Curiae* Concerned Corporations in Support of Petitioners at 3, *Dimick v. Republican Party of Minn.*, 546 U.S. 1157 (2006), No. 05-566, 2006 WL 42102 (Jan. 4, 2006).

[63] David Barnhizer, *"On The Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 CATHOLIC UNIV. L. REV. 361, 379–80 (2001).

> from lawyers and their clients has the upper hand. But then the day of reckoning comes. When you appear before a court, you ask how much your lawyer gave to the judge's campaign. If the opposing counsel gave more, you are cynical."[64]

- An Ohio AFL-CIO official admitted: "We figured out a long time ago that it's easier to elect seven judges than to elect 132 legislators."[65]

Attorneys thus find themselves facing ironic ethical and strategic questions: Does the requirement of zealous advocacy on behalf of their clients demand that attorneys contribute to judges? Is it malpractice *not* to attempt to influence a case's outcome in jurisdictions where such behavior is the norm?

The influx of money into judicial elections thus perpetuates a cycle that weakens the integrity of the judicial system. Attorneys must worry whether they have contributed enough to the judge's campaign for their clients to receive a fair hearing. The perception that campaign contributions encourage positive judicial outcomes creates incentives to contribute, and those contributions further augment the pressure to add to the rising tide of money. Public financing for judicial elections seeks to break that cycle.

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[64] Wallace B. Jefferson, "Why not elect judges on merit, not whim?" DALLAS MORNING NEWS, Mar. 12, 2009, http://www.dallasnews.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-jefferson_13edi.State.Edition1.2212195.html.

[65] Sample, *supra* note 16, at 9 (citing J. Christopher Heagarty, "The Changing Face of Judicial Elections," N.C. ST. BAR J. 19, 20 (2002)).

II. PUBLIC FINANCING IS AN IMPORTANT MEANS OF COMBATING CORRUPTION AND THE APPEARANCE OF CORRUPTION IN JUDICIAL ELECTIONS, AND THIS COURT'S DECISION WILL AFFECT THE ABILITY OF STATES TO PROVIDE PUBLIC FINANCING TO PROTECT JUDICIAL INDEPENDENCE.

A. Public Financing of Judicial Elections Fosters Judicial Independence and Strengthens Public Perceptions of Judicial Integrity.

State laws providing public financing directly address the problems of actual and perceived corruption in judicial elections. As detailed above, the influx of money into traditionally financed judicial elections has created the perception that justice may be for sale. Publicly funded candidates, however, are not seen as beholden to specific contributors, and judges elected under public financing have few opportunities to pass judgment on a litigant who helped their election effort. Likewise, judges elected with public financing need not fear that parties they rule against will contribute to their opponents in upcoming elections. Public financing preserves judicial independence while promoting discussion about candidates' qualifications rather than their politics.

Public financing lessens the pressures on judicial candidates to raise money and lessens opportunities for ethical conflicts by refocusing judicial campaigns on the qualifications of the candidates, rather than the money lining the pockets of potential donors.[66] Judicial candidates, for example, "report that full

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[66] *See* Brandenburg, *supra* note 57, at 215.

public funding 'allowed them to concentrate on connecting with voters rather than on soliciting campaign contributions.'"[67] North Carolina Court of Appeals Judge Wanda Bryant explained that she "chose to run under the new public financing system because the system is such that [she] could focus on talking with voters about [her] legal experience and qualifications instead of spending countless hours dialing for dollars."[68] In this way, public financing promotes a dialogue between judicial candidates and voters while minimizing partisan rancor.

Currently, public financing systems in four states expressly seek to mitigate perceptions of a biased judiciary and to realign the focus of elections on candidate qualifications. North Carolina,[69] Wisconsin,[70] and New Mexico[71] provide public financing for judicial elections.[72] West Virginia will begin to offer

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[67] Deborah Goldberg, *Public Funding of Judicial Elections: The Roles of Judges and the Rules of Campaign Finance*, 64 OHIO ST. L. J. 95 (2003).

[68] Wanda Bryant, *Publicly Finance Judicial Elections*, SEATTLE POST-INTELLIGENCER, Mar. 20, 2007, *available at* 2007 WLNR 5330089.

[69] North Carolina Public Campaign Fund, N.C. Stat. § 163-278.61 *et seq.* (West 2011).

[70] Wis. Stat. Ann. § 11.001 *et seq.* (West 2010); Impartial Justice Act, S. 40, 2009–2010 Leg. (Wis. 2009).

[71] New Mexico Voter Action Act, N.M. Stat. Ann. § 1-19A-1 *et seq.* (West 2011). *See also* American Judicature Society, *Judicial Campaigns and Elections*, http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm.

[72] *See generally Public Financing of Judicial Campaigns*, *supra* note 6, at 30; Brennan Center for Justice, *State Judicial Elections*, http://www.brennancenter.org/content/section/category/state_judicial_elections; Committee for Economic

public financing for candidates in the 2012 election.[73] Each of these states has turned to public financing specifically to address the issues discussed above. For example, West Virginia's system is designed to "protect the impartiality and integrity of the judiciary, and strengthen public confidence in the judiciary."[74] Likewise, North Carolina's law recognizes that "impartiality is uniquely important to the integrity and credibility of the courts."[75]

Public support for public financing of judicial elections is strong. A survey of West Virginia residents showed that nearly 75% of citizens favored adopting a system of public financing for statewide judicial elections.[76] Likewise, 65% of Wisconsin voters surveyed in 2008, prior to that state's adoption of updated public financing laws, said they favored public financing for state supreme court candidates.[77]

Development, *Justice for Hire: Improving Judicial Selection* 1–4 (2002), *available at* http://www.ced.org/images/library/reports/justice_for_hire/report_judicialselection.pdf.

[73] West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, W. VA. Code § 3-12-1 *et seq.* (West 2011); H.B. 4130, 79th Leg., 2d Sess. (W. Va. 2010).

[74] W. Va. Code § 3-12-2(9).

[75] N.C. Stat. § 163-278.61.

[76] Andrew Clevenger, *Judicial Reform Survey: Public mixed on financing Committee probing judiciary holds first meeting, at Marshal*, CHARLOTTE GAZETTE & DAILY MAIL (WV), Aug. 29, 2009, *available at* 2009 WLNR 17006336.

[77] American Viewpoint, Inc., *Justice at Stake Wisconsin Statewide Poll* 3 (January 2008), *available at* http://www.justiceatstake.org/media/cms/AmView_Wisconsin_Statewide_Toplines_4BAC7C24F248C.pdf.

Even 73% of national business leaders support public financing of state judicial elections.[18]

The voting public thus recognizes that public financing of judicial elections safeguards the independence of the judiciary by curbing opportunities for corruption and the appearance of corruption. And given that the perception of corruption can be just as corrosive to the courts as actual corruption, such systems effectively bolster the integrity of the judiciary.

B. Public Financing Systems That Address the Practical Concerns of Judicial Candidates Benefit the Judicial System.

Public financing systems minimize the possibility that campaign contributions will lead to undue pressures upon the judiciary and the appearance of judicial corruption. But such systems can only achieve that goal if candidates elect to participate in public financing. Matching or supplemental fund provisions, such as the provision in Arizona's public financing program, are a vital element of public financing systems.

Without matching fund provisions, public financing systems are not viable alternatives to traditional systems of private funding. As the ABA Standing Committee on Judicial Independence concluded, judicial candidates, like other candidates, only will participate in public financing "if they receive public

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[18] Zogby Int'l, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges* 3 (May, 2007), *available at* http://www.justiceatstake.org/media/cms/CED_FINAL_reports_14MAY07_8ED4DF4955B01.pdf

funds in amounts sufficient to enable them to reach voters effectively."[79] The ABA Committee thus concluded that "making supplemental public funds available to candidates for the purpose of enabling them to respond to speech sponsored by independent campaign expenditures is the most workable means to encourage robust debate in judicial campaigns and preserve public financing as a viable option for judicial candidates."[80] In other words, candidates will participate in public funding systems if they have some assurance that their participation will not automatically ensure that they will be vastly outspent by their opponents.

At the same time, matching funds provisions help ensure the sustainability of the public financing system. It is not feasible for states to advance millions of dollars to all potential candidates early in an election cycle, if ever. Such a requirement, which is the primary alternative to a triggered matching funds provision, would make it impossible for states to fund public financing systems. Matching funds provisions ensure reasonable and appropriate distribution of funding, with the flexibility to provide additional funds as campaign competitiveness increases. Accordingly, each of the four states that provide public financing for judicial elections provide limited

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[79] American Bar Ass'n, Standing Comm. on Judicial Independence, *Public Financing of Judicial Campaigns: Report of the Commission on Public Financing of Judicial Campaigns* 44 (2002).

[80] *Id.* at 49.

matching funds when nonparticipating candidates' expenditures reach a specified threshold.[81]

Systems that do not provide matching funds, or which provide inadequate funds to sustain a campaign, cannot succeed in addressing corruption because such systems are not viable for candidates. In Wisconsin, for example, where judicial elections historically have been partially publicly financed, the limited public funds became insufficient to finance the entire campaign and candidates were forced to rely heavily on supplemental private contributions.[82] As candidates drifted away from public financing between 2000 and 2009, expenditures in Wisconsin Supreme Court elections totaled nearly $6.7 million, and including third-party television spending, the total over the same period was $11.5 million.[83] Spending reached $8.5 million in the 2007–2008 election cycle alone.[84] In response to this dramatic increase in spending, Wisconsin recently passed a new "Impartial Justice" bill, creating a more robust system of public financing for judicial elections.[85] The new law, which is in effect for the 2011 election, provides for increased initial funding for appellate court candidates, matching funds when nonparticipating candidates outspend participants, and additional funds when third-parties make independent

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[81] N.C. Stat. § 163-278.67; N.M. Stat. § 1-19A-14; Wisc. Impartial Justice Act, S. 40, § 11.512(2); W. Va. Code § 3-12-11(3).

[82] Goldberg, *supra* note 6, at 4.

[83] Sample, *supra* note 16, at 12.

[84] *Id.* at 2.

[85] Impartial Justice Act, S. 40, 2009-2010 Leg. (Wis. 2009); *see also* Brandenberg, *supra* note 57, at 216.

disbursements under certain conditions.[86] Three of four candidates for a contested seat on the Wisconsin Supreme Court already have sought and qualified for public funding.[87]

North Carolina has the oldest full public financing systems for judicial elections: it was enacted in 2002 and took effect in 2004.[88] Participation in the system is high. Since it began, 77% of all candidates have enrolled in the program, with 64% qualifying to receive public funds.[89] In 2008, 11 of the 12 candidates participated in the program.[90] In the 2010 campaign, eight judicial candidates collected $1.7 million in total funding, and 73% of this was from public funds.[91] The exact opposite was true in 2002, the last election before public financing was available: in that election cycle, 73% of funding came from

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[86] Impartial Justice Act, S. 40, § 11.512(2), § 11.513(2).

[87] Patrick Marley, *Three Supreme Court Candidates Will Get Public Funding*, MILWAUKEE J. SENTINEL, Jan. 13, 2011, *available at* http://www.jsonline.com/news/statepolitics/113461409.html

[88] N.C. Ctr. for Voter Educ., Fact Sheet: The Public Campaign Fund, http://www.ncjudges.org/media/fact_sheet_pcf.html.

[89] Press Release, Democracy North Carolina, *Special Interest Funding Declines In State Court Elections As 77 percent Of The Top Judges Qualify For Public Funds* 1 (December 21, 2010), *available at* http://www.democracy-nc.org/downloads/JudicialPublicFinPRDec2010.pdf. Candidates qualify by demonstrating support of their candidacy by obtaining qualifying contributions from at least 350 registered voters; contributions may be between $10 and $500. N.C. Stat. § 163-278.62, § 163-278.64. *See also* N.C. Ctr. for Voter Educ., *supra* note 88.

[90] Damon Circosta, N.C. Center for Voter Education, Public Financing Not So Radical Anymore, Feb. 2, 2009, http://www.ncvotered.com/column/2009/2_2_09_pcf_not_radical.php.

[91] Democracy North Carolina, *supra* note 89, at 1.

interested individual donors.[82] That is to say, where before 73% of funding came from donors who could later have a case before the elected judges, now the result is reversed: 73% of funding comes from the agnostic public pool.[83] Participation in the system has not disadvantaged candidates; since 2003, 39 candidates qualified for public funds, and 19 won their elections.[84] In the words of Judge Bryant: "It makes all the difference. I've run in two elections, one with campaign finance reform and one without. I'll take 'with' any day, anytime, anywhere."[85]

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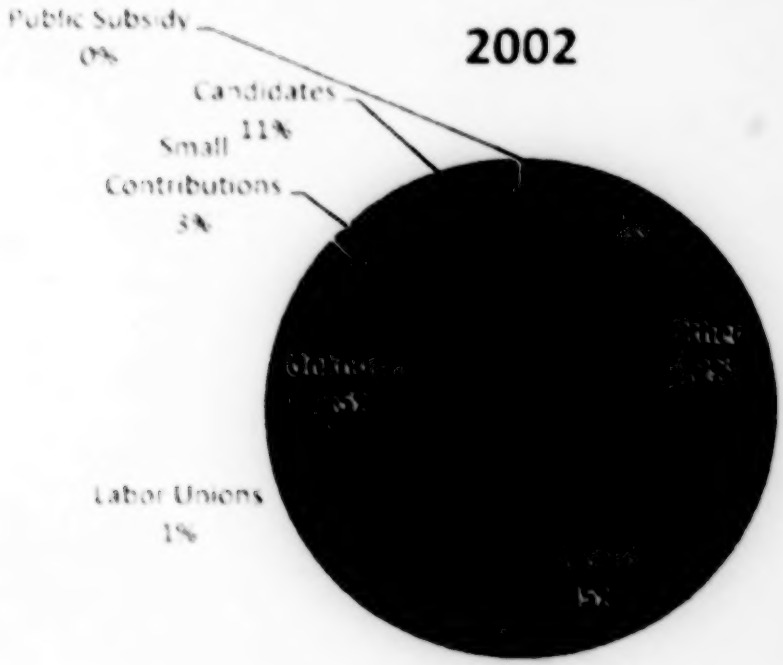
[82] *Id.*

[83] For a comparison of the sources of campaign contributions in the 2002 and 2008 elections, *see* Figures 2 and 3.

[84] Democracy North Carolina, *supra* note 89, at 3.

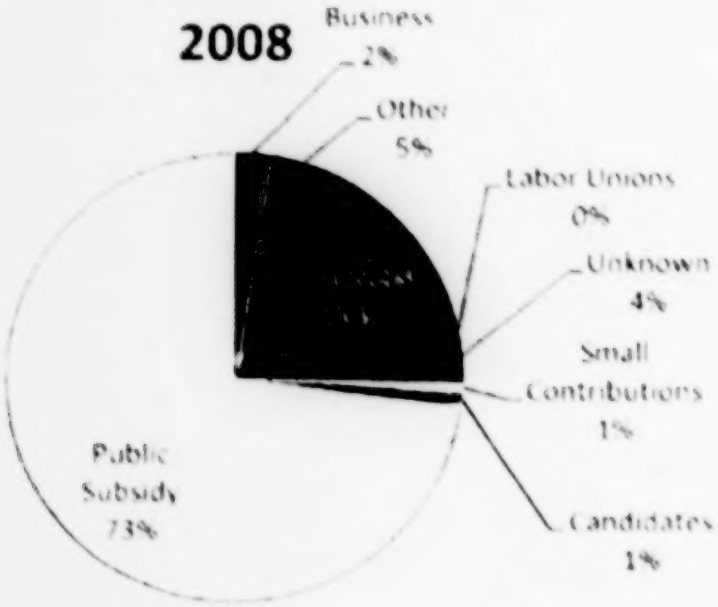
[85] Brandenburg, *supra* note 57, at 215.

Figure 2: Sources of North Carolina Judicial Campaign Contributions, 2002*



* The figures in this chart are based on Justice at Stake's analysis of contribution data maintained by the National Institute on Money in State Politics. *See* National Institute on Money in State Politics, *Industry Influence Search Tool*, http://www.followthemoney.org/database/IndustryTotals.phtml.

Figure 3: Sources of North Carolina Judicial Campaign Contributions, 2008[97]



North Carolina's public financing system has succeeded in encouraging, rather than chilling, speech in judicial elections. Accordingly, the Fourth Circuit rejected a challenge to the constitutionality of North Carolina's public financing system. *North Carolina Right To Life Committee Fund For Independent Political Expenditures v. Leake*, 524 F.3d 427, 441 (4th Cir. 2008), *cert. denied* 129 S. Ct. 490 (2008). The court held that the system's triggered matching funds provision was not coercive and that candidates who do not participate in public financing "remain free to raise and spend as much money, and engage in as much political speech, as they desire." *Id.* at 436, 441. Moreover, the court noted that the goals of the system reflected traditional and long-held

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[97] *Id.*

values: "The concern for promoting and protecting the impartiality and independence of the judiciary is not a new one; it dates back at least to our nation's founding.... [T]he provisions challenged today... are within the limits placed on the state by the First Amendment." *Id.* at 441.

The continued success of public financing for judicial elections relies on the states' ability to design systems that encourage participation through provisions that address campaign realities. If this Court were to invalidate the triggered matching funds provision of the Arizona Citizens Clean Elections Act, states such as North Carolina, Wisconsin, and West Virginia may not be able to sustain their systems, which promote and protect the impartiality and independence of the judiciary. Simply put, stripped of the option to create matching fund provisions, states will find it more difficult to create sustainable public financing systems for judicial elections.

CONCLUSION

The rising tide of money flowing into judicial elections shows no sign of abating. As that tide rises, so too does public skepticism regarding the impartiality of the judiciary. Justice O'Connor has observed that "[j]udicial independence does not just happen all by itself. It is tremendously hard to create, and easier than most people imagine to destroy."[28] Invalidating the triggered matching funds provision of Arizona's public financing system threatens the ability of states to preserve and protect this

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[28] Sandra Day O'Connor, *A Fair, Impartial and Independent Judiciary*, Nat'l Voter, Feb. 2008, at 7, 8, *available at* http://www.lwv.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=10515.

crucial judicial independence. At a minimum, it will have a chilling effect on the efforts of other states to establish viable alternatives to the spending arms race in judicial elections.

Respectfully submitted,

JAMES E. SCARBORO
Counsel of Record
JESSICA A. SHOEMAKER
PAUL W. RODNEY
ARNOLD & PORTER LLP
370 Seventeenth Street,
Suite 4500
Denver, CO 80202
(303) 863-1000
James.Scarboro@aporter.com

Counsel for Amici Curiae

February 22, 2011

AMICUS CURIAE BRIEF

Nos. 10-238, 10-239

In The Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

JOHN McCOMISH, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* MAINE CITIZENS FOR CLEAN ELECTIONS, LAWRENCE BLISS, PAMELA JABAR TRINWARD, ANDREW O'BRIEN, AND DAVID VAN WIE IN SUPPORT OF RESPONDENTS

JOHN BRAUTIGAM
1 Knight Hill Road
Falmouth, ME 04105
(207) 671-6700

BRENDA WRIGHT
Counsel of Record
LISA J. DANETZ
DEMOS
358 Chestnut Hill Avenue
Suite 303
Brighton, MA 02135
(617) 232-5885
bwright@demos.org

Counsel for Amici Curiae

February 2011

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICI CURIAE*

Maine Citizens for Clean Elections ("MCCE") is a non-partisan association of organizations and individuals with the common purpose of working in the public interest to advocate for, increase public support for, defend and improve the Maine Clean Election Act ("MCEA") and other campaign finance reforms. For its fifteen-year history, MCCE has been dedicated to ensuring the orderly and successful functioning of the election process and Maine's citizen-initiated campaign finance system.

MCCE has invested deeply in the success of the MCEA. Attempting to address oft-expressed concerns about the influence of moneyed interests on Maine elections and in Maine's government, the organization drafted the law and successfully campaigned for its approval by popular vote in November 1996. Since then, MCCE has spearheaded significant efforts to educate the public and candidates about the law, ensured its full implementation by the Maine Commission on Governmental Ethics and Election Practices, helped defend the law from the first round of legal challenges, *see Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000), and fought for the law's full financing. Most recently, MCCE participated as *amicus* before

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[*] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, and no counsel or party funded its preparation or submission.

this Court in *Respect Maine PAC v. McKee*, No. 10-A362, opposing an application for a writ of injunction against the public financing trigger provisions of the MCEA. The Court denied the application. *Respect Maine PAC v. McKee*, 131 S.Ct. 445 (Oct. 22, 2010).

Amici Lawrence Bliss, Pamela Jabar Trinward, Andrew O'Brien, and David van Wie are individuals who ran as participating candidates under the MCEA in the November 2010 elections – and who plan to run again in future races. Lawrence Bliss and Pamela Jabar Trinward competed for seats in Maine's Senate while Andrew O'Brien and David van Wie ran for Maine's House of Representatives.

Their campaigns demonstrated the benefit of supplemental funds in different types of races for Maine's legislative contests: highly competitive races, races against traditionally funded opponents who exceeded the trigger threshold, and races where outside groups funded independent expenditures. Each invested substantial resources qualifying for the public funding system and organizing his or her campaign according to its regulatory scheme and each is strongly inclined to run as a participating candidate in future campaigns, but the availability of matching funds is a factor in whether or not each will participate. Pamela Jabar Trinward and David van Wie also participated with MCCE as *amici* before this Court in *Respect Maine PAC v. McKee*, No. 10-A362.

SUMMARY OF ARGUMENT

Enacted by the citizens of Maine through a voter initiative, the MCEA has offered a full public funding option to candidates for state offices for the past decade. That option provides candidates who demonstrate a threshold level of public support with an initial distribution of public funds in lieu of private contributions. It provides for additional funds in more highly contested elections, subject to a cap, under a formula that takes into account an opponent's spending and spending by independent sources. Maine's successful experience with public financing in six election cycles since 2000 confirms that public funding furthers, not abridges, pertinent First Amendment values.

Full public financing has invigorated the electoral marketplace in Maine. Candidates across the political spectrum have opted into the public financing program in large numbers, reflecting strong and widespread public support for an electoral system that frees candidates from dependency on private donations and thus deters the threat and appearance of *quid pro quo* corruption. The availability of full public financing has spurred electoral competition, dramatically reducing the number of uncontested elections and enhancing challengers' ability to take on incumbents in competitive elections. The full public financing program has enhanced candidates' engagement with voters and increased citizens' participation in state legislative elections.

Maine's law accomplishes all this without placing any limit on what privately funded candidates may spend or on independent expenditures. To encourage participation in the system, the program includes a trigger provision allowing additional public funds to a participating candidate under certain conditions, based on calculations that take into account an opponent's spending as well as independent expenditures both for and against the participating candidate and his opponent. The ability to receive triggered matching funds in more highly contested elections is critical to ensuring strong participation, and thus critical to the success of the MCEA in fulfilling its anti-corruption purpose.

But such additional funds are subject to an upper limit, so a privately financed candidate remains free to outspend his opponent.

The record in Maine refutes any contention that the triggered matching funds work to "chill" fundraising or spending by privately financed candidates or independent sources. Analysis of spending patterns in Maine elections from 2002 through 2010 shows no empirical support for the conjecture that Maine's trigger provisions deter candidates from raising and spending as much as they can. Indeed, the actions of the only candidate ever to have claimed such a First Amendment injury in Maine directly disproved the "chill" theory. He outspent not only his publicly financed opponent, but all other candidates for the Maine House in 2010 – including those who faced no publicly financed opponent.

Finally, the "fear of speech" theory that petitioners advance in this case is fundamentally at odds with the purpose of the First Amendment, which seeks to "secure the widest possible dissemination of information from diverse and antagonistic sources." *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (citations omitted). In the political marketplace contemplated by the First Amendment, an exchange of diverging viewpoints is to be encouraged, not feared – and the supplemental funds foster rather than inhibit that exchange. The First Amendment therefore should not be twisted into an instrument that shields candidates from other candidates' speech. Instead, the public financing provisions at issue here are fully constitutional as a means to enhance and facilitate the "'uninhibited, robust, and wide-open' public debate" that the First Amendment was designed to ensure. *Id.* at 93 n.127.

ARGUMENT

I. MAINE'S SUCCESSFUL EXPERIENCE WITH FULL PUBLIC FINANCING OF ELECTIONS CONFIRMS THAT PUBLIC FUNDING FURTHERS, NOT ABRIDGES, PERTINENT FIRST AMENDMENT VALUES.

Buckley long ago established the principles anchoring the constitutionality of public financing of elections, holding that the role of public funding in expanding public deliberation and debate directly serves the goals of the First Amendment:

> [T]he central purpose of the Speech and Press Clauses was to assure a society in which "uninhibited, robust, and wide-open" public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish. Legislation to enhance these First Amendment values is the rule, not the exception.

Id. (citations omitted). Like the presidential public financing system praised by the *Buckley* Court, the MCEA is an effort "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93.

Following its enactment in 1996, various provisions of the MCEA – including its public financing trigger provisions, disclosure provisions, and contribution limits – were challenged on First Amendment grounds. These provisions all were upheld by both the District Court and Court of Appeals. *Daggett v. Webster*, 74 F. Supp. 2d 53 (D.Me. 1999), *aff'd sub nom. Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000). Maine's experience under the MCEA over the past decade confirms that its public financing program "furthers,

not abridges, pertinent First Amendment values." *Buckley*, 424 U.S. at 93.[2]

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[2] Following *Buckley*, voluntary public financing schemes repeatedly were upheld in recognition of this principle – that the rights of nonparticipants are not unconstitutionally infringed by the grant of public funds to participating candidates. *See*, in addition to *Daggett*, *North Carolina Right to Life Comm. Fund v. Leake*, 524 F.3d 427 (4th Cir. 2008) (affirming denial of preliminary injunction against public financing system for appellate judicial elections); *Gable v. Patton*, 142 F.3d 940, 948-949 (6th Cir. 1998) (upholding trigger provision lifting certain limits on participating candidates when nonparticipating candidates exceed certain threshold); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) (upholding Minnesota's public funding for elections); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993) (upholding Rhode Island's public funding system); *but see Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994) (striking down trigger provision for matching funds where participation in program was nearly 100% before trigger provision was added).

More recently, four circuits have reached varying conclusions about the constitutionality of different trigger provisions within four states' public funding programs. *Respect Maine PAC v. McKee*, 622 F.3d 13 (1st Cir. 2010) (denying request to enjoin trigger provisions); *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010) (upholding trigger provisions); *Green Party v. Garfield*, 616 F.3d 213 (2d Cir. 2010) (striking trigger provisions); *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010) (enjoining trigger provisions).

The different outcomes of recent cases underscore that no two public funding programs are alike. *See Daggett*, 205 F.3d at 469 ("no two public funding schemes are identical, and thus no two evaluations of such systems are alike"). Accordingly, it is erroneous to treat all grant distribution plans as identical for constitutional purposes. *Id.*; *see also McComish*, 611 F.3d at 523-526 (examining factual record of Arizona's program to balance extent of burden against strength of state interests). Instead,

(Continued on following page)

A. Maine's Public Financing System

In November 1996, through a citizen initiative, Maine voters adopted a set of provisions establishing a voluntary public financing program for state legislative and gubernatorial elections, the Maine Clean Election Act, ME. REV. STAT. ANN. tit. 21A §§ 1121 *et seq.* ("MCEA"). Under the MCEA, candidates who meet certain qualifying conditions and agree to limit their private fundraising and expenditures become eligible to receive set amounts of public financing for their campaigns.

Candidates seeking to participate in Maine's public funding program must meet several requirements. They must demonstrate a level of public support by collecting a minimum number of $5 "qualifying contributions" from registered voters in the candidate's district.[3] To facilitate the process of raising qualifying contributions, legislative candidates also may raise a limited total of "seed money" contributions in amounts not greater than $100 per donation; while gubernatorial candidates are required to collect at least $40,000 from in-state donors in such

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the range of burdens and interests presented by each scheme must be closely analyzed and balanced.

[3] Gubernatorial candidates must collect 3,250 qualifying contributions, Senate candidates 175, and House candidates 60. ME. REV. STAT. ANN. tit. 21A § 1125(3). These qualifying contributions are deposited to the Maine Clean Election Fund ("Fund"), not to the individual candidate's account. *See id.* §§ 1122(7) & 1125(3).

$100 seed money contributions as an additional demonstration of the threshold level of support necessary to qualify for the public funding.[4] *See id.* §§ 1122(9), 1125(2) & 1125(5)(C-1).

Once they are certified, participating candidates may not accept any private contributions, and must limit their campaign expenditures to the amount of disbursements they receive from the Fund. *See id.* § 1125(6). Participating candidates are subject to civil and criminal penalties for violating the rules governing participation. *See id.* § 1127.

Candidates who meet the qualifying requirements receive an initial grant from the Fund, which is reduced by the amount of any unspent seed money they have collected. *See id.* §§ 1125(5) & (7).[5] Beyond

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[4] The total amount that participating candidates may raise through these $100 seed money contributions is limited to $500 for House candidates, $1500 for Senate candidates and $200,000 for gubernatorial candidates. ME. REV. STAT. ANN. tit. 21A §§ 1122(9), 1125(2) & 1125(5)(C-1). By contrast, candidates who choose not to participate in the public financing program may accept an unlimited number of donations, and each donor may give $350 per election for legislative elections ($700 total for the primary and general) and $750 per election for gubernatorial races ($1500 total for the primary and general). These limits on contributions to privately financed candidates are adjusted for inflation every two years. *See id.* § 1015.

[5] The initial distribution for participating Senate and House candidates is generally calculated based on the average amount of campaign expenditures in the prior two election cycles for the particular office. ME. REV. STAT. ANN. tit. 21A § 1125(8). Beginning September 1, 2011, that formula will be modified. In determining the amount, the Commission will take

(Continued on following page)

the initial disbursement, participating candidates may, under certain conditions, receive limited supplemental grants of public funds. These funds may be triggered by the cumulative spending or fundraising of an opponent coupled with independent expenditures opposing the participant or supporting the opponent. *See id.* § 1125(9).

Maine's system for distributing additional funds differs somewhat from those of most states. The amount of additional funds provided to a participating candidate in Maine is not solely a product of spending or fundraising by the privately financed candidate and his independent expenditure supporters, but is reduced by the amount of independent expenditures made to support a publicly financed candidate or to oppose the privately financed candidate. 94-270 C.M.S. Ch. 3, § 5(3)(C) (Maine Comm'n on Governmental Ethics & Election Practices). As a result, a candidate who outspends his opponent will not necessarily trigger matching funds. For example, a nonparticipating candidate might spend over the amount of

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into consideration any relevant information including, but not limited to, the range of campaign spending by candidates in the prior two election cycles for the particular office, the Consumer Price Index, significant changes in the costs of campaigning, and the impact of independent expenditures on the payment of supplemental funds. *See id.* § 1125(8-A). Participating gubernatorial candidates receive and will continue to receive a fixed amount for their initial distribution: $400,000 for a contested primary and $600,000 for the general election. *See id.* §§ 1125(8)(E) & (F), 1125(8-A), 1125(9).

the initial distribution but the participating candidate nevertheless would not receive additional funds if there had been offsetting independent expenditures in favor of the participating candidate, or if independent expenditures had been made in opposition to the nonparticipating candidate. *Id.*[6]

The computation of matching funds in Maine also excludes contributions received by Maine's privately financed candidates when they are not actually disbursed to influence the nomination or election of a candidate – such as contributions that a nonparticipating candidate may use to repay a loan, refund a contribution, or transfer to another political committee. 94-270 C.M.S. Ch. 3, § 5(3)(C) & (J).

The triggered matching funds a participating candidate may receive are not unlimited, but are subject to a cap. For legislative candidates, the cap is equal to twice the initial disbursement. ME. REV. STAT. ANN. tit. 21A § 1125(9). For participating gubernatorial candidates in the primary, matching funds may equal one-half of the initial distribution, while for the general, matching funds equal to the initial

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[6] In this, Maine's system differs from Arizona's, Connecticut's and Florida's. *Compare with* FLA. STAT. ANN. § 106.355 (independent expenditures not taken into account); Ariz. Admin. Reg. R2-20-113(c) (independent expenditures in opposition to privately financed candidate not considered in calculating matching funds); CONN. GEN. STAT. § 9-714 (repealed 2010) (addressing only independent expenditures "with the intent to promote the defeat of a participating candidate").

distribution may be awarded. *Id.*[7] Once the applicable cap is reached, participating candidates receive no additional public funds regardless of how much money the privately funded opponent raises or spends. Participating candidates in Maine are not entitled to cumulative matching funds for multiple opponents. 94-270 C.M.S. Ch. 3, § 5(3)(G).

Candidates who choose not to participate in the public financing program face no limits on the expenditures they may make in support of their campaigns, or the total amount of contributions they may raise from private sources. Thus, privately funded candidates in Maine (and their independent expenditure supporters) always retain the ability to outspend an opponent who receives public financing.

B. Maine's Public Financing Program Has Attracted Widespread Candidate Participation, Freeing Officeholders from Indebtedness to Private Donors and Deterring Corruption.

Deterring corruption of elected officials and avoiding the appearance of corruption are significant

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[7] Thus, in the primary, a participating gubernatorial candidate with an opponent will receive $400,000, with the potential to qualify for an additional $200,000 in matching funds; and in the general election, a participating candidate will receive $600,000, with the potential to qualify for a maximum of $600,000 in matching funds. ME. REV. STAT. ANN. tit. 21A § 1125(9).

and indeed compelling governmental interests. *Buckley*, 424 U.S. at 26-27; *see also Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 901 (2010) (noting the *Buckley* Court's concern that "large contributions could be given 'to secure a political *quid pro quo*.'" (quoting *Buckley*, 424 U.S. at 26)); *Fed. Election Comm'n v. Nat'l Conservative PAC*, 470 U.S. 480, 496-97 (1985) (identifying "preventing corruption or the appearance of corruption" as "compelling government interests"); *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973) (noting the strong governmental interest in maintaining the public's "confidence in the system of representative Government").

By freeing candidates from dependency on private donations from sources that may expect a *quid pro quo* from elected officials, public financing of elections directly serves to deter corruption and its appearance. As *Buckley* observed, "It cannot be gainsaid that public financing as a means of eliminating the influence of large private contributions furthers a significant governmental interest." 424 U.S. at 96.

The MCEA has been extremely successful in ensuring that Maine legislators can serve their constituents without being financially beholden to private interests for funding their campaigns. The great majority of candidates in Maine now run for legislative office – and win – without the need to seek private donations, apart from $5 qualifying contributions or a handful of "seed money" contributions under $100. The last four elections in Maine (2004-2010)

have seen participation rates of 77% to 81% among candidates running for the legislature. Maine Comm'n on Governmental Ethics and Election Practices, *Maine Clean Election Act: Overview of Participation Rates and Payments, 2000-2010* ("Overview Report") at 1 (Jan. 19, 2011), *available at* http://www.mainecleanelections.org/assets/files/Ethics%20Commission%20Overview%202000-2010%20for%20LVA%201.19.11%281%29.pdf (last visited Feb. 17, 2011). Among candidates actually elected to office in Maine, between 78% and 85% ran with public funding over the same time period. Currently, 80% of sitting legislators in Maine are MCEA participants. *Id.*

The majority of Republicans and Democrats run as MCEA candidates. In the 2010 Senate elections, 94% of Republican candidates, and 82% of Democratic candidates, used MCEA funding. *Id.* In House campaigns, 89% of Democratic candidates and 68% of Republican candidates participated. *Id.* In the three gubernatorial elections since MCEA was enacted, several highly competitive candidates, including nominees of the major parties, participated in MCEA. *Id.*

The ability to receive additional funding beyond the base grant to match at least some of the adverse spending in more highly contested elections is critical to ensuring strong participation, and thus critical to the success of the MCEA in fulfilling its anti-corruption purpose. As one candidate explained:

> The availability of matching funds was an important factor in my decision to use the

> Clean Elections system. The elimination of matching funds would make the system much less attractive to me and no doubt to other candidates, and would leave voters hearing less speech, not more.

Declaration of Andrew O'Brien in Support of Motion to Intervene, ¶ 11 ("O'Brien Decl."), *Cushing v. McKee*, No. 10-cv-330, docket # 46 (D.Me. Dec. 6, 2010); *see also* Declaration of Pamela Jabar Trinward, in Support of Motion to Intervene, ¶ 5 ("Trinward Decl."), *Cushing v. McKee*, No. 10-cv-330, docket # 46 (D.Me. Dec. 6, 2010) ("Matching funds encourage participation in the system" and "enable the voters to have more complete information."); Declaration of Owen Pickus in Support of Motion to Intervene, ¶ 5 ("Pickus Decl."), *Cushing v. McKee*, No. 10-cv-330, docket # 46 (D.Me. Dec. 6, 2010) (availability of matching funds was a factor in decision to participate in system). *Accord Daggett*, 205 F.3d at 467 ("[T]he government may create incentives for candidates to participate in a public funding system in exchange for their agreement not to rely on private contributions.").

High rates of participation in the public funding program serve the state's critical interest in protecting Maine's electoral process from the threat of corruption and its appearance. *See* Declaration of Alison Smith in Support of Motion to Intervene, ¶ 4 ("Smith Decl."), *Cushing v. McKee*, No. 10-cv-330, docket # 46 (D.Me. Dec. 6, 2010) (noting importance of MCEA in preserving "an electoral system that is free of corruption"). Indeed, Maine citizens consistently

express strong support for Maine's public funding program. In recent surveys, two-thirds of Maine voters expressed overall approval for the law and agreed that the MCEA is needed because, prior to the enactment of the law, large donors wielded disproportionate influence. Seventy percent expressed support for the public financing provisions specifically. *See Critical Insights on Maine Tracking Survey: Summary Report of Finding from Proprietary Items 5, 7, 10* (Critical Insights ed., May 2010), *in* Declaration of Mimi Marziani, Exh. 3, *Cushing v. McKee*, No. 10-cv-330, docket # 46 (D.Me. Dec. 6, 2010).

Candidates and legislators also confirm that high rates of participation in the public funding program serve to protect Maine's electoral process from the threat of corruption. *See* O'Brien Decl. ¶ 4 ("I participated in the Clean Elections system in part because I believe it is important for the public to know that their legislators owe no debt to large contributors."); Trinward Decl. ¶ 3 (noting public financing's role in "reducing the appearance of undue influence").

C. Public Financing Has Enhanced the Competitiveness of Maine Elections.

This Court has recognized that electoral competition is central to democratic governance as a means by which voters can hold elected officials accountable. *See Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("Competition in ideas and governmental policies is at the core of our electoral process and of the First

Amendment freedoms"); *Randall v. Sorrell*, 548 U.S. 230, 249 (2006) (expressing concern that entrenchment of incumbents harms competition, "thereby reducing electoral accountability"). *See also, e.g.*, Kenneth Mayer, Timothy Werner and Amanda Williams, *Do Public Funding Programs Enhance Electoral Competition?* *in* THE MARKET PLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS 245, 249 (Michael P. McDonald and John Samples, eds., 2006) ("Mayer study") ("meaningful political competition is the foundation of democratic legitimacy"). Studies examining the impact of public financing on Maine's elections have found that the competitiveness of elections has increased in a variety of ways since adoption of full public financing.

As noted in the Mayer study, "[t]here is compelling evidence that Arizona and Maine have become much more competitive states in the wake of the 1998 clean elections programs." *Id.* at 263. With respect to Maine, the study found that after full public financing was adopted, the percentage of legislative elections in which incumbents were challenged increased in both 2002 and 2004, and that "Maine's contested rate in 2004 (98 percent) was higher than it was at any point since 1990." *Id.* at 257. Not only were more incumbents challenged, but the contests themselves were more competitive, as measured by the margin of victory in the election. In 1998, before public financing was instituted, only 35% of legislative incumbents in Maine were in competitive races, while by 2004,

nearly two-thirds of incumbents (64%) faced competitive races. *Id.* at 259.

A 2008 study analyzing the impact of public financing in Arizona and Maine found similar effects:

> [C]lean elections programs in both states significantly increased competition in districts where challengers accepted public funding. These findings suggest that public monies do not simply attract low-quality challengers and that access to campaign funds is an important determinant of competitiveness.

Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 STATE POLITICS AND POLICY QUARTERLY 263 (2008) (from abstract), *available at* http://spa.sagepub.com/content/8/3/263.abstract (last visited Feb. 18, 2011).

A 2007 study by the Maine Commission on Governmental Ethics and Election Practices ("Commission") also noted gains in competition. While there were typically more than 30 uncontested races in general elections for the Maine legislature in the years preceding the MCEA (1990-1998), the number of uncontested races dropped to 5 in 2004 and only 4 in 2006. Maine Comm'n on Governmental Ethics and Election Practices, *2007 Study Report: Has Public Funding Improved Maine Elections?* ("2007 Report") at 19, Fig. 2.4 (2007), *available at* http://www.maine.gov/ethics/pdf/publications/2007_study_report.pdf (last visited Feb. 17, 2011). A survey of candidates in 2006

showed that the availability of public funding was particularly important to first-time candidates in encouraging them to run. *Id.* at 17. In the recent 2010 elections, 100% of the Senate candidates who won a Senate seat for the first time (14 candidates) did so with MCEA funding.

D. Public Financing in Maine Has Increased Candidates' Engagement with Voters and Citizens' Participation in Legislative Elections.

Buckley recognized that the "burden of fundraising" solely through private donations is one of the ills addressed by public financing, which the Court found "an appropriate means of relieving major party Presidential candidates of the rigors of soliciting private contributions." 424 U.S. at 96; *see also id.* at 91 (noting Congress' goal of "free[ing] candidates from the rigors of fundraising" through public financing). The record in Maine shows that its public financing program has helped promote a robust electoral debate in part by freeing candidates' resources from the burdens of fundraising and thus facilitating increased engagement with the voting public.

Direct campaign engagement with voters – *e.g.*, face-to-face canvassing and other personal forms of outreach – is well understood as a powerful tool for voter mobilization. *See, e.g.*, Donald Green and Alan Gerber, *Get Out the Vote: How to Increase Voter Turnout*, The Brookings Institution (2008). Thus, if public

funding frees candidates from fundraising duties, they are likely to spend more time on direct voter outreach, and this in turn can stimulate voter engagement in elections. Indeed, a study of states with full public financing (including Maine) shows that "the acceptance of full funding provides candidates with time flexibility sufficiently powerful to facilitate higher levels of direct interaction with citizens, and that this heightened engagement translates to more voters casting ballots in those races." Michael G. Miller, *Citizen Engagement and Voting Behavior in Publicly Funded Elections* at 3 (Working Paper), *available at* http://www.sites.google.com/site/millerpolsci/research (visited Feb. 10, 2011).

According to the study, "the acceptance of full funding such as that in Arizona, Connecticut, and Maine, causes an increase of nearly 10 percentage points in the proportion of time candidates spend directly engaging voters" – a difference that is "highly significant." *Id.* at 15. Indeed, the "enhanced mobilization capability" facilitated by full public financing "translates to at least hundreds, and possibly thousands of high-quality voter contacts that would not have otherwise occurred." *Id.* at 26.

Moreover, the same study found that the additional time candidates spend engaging with voters when full public financing is available translates into increased likelihood of voter participation in legislative elections. Political scientists long have recognized the phenomenon of voter roll-off in elections that are not at the top of the ballot – such as state legislative

elections. *Id.* at 8-9. Voters who cast a vote in the "top of the ballot" race – President, Governor, U.S. Senate – may not be as likely to vote in state legislative races, which are lower down on the ballot and about which they may have less information. Accordingly, a good measure of the impact of public financing on voter engagement is to test whether it reduces voter roll-off in legislative contests where at least one candidate uses public funding. *Id.* at 8. In fact, the study found that ballot roll-off in districts with a candidate using full public financing "is lower by about 1.5 percentage points in Maine and 2 points in Connecticut, a factor of about 20% in each state." *Id.* at 3.

Candidates who have used public financing in Maine confirm that the system facilitates broader engagement with voters. As gubernatorial candidate Libby Mitchell noted, "As soon as we qualified, the only job I had was to connect with voters," she said. "I would often say, 'No you don't have to bring a check to this party. It's a house party to get to know you.' This is strange to many people." Susan M. Cover, *Mitchell: Sees Strong Victory, Doubts Gender Played a Role,* THE PORTLAND PRESS HERALD, June 10, 2010, *available at* http://www.pressherald.com/news/mitchell-sees-strong-victory-doubts-gender-played-a-role_2010-06-10.html?comments=y. Similarly, Lawrence Bliss, a candidate for the Senate in 2010, observed that the public financing system "has allowed me to prioritize and focus my time and efforts on speaking directly with the voters I hope to represent, rather than on fundraising." Declaration of Lawrence Bliss in

Support of Motion to Intervene, ¶ 4 ("Bliss Decl."), *Cushing v. McKee*, No. 10-cv-330, docket # 46 (D.Me. Dec. 6, 2010). *See also* Trinward Decl. ¶ 3 ("I also believe the voters of my district are better served when candidates spend time directly engaged in communication with voters in the district rather than holding fundraisers or calling potential contributors to ask for money.").

II. MAINE'S EXPERIENCE REFUTES THE CLAIM THAT TRIGGERED MATCHING FUNDS "CHILL" SPENDING.

Although opponents of public financing in Maine filed a legal challenge to Maine's trigger provisions prior to the 2010 elections (*Cushing v. McKee*, No. 10-cv-330 (D.Me. filed Aug. 5, 2010)), they were unable to produce any evidence that trigger provisions had chilled candidate spending in Maine. In fact, the spending record of the sole candidate who claimed to be chilled by Maine's trigger provisions emphatically *disproved* the chill theory. Further, broader analysis of spending by privately financed candidates in Maine elections for the past decade also shows no evidence of a chilling effect from the trigger provisions.

The candidate-plaintiff in *Cushing v. McKee*, Representative Andre Cushing III, sought a pre-election injunction based on a series of declarations asserting that he would curtail his own fundraising and spending in order to avoid triggering matching funds for his opponent, unless the courts enjoined

Maine's trigger provisions. Nonetheless, when the courts denied injunctive relief, the "chill" that allegedly had threatened Rep. Cushing's First Amendment rights simply dissipated. Additional funds for his opponent were released when Rep. Cushing's spending reached the trigger, but rather than halting his expenditures at that point, his fundraising and spending continued unimpeded, more than doubling the trigger amount by the end of the campaign.[8]

In fact, Rep. Cushing not only outspent his opponents, but raised 25% more than any other candidate for the House in 2010. Indeed, the largest amount raised by a privately funded House candidate who did *not* face a publicly funded opponent was $5,490 – about half of what Rep. Cushing raised. His voice was heard loud and clear by the electorate in Maine – he won the election – and the voters benefited from hearing more total speech than if his legal challenge had succeeded in blocking additional funds to his opponent.[9]

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[8] A graph illustrating Rep. Cushing's fundraising is attached as an Appendix to this Brief. All data for this graph, and relating to fundraising in the 2010 election generally, were obtained from publicly available records of the Maine Commission on Governmental Ethics and Election Practices, www.maine.gov/ethics.

[9] It is worthwhile to consider what conclusions would have been drawn from this same record had the district court, on September 16, 2010, *granted*, rather than denied, Rep. Cushing's request to enjoin Maine's trigger provisions. In that event, the

(Continued on following page)

Moreover, like the example of Rep. Cushing, the larger record of privately financed candidates in Maine's legislative elections spanning five election cycles (2002 through 2010) shows no evidence of a chilling effect from the trigger provisions. If the prospect of triggering additional funds to publicly financed opponents indeed chilled the spending of privately funded candidates, one would expect to see their fundraising stop just short of these thresholds. The patterns in Maine's elections, however, show no such "clustering" below the triggering threshold. Indeed, as noted in an analysis by Professor Anthony Gierzynski, these spending patterns are indistinguishable from patterns seen in other states without public financing programs. Anthony Gierzynski, *Do Maine's Public Funding Program's Trigger Provisions Have a Chilling Effect on Fund Raising?* ("Gierzynski") (2011), *available at* http://www.mainecleanelections.org/assets/files/Do%20Public%20Funding%20Program%20Trigger%20Provisions%20Have%20a%20Chilling%20Effect%20on%20Fund%20Raising.pdf (last visited Feb. 17, 2011). Instead, privately funded candidates in Maine seem to raise

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very same record of spending in the wake of the injunction would have been touted as proving that an injunction against matching funds was the necessary condition allowing Rep. Cushing to make thousands of dollars in additional expenditures beyond the trigger point. Only because the courts denied the injunction is it possible to see that the claim of chill was a fiction, and that the plaintiff made the sensible decision to continue his campaign expenditures regardless of the additional funds triggered for the opponent.

and spend as much as they can – presumably constrained not by the triggering threshold, but by their own fundraising ability. Thus, the record in Maine refutes the claim that privately financed candidates engage in any less First Amendment activity than candidates without publicly funded opposition.

In sum, the facts underlying the most recent challenge to Maine's public financing system only serve to underscore what the courts found a decade ago: the triggered matching funds do not "create an exceptional benefit for the participating candidate." *Daggett*, 205 F.3d at 468. The rights of non-participating candidates and third-party supporters are not unconstitutionally burdened "as long as the candidate remains free to engage in unlimited private funding and spending instead of limited public funding." *Id.* (citation omitted). Indeed, participating candidates who receive triggered matching funds enjoy no competitive advantage relative to their privately funded opponents. The reality under the MCEA is just the opposite: The privately funded candidate, with an unfettered ability to amass private funds and make unlimited expenditures, ultimately enjoys a fundraising advantage over the publicly funded candidate who operates under an expenditure cap.

III. "FEAR OF SPEECH" SHOULD NOT BE RECOGNIZED AS A FIRST AMENDMENT INJURY REQUIRING STRICT SCRUTINY OF PUBLIC FINANCING TRIGGER PROVISIONS.

The electoral arena contemplated by the First Amendment is one of "'uninhibited, robust, and wide-open' public debate." *Buckley*, 424 U.S. at 93 n.127 (citations omitted). Indeed, "[T]he vitality of civil and political institutions in our society depends on free discussion," because "it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). "Accordingly, a function of free speech under our system of government is to invite dispute." *Id. See also Buckley*, 424 U.S. at 49 (the First Amendment seeks to "secure the widest possible dissemination of information from diverse and antagonistic sources"). In sum, in the political marketplace contemplated by the First Amendment, an exchange of diverging viewpoints is to be encouraged, not feared.

The claim advanced by petitioners in this case contradicts this constitutional tradition. Instead of needing First Amendment protection from government-imposed spending limits, they ask for First Amendment protection against "hostile speech" by their electoral opponents. *See, e.g.*, Brief of Petitioners John McComish, Nancy McClain and Tony Bouie

("McComish Pet. Br.") at 31, 41, 46.[10] Facing no limits on what they can say, they threaten to censor *themselves* if their opponents are given the means to respond. They ask for creation of a First Amendment "right to speak without response." *Cf. Daggett*, 205 F.3d at 464.

Because such a claim is so inherently at odds with the First Amendment's commitment to robust debate as the foundation of democracy, it should not result in strict scrutiny of trigger provisions even if the likelihood of candidate self-censorship were both plausible and proven. But it is neither, for several reasons.

First, the notion that candidates seeking electoral office are so fearful of an opponent's speech that they will routinely turn down donations or curtail their own spending solely to prevent it is not realistic. Except in uncontested elections, entering the electoral arena entails facing an opponent and vying with him or her for public approval. Candidates for office understand that they must face not only responsive speech from their opponents, but sometimes uncomfortable or hostile scrutiny from the press and the public at large.

Indeed, recent events have brought vivid reminders that persons seeking and attaining public office in

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[10] The *McComish* petitioners use the phrase "hostile speech" to describe what they fear at least 15 times in their brief on the merits.

these rancorous times must all too often be prepared to face anger, threats and worse because of the public positions they take.[11] Yet the petitioners' First Amendment theory argues that these same aspiring public servants must be considered so fragile that they will hold back from promoting their own campaigns merely because they fear responsive campaign ads or mailings by their publicly funded opponents. Such a timid conception of electoral politics is unrealistic, and in any event makes a poor foundation for a First Amendment claim.[12]

Second, petitioners' First Amendment theory is irrational even on its own terms. It posits that privately financed candidates would prefer to compete

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[11] *See, e.g.*, Timothy Williams, *After Tucson Rampage, A Struggle to Stay in Reach*, N.Y. TIMES, Feb. 6, 2011, *available at* http://www.nytimes.com/2011/02/07/us/politics/07townhalls.html?ref=timothywilliams (describing representatives' continuing public events despite security challenges); Huma Khan, *Four California Lawmakers Get Profiles in Courage Award*, ABCNEWS.COM, May 24, 2010, *available at* http://abcnews.go.com/GMA/profiles-courage-california-state-legislators-recognized-bipartisanship-budget/story?id=10727700 (noting threats received by legislators joining bipartisan budget deficit plan); Charlie Brennan, *Threats in wake of Bruce controversy*, CHICAGO TRIBUNE, Apr. 24, 2008, available at http://www.chicagotribune.com/topic/kdvr-threatsinwakeofbrucecontr-6379598,0,3100002.story (describing threats to legislators).

[12] Indeed, even "harsh criticism, short of unlawful action, is a price our people traditionally have been willing to pay for self-governance." *Doe v. Reed*, 130 S.Ct. 2811, 2837 (2010) (Scalia, J., concurring in the judgment); *id.* (noting the value of "civic courage, without which democracy is doomed").

under a system where their opponents are *guaranteed* to receive the maximum possible public grant at the outset of the campaign, even if the privately funded opponent never manages to raise comparable amounts. *See* McComish Pet. Br. at 84-85. Such a system would suffer from no constitutional infirmity under petitioners' theory, because the funding for the publicly financed candidate would be unrelated to the spending of the privately financed candidate or his supporters.[13] But no rational political actor would choose such a system over the existing model of incremental supplemental grants to participating candidates. A candidate who fears that an opponent will be able to match his spending clearly cannot relish the prospect that the opponent will exceed his spending.

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[13] Petitioners cannot contend that *all* public financing grants are suspect, because to do so would require overturning *Buckley*, an outcome they have not even attempted to pursue. Accordingly, they are left with the irrational position that privately funded candidates would prefer larger, unconditional grants to their opponents, rather than smaller, incremental grants that merely match what the privately financed candidates spend. In *Davis*, the presumptively constitutional alternative of lifting contribution limits for all candidates would at least have afforded some benefit to the complaining candidate by allowing him to raise larger contributions as well. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 737 (2008). Here, no benefit whatsoever would flow to privately funded candidates by instituting the alternative scheme they claim to prefer.

The transparent goal of their First Amendment challenge, then, is not to make public financing less burdensome for privately financed candidates, but instead to make it entirely unaffordable for states. That goal does not give rise to a viable First Amendment cause of action.

Third, even if public financing trigger provisions are thought to prompt strategic choices by candidates, these would not be different in kind than the choices made in races without public financing. Regardless of public financing, candidates for office realize that their own fundraising and spending may well trigger a response from an opponent or from independent sources that support the opponent, and may assist the opponent in attracting more donations. Candidates frequently cite their opponents' advertisements or fundraising totals in appeals to their own supporters asking for additional donations. "Help me fight Candidate Smith's outrageous attack ad" indeed is a common fundraising pitch.[14]

Therefore, any candidate who enters the political fray must weigh the possibility that his own fundraising, spending and speech will mobilize additional opposition to his campaign. But because a publicly financed candidate has given up the right to engage in additional private fundraising during the heat of a campaign, a grant of additional public funds provides the only means for him to engage in the same kind of

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[14] *See, e.g.*, Becky Bohrer, *Tea party group makes fundraising plea for Miller*, ANCHORAGE DAILY NEWS, Oct. 15, 2010, *available at* http://www.adn.com/2010/10/15/1503377/problems-prompt-fundraising-plea.html (visited Feb. 15, 2011) (fundraising letter cites opponents' fundraising); Massachusetts Election 2010, *Patrick Campaign Responds to RGA Attack Ads*, July 13, 2010, *available at* http://massachusetts-election-2010.com/2849/patrick-campaign-responds-to-rga-attack-ads/ (visited Feb. 15, 2011) (fundraising letter cites opposing attack ads).

responsive fundraising that happens day-in, day-out in traditional campaigns. This merely "substitutes public funding for what the parties would raise privately," the very premise of a public financing system. *Buckley*, 424 U.S. at 96 n.129.

Trigger provisions for public financing thus do not inject any dramatically new dynamic into the calculus, but simply change the source of the responsive funding. A candidate willing to censor himself based on fear of responsive speech might do the same in an election without public financing, but those hardy enough to enter the electoral fray at all are highly unlikely to choose such a passive course, regardless whether the responsive speech is facilitated by private or public funding.

All of these considerations underscore that First Amendment doctrine should not be distorted to address a "fear of speech" that is so completely out of place in the electoral marketplace. A presumption of unconstitutionality that flows from applying strict scrutiny is entirely inappropriate for public financing provisions that enhance and facilitate public debate. The First

Amendment should not be twisted into an instrument that shields candidates from other candidates' speech.[15]

CONCLUSION

The judgment of the court below should be affirmed.

February 2011

Respectfully submitted,

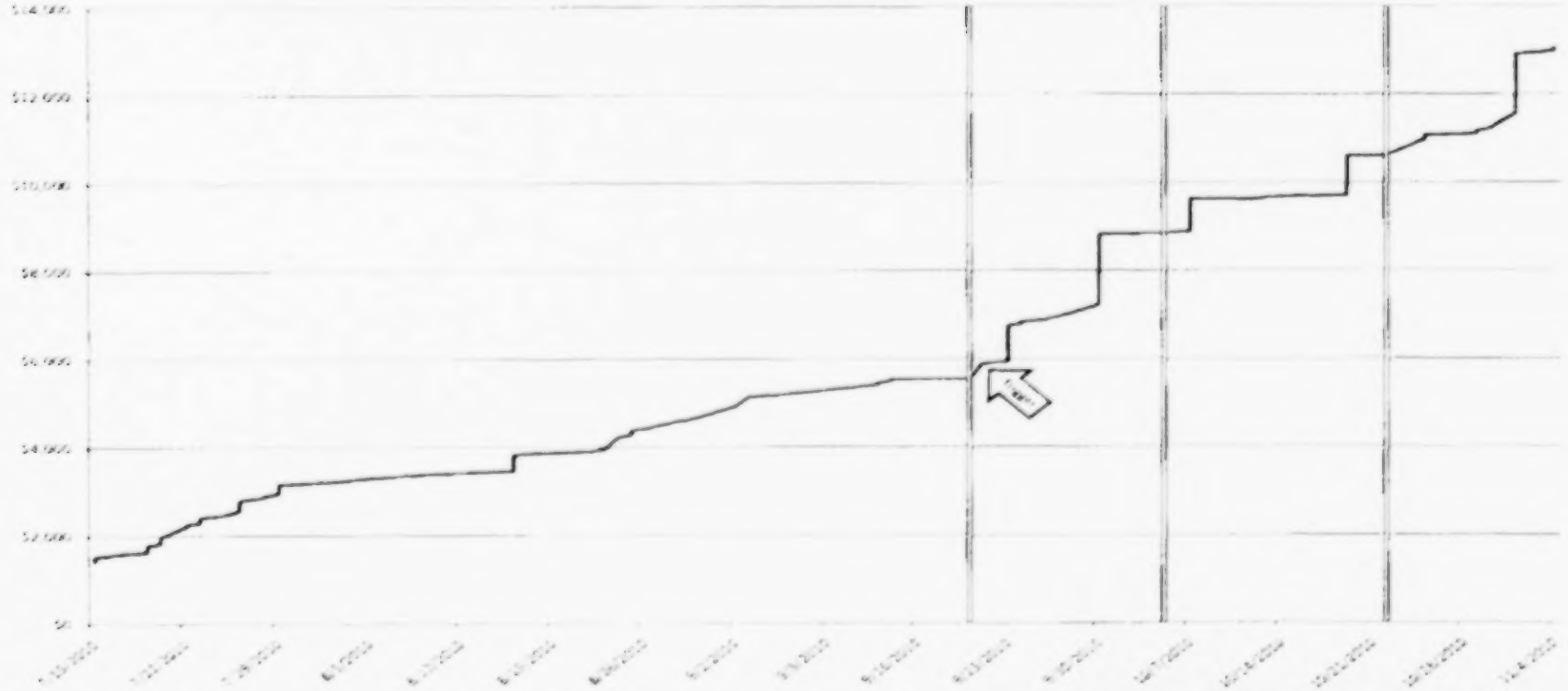
BRENDA WRIGHT
Counsel of Record
LISA J. DANETZ
DĒMOS
358 Chestnut Hill Avenue
Suite 303
Brighton, MA 02135
(617) 232-5885
bwright@demos.org

JOHN BRAUTIGAM
1 Knight Hill Road
Falmouth, ME 04105
(207) 671-6700

Counsel for Amici Curiae

[15] *Amici* also agree fully with the analysis set forth in the briefs of the Respondents explaining why strict scrutiny is inappropriate in examining provisions that place no direct limit on candidate spending, why the holding of *Davis v. Fed. Election Comm'n* is inapplicable, and why Arizona's trigger provisions should be upheld.

2010 Maine Legislative Candidate Andre Cushing Fundraising Showing Dates of Court Orders Denying Injunctive Relief and Trigger Date



The vertical lines indicate dates upon which injunctive relief was denied in the Maine case. The United States District Court for the District of Maine denied Cushing's motion for an injunction on September 20, 2010. The United States Court of Appeals for the First Circuit denied Cushing's motion for an injunction on October 5, 2010. The United States Supreme Court denied an emergency application for a writ of injunction pending appeal on October 22, 2010.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JAN 20 2011
OFFICE OF THE CLERK

Nos. 10-238 and 10-239

In the Supreme Court of the United States

JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,

Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, LOUIS HOFFMAN, and LORI DANIELS, in their official capacities as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF MITCH MCCONNELL, UNITED STATES SENATOR, AS *AMICUS CURIAE* SUPPORTING PETITIONERS

Bobby R. Burchfield
Counsel of Record
Richard W. Smith
Matthew M. Leland
MCDERMOTT WILL & EMERY LLP
600 Thirteenth St., NW
Washington, DC 20005
(202) 756-8000
BBurchfield@mwe.com

Attorneys for Senate Republican Leader Mitch McConnell

January 20, 2011

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INTEREST OF THE AMICUS CURIAE

Amicus Senator Mitch McConnell is the Senate Republican Leader and the senior United States Senator from the Commonwealth of Kentucky. He is the former Chairman of the National Republican Senatorial Committee, a national political party committee comprising the Republican members of the United States Senate.

Senator McConnell is a respected senior statesman and is recognized as the Senate's most passionate defender of the First Amendment guarantee of unrestricted political speech. In addition, he has acquired considerable practical experience over the last three decades complying with various federal and state campaign finance restrictions. He has been asked, and expects to be asked in the future, to assist other Republican candidates at all levels including by soliciting contributions so those candidates may make expenditures in connection with state and federal elections. For these reasons, Senator McConnell's associational and free speech rights may be impacted by the outcome of this case.

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* made a financial contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

I. Arizona's Clean Elections Act imposes a severe penalty on nonparticipating candidates and anyone making independent expenditures. Any nonparticipating candidate who spends more than the statutory limit, as well as many independent spenders, incur the direct statutory consequence of triggering incremental public funds to the very candidates they oppose. The Act unquestionably burdens the core political speech of nonparticipants and independent speakers, and therefore must withstand strict scrutiny to survive.

II. To survive strict scrutiny, the penalty imposed on candidates and independent expenditure organizations by the Arizona Clean Elections Act must fulfill a "compelling governmental interest" and be "narrowly tailored to achieve that interest." The only governmental interest that may be deemed "compelling" is the government's interest in preventing actual or apparent *quid pro quo* corruption, that is, the exchange of money for political favors.

III. When held to strict scrutiny, the Act's matching funds provision must fail. The Ninth Circuit incorrectly subjected the matching funds provision to intermediate scrutiny. The Ninth Circuit also improperly ignored the penalties the Act imposes on speech of nonparticipating candidates and independent speakers. Rather, it upheld the statute based exclusively on the benefits provided to participants in the public financing system. Just as in *Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008), the Arizona Clean Elections Act undeniably burdens

the core political speech of nonparticipants and independent speakers, and is not narrowly tailored to advance the government's interest in stemming *quid pro quo* corruption.

ARGUMENT

The First Amendment instructs: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Political speech is at the core of the First Amendment, which "'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

The State of Arizona regulates the financing of state and local campaigns by imposing both strict limitations on contributions, which are not at issue here, and limitations on expenditures, which are central to this case. The expenditure limitations take two forms. Candidates who elect to participate in the state public campaign financing system must commit to expenditure limitations. These commitments by candidates to spending limits in exchange for taxpayer funding are also not at issue here, and in this limited respect are analogous to the public funding approved in *Buckley*. *Id.* at 85-90.

But, unlike the federal funding system upheld in *Buckley*, these expenditure limitations also affect candidates who elect not to participate in the public financing system, as well as any individual or organization who considers spending money independently to support or oppose a candidate. Non-

participating candidates who are running against participating candidates will trigger additional "matching funds" for their opponents if they spend above the statutory spending limit. Likewise, independent speakers are restricted by the public financing system because their spending in support of a nonparticipating candidate, or in opposition to a participating candidate, will trigger additional matching funds for the participating candidates.

The incremental matching funds payable to the participating candidates as a direct statutory consequence of these decisions to spend *more* (in the case of nonparticipating candidates) or *any* (in the case of independent speakers) money are called "*equalizing payments*." These "equalizing payments" are the amount of the above cap spending by the nonparticipating opposing candidate, or an amount equal to the independent spending, less six percent. Participating candidates receive these "equalizing payments" up to a maximum of three times their original public funding grant.

It cannot be seriously disputed that the "equalizing payments" affect, and burden, the decisions of nonparticipating candidates to engage in more speech, and the decisions of independent speakers to speak at all. This burden on campaign spending fits firmly within the line of precedents holding that expenditure limits are subject to strict scrutiny, and cannot survive unless the limit is narrowly tailored to serve the compelling interest of fighting *quid pro quo* corruption. The equalizing payments are analogous to, but even more oppressive than, the

expenditure limitations struck down by *Davis*, 554 U.S. 724.

Senator McConnell respectfully urges the Court to use this case as a vehicle to clarify that both direct and indirect expenditure limitations are subject to strict scrutiny, and that only a restriction narrowly tailored to combat *quid pro quo* corruption or the appearance of *quid pro quo* corruption can survive.

I. THE ARIZONA CLEAN ELECTIONS ACT IS SUBJECT TO STRICT SCRUTINY BECAUSE IT IMPOSES BURDENS ON THE EXPENDITURE OF MONEY FOR POLITICAL SPEECH.

A. Any Governmental Burden on the Decision To Spend Money on Political Speech Must Withstand Strict Scrutiny.

Buckley established four basic propositions relevant here: Political speech costs money, restrictions on political spending infringe fundamental First Amendment freedoms, such restrictions will be upheld only if narrowly tailored to serve a compelling government interest, and the only government interests sufficiently compelling to support such restrictions are the prevention of actual or apparent *quid pro quo* corruption. 424 U.S. at 14-15, 26. Indeed, *Buckley* struck down the expenditure limitations in the Federal Election Campaign Act, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. §§ 431-455 (1994)) ("FECA"), on the grounds that they "impose direct and sub-

stantial restraints on the quantity of political speech," 424 U.S. at 39, and that the asserted governmental interests were insufficient "to justify the restriction," *id.* at 55. The Court reasoned that a candidate who *raised* a great deal of money in compliance with contribution limits could not be corrupted simply by *spending* the large amount of money legally raised. *Id.* at 28, 52-59.

Since at least *Buckley* it has been clear that

> [a] restriction on the amount of money a person or group can spend on political communications during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

424 U.S. at 19. For this reason, the Court held that "expenditure ceilings impose direct and substantial restraints on the quantity of political speech." *Id.* at 39.

In the intervening 35 years, this Court has repeatedly confirmed *Buckley*'s four basic propositions. Whatever imaginative form government restrictions on political expenditures may take, this Court has continued to subject such restrictions to

strict scrutiny.[2] *See, e.g., Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 898 (2010) (stating that limitations on political expenditures must be evaluated using "strict scrutiny standard" which "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest"); *Davis v. FEC*, 554 U.S. 724, 128 S.Ct. at 2772 (subjecting "Millionaire's Amendment" to strict scrutiny); *Fed. Election Comm'n v. Wisconsin Right to Life* ("WRTL"), 551 U.S. 449, 449 (2007) ("Because [the statute] burdens political speech, it is subject to strict scrutiny."); *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.* ("Colorado Republican II"), 533 U.S. 431, 440 (2001) (observing "limits on political expenditures deserve closer scrutiny than restrictions on political contributions"); *see also Randall v. Sorrell*, 548 U.S. 230, 242 (2006) (noting that Court has "repeatedly adhered to *Buckley*'s constraints ... on expenditure limits.").

It is certainly true that fixed dollar limits on campaign spending are subject to—and inevitably fail—strict scrutiny. *See, e.g., Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 613-19 (1996) (rejecting limits on independent political party spending); *Fed. Election Comm'n v. National Conservative Pol. Action Comm.* ("NCPAC"), 470 U.S. 480, 493-501 (1985) (striking down $1,000 limit on independent expenditures); *Buckley*, 424 U.S. at 39-51 (rejecting dollar

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[2] The lone exception has been disclaimer and disclosure requirements, as explained below. *See infra* II.A.

limits on independent expenditures); *see also Randall*, 548 U.S. at 240-46 (rejecting limits on candidate expenditures). But this Court has also recognized that less direct restrictions on the amount of political spending must suffer the same fate. Thus, it has applied strict scrutiny to reject black-out periods for corporate political spending prior to elections, *Citizens United*, 130 S.Ct. 876; "asymmetrical contribution limits" triggered by the use of personal assets for campaign spending, *Davis*, 554 U.S. at 738-44; and even a forced choice between party coordinated spending and party independent spending, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 219 (2003). Increasingly creative approaches to limiting, burdening, or deterring the decisions of candidates, parties, and independent speakers to spend more money on political speech have met the same fate—invalidation under strict scrutiny.

B. The Matching Funds Provision Burdens Core Political Speech.

Although proponents of Arizona's so-called Clean Election Act claim the matching funds provision is merely an incentive for candidates to participate in the public financing system, the statute is in effect an expenditure restriction on core political speech by nonparticipating candidates and independent speakers.

On its face, the statute betrays unacceptable purposes. The preamble criticizes the prior Arizona campaign finance regulatory regime, which "[drove] up the cost of running for state office," and "[r]equire[d] that elected officials spend too much of

their time raising funds," A.R.S. § 16-940(B)(7) & (8). The matching funds provision is entitled "Equal funding of candidates," and imposes on nonparticipating candidates both "primary election spending limit[s]" and "general election spending limit[s]". *Id.* § 16-952(A) & (B). Nonparticipating candidates who exceed these primary and general election "spending limits" entitle their opponents to "equalizing funds" to offset this advantage; spending by independent speakers may also entitle participating candidates to "equalizing funds." *Id.* § 16-952(C)(4) & (5).[3] It is surprising, then, that the Court of Appeals refused to recognize the matching fund provisions as a spending limit, but instead justified it as an innocuous mechanism to encourage participation in the public funding scheme. *See McComish v. Bennett*, 611 F.3d 510, 522-27 (9th Cir. 2010).

The record confirms that the Act has caused serious burdens to candidates and independent speech organizations. For example, in 2008, Petitioner McComish faced three participating candidates in the Arizona primary. *See* Pet. Br. 30. Because he

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[3] Moreover, the Act declares that Arizona's former election campaign finance system "effectively suppresses the voices and influence of the vast majority of Arizona citizens in favor a small number of *wealthy* special interests." A.R.S. § 16-940(B)(4); *see also* Ballot Proposition Publicity Pamphlet for the 1998 Arizona Election (hereafter "Pamphlet") available at http://www.azsos.gov/election/1998/Info/PubPamphlet/prop200.pdf (citing Former Arizona Governor Rose Mofford) ("The Clean Elections Act . . . limits campaign spending and enables candidates without access to wealth to run for office, waging a battle of ideas rather than bank accounts").

faced three opponents, each dollar he spent above the grant limit resulted in an additional $3 being spent against his candidacy. *See id.* at 30-31. Due to Petitioner's own spending, and the spending of independent groups supporting him, his opponents received additional public funding of at least $82,081.98. *See id.* Accordingly, the Petitioner decided to forego further campaign spending to avoid providing additional campaign resources to his opponents.

The Act's funding trigger directly discourages campaign spending. Whenever a nonparticipating candidate reaches the statutory cap on spending, he or she must decide whether the benefit of increased political speech is worth incurring the consequence of triggering additional public funding for his or her opponent. Even more stark is the decision facing an independent speaker, who must decide whether the provision makes it unwise to speak at all.

The penalty on the nonparticipating candidate is worse than the burden faced by the Petitioner in *Davis*, 554 U.S. at 744-45. At issue in *Davis* was the so-called "Millionaire's Amendment" created as part of the Bipartisan Campaign Reform Act ("BCRA"). *Id.* at 729 (citing the BCRA § 319(a), 116 Stat. 109, 2 U.S.C. § 441a(1)(a)). According to that provision, whenever a candidate spent specified amounts of his or her own money, the opposing candidate would benefit from increased contribution limits, up to three times the standard limit, with no similar increase for the self-financing candidate. *Id.* at 729. The benefit enjoyed by the opposing candidate "impermissibly burden[ed]" the self-financing

candidate's right to spend personal money for campaign speech. *Id.* at 738. Employing strict scrutiny, the Court held the Millionaire's Amendment violated the First Amendment.

The Arizona statute parallels the Millionaire's Amendment because both provide benefits to an opposing candidate based solely on the nonparticipating candidate's decision to spend more money on political speech. But the Arizona matching funds provision imposes a more certain and more substantial penalty. Whereas the Millionaire's Amendment gave the opposing candidate the *opportunity* to *raise* more money—requiring resources and effort—the Arizona statute *automatically* injects an equivalent amount (less six percent) into the opponent's coffers. The Millionaire's Amendment restricts candidate spending above a threshold of personal funds; the Arizona statute restricts nonparticipating candidate spending above a threshold of all funds. Perhaps even more troubling, the Arizona statute reaches beyond the candidate-versus-candidate contest to impose a burden on independent speakers. Other courts have recognized that mechanisms of this nature impose a heavy burden on speech.[4]

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[4] Several Circuit Courts—including the Ninth Circuit below—acknowledge that the funding trigger used by the Act burdens core First Amendment speech. *See Scott v. Roberts*, 612 F.3d 1279, 1291 (11th Cir. 2010) (applying strict scrutiny to enjoin excess spending subsidy to participating candidate) ("[W]e know of no court that doubts that a subsidy like the one at issue here burdens nonparticipants, apart from whether it is a substantial burden under the First Amendment.") (citing *Green Party of Conn. v. Garfield*, 616 F.3d 213, 245 (2d Cir.

Accordingly, because the matching funds provision has a direct and substantial effect on spending by nonparticipating candidates and independent speakers, it is an expenditure limitation. As an expenditure limitation, it is subject to strict scrutiny, and must be narrowly tailored to serve a "compelling government interest."

II. STRICT SCRUTINY REQUIRES THAT BURDENS ON FIRST AMENDMENT RIGHTS MUST BE NARROWLY TAILORED TO PREVENT *QUID PRO QUO* CORRUPTION OR THE APPEARANCE OF *QUID PRO QUO* CORRUPTION.

This case presents an important opportunity for the Court to reaffirm that the only government interests compelling enough to justify restrictions in campaign spending are the prevention of corruption or the appearance of corruption. Further, the Court

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2010); *McComish*, 611 F.3d at 524 ("[W]e recognize that under the Supreme Court's jurisprudence, even laws that create only potential chilling effects impose some First Amendment burden."); *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 438 (4th Cir. 2008) (acknowledging potential "chilling effect" stemming "from the realization that one group's speech will enable another to speak in response," but not equating chilling effect with government censorship); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 464-65 (1st Cir. 2000) (applying strict scrutiny to matching fund provision)); *see also Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994) (reasoning that potential "self-censorship" created by matching funds provision "is no less a burden on speech . . . than is direct government censorship").

can and should clarify that the anticorruption interest is narrow, and confined only to prohibiting the exchange of money for political favors.

A. The Prevention of Corruption or the Appearance of Corruption Is the Government's Only Interest in Restricting Political Speech.

In upholding federal candidate contribution limits in *Buckley*, the Court held that only one government interest, the prevention of corruption and the appearance of corruption, justified this interference with protected First Amendment rights. *Buckley*, 424 U.S. at 25-29. Based on the record of corruption regarding the 1972 election, the Court specifically found that democracy is undermined when "*large contributions* are given *to secure political quid pro quo's* [sic] from current and potential office holders." *Id.* at 26 (emphasis added). The Court also found that harm arises from "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of *large individual financial contributions*." *Id.* at 27 (emphasis added). Thus, the Court defined the anti-corruption interest based on the corruptive influences caused by large contributions, and *quid pro quo* arrangements between contributors and candidates.

Since *Buckley*, the Court has reviewed at least seven different government interests that have been suggested as justifications for contribution and expenditure limits. Nevertheless, the only interest deemed sufficient to outweigh First Amendment rights is the government's interest in preventing

corruption or the appearance of that corruption. *See NCPAC*, 470 U.S. at 496-97. ("We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling interests thus far identified for restricting campaign finances."). *Citizens United* reaffirmed and emphasized this point, stating: "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption. . . . The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt. . . ." *Citizens United*, 130 S.Ct. at 910.

Other interests have either been rejected outright, or, after temporary acceptance, have been disapproved by the Court. *Buckley* rejected an asserted interest in "mut[ing] the voices of affluent persons and groups. . . to equalize the relative ability of all citizens to affect the outcome of elections." *Buckley*, 424 U.S. at 25-26. The Court showed no sympathy at all for this purported interest: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is *wholly foreign to the First Amendment*." *Id.* at 48-49 (emphasis added).

The *Buckley* Court also held insufficient the government's asserted interest in curbing "the skyrocketing cost of political campaigns . . . to open the political system more widely to candidates without access to sources of large amounts of money." *Buckley*, 424 U.S. at 26.

In *Randall*, 548 U.S. at 245-46, the Court rejected any government interest in "reduc[ing] the amount of time candidates must spend raising money." The Court specifically held that this interest was inadequate to justify an expenditure limit. *Id.*[5]

For a time, the Court appeared to accept a government interest in fighting "circumvention of valid contribution limits." *Colorado Republican II*, 533 U.S. at 456. This anticircumvention interest expanded dramatically in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2002), which upheld the BCRA's ban on national, state, and local political parties raising and spending nonfederal contributions to political parties. This restriction was based on Congress's finding that the solicitation, transfer, and spending of nonfederal funds enabled political parties and candidates to circumvent the Federal Election Campaign Act's contribution limits. *Id.* at 126. More recently, however, the Court has recognized that "anticircumvention" could be used to justify all manner of restraints on core speech, even restraints with but an attenuated relationship to actual or apparent corruption. Accordingly, in *WRTL*, 551 U.S. at 479, the Court admonished that "such a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny."

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[5] The Clean Elections Act was passed nearly two years after *Randall*, yet the law was still justified by the notion "that elected officials spend too much of their time raising funds rather than representing the public." A.R.S. § 16-940(8).

The *McConnell* Court also accepted a notion of "access corruption," by crediting a government interest in "curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'" 540 U.S. at 150. "Access corruption" involved selling *access* to candidates and officeholders, which purportedly gave rise to the appearance of undue influence. *Id.* at 153-54. But Last Term in *Citizens United*, the Court clarified that "[i]ngratiation and access . . . are not corruption," *Citizens United*, 130 S.Ct. at 910. Nor will "[t]he appearance of influence or access . . . cause the electorate to lose faith in our democracy." *Id.*

Also in *Citizens United*, the Court revisited and rejected an "antidistortion" rationale—a purported government interest in preventing the corrosive and distorting effects of immense aggregations of wealth accumulated by corporations. *Citizens United*, 130 S.Ct. at 907. On rebriefing, the Government "did little to defend [the antidistortion rationale]." *Id.* at 904. The Court concluded that the antidistortion rationale was an aberration, provided no basis for limiting corporate independent expenditures, and could not serve as a legitimate government interest in the strict scrutiny analysis. *Id.* at 898, 907, 913.

Likewise, the Court rejected a "shareholder protection" interest in *Citizens United*. As support for the federal corporate expenditure ban, the Federal Election Commission argued the government had an interest in "protecting dissenting shareholders from being compelled to fund corporate political speech." *Id.* at 911. This interest was dismissed by the Court

on various grounds, including overbreadth and underinclusiveness. *Id.*

In short, *Citizens United* has returned the strict scrutiny analysis to the focus set forth in *Buckley*: whenever expenditure restrictions are at issue, they are invalid unless they are narrowly tailored to prevent corruption or the appearance of corruption.

B. The Anticorruption Interest Is Limited to Preventing Actual or Apparent Quid Pro Quo Corruption.

The *quid pro quo*, or exchange of dollars for political favors, is the "hallmark of corruption." *NCPAC*, 470 U.S. at 497. The Court experimented with broadening the notion of "corruption" to encompass many things, but none have passed the test of time, analysis, and experience to supplant or supplement the original definition: "corruption" is one thing and one thing only, *quid pro quo* corruption, the actual or apparent exchange of dollars for political favors.

The *Buckley* Court explained that this corruption arises from a campaign contribution (the "*quid*") that is large enough to persuade the candidate to take it in exchange for a legislative favor or official action (the "*quo*"). *See Buckley*, 424 U.S. at 25-29. The threshold sum at which a contribution becomes an actual or apparent corruptive influence is a legislative judgment. Thus, a contribution limitation enables government to "focus[] precisely on the problem of large campaign contributions." *Id.* at 28.

Although the anticorruption interest has served to justify contribution limits, which are not subject to strict scrutiny, the Court has repeatedly found it insufficient to justify restrictions on the expenditure of funds for political speech. *See Citizens United*, 130 S.Ct. at 909 ("[W]e now conclude that independent expenditures . . . do not give rise to corruption or the appearance of corruption."); *NCPAC*, 470 U.S. at 498 ("exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more"); *Buckley*, 424 U.S. at 47 (expenditures not "a *quid pro quo* for improper commitments from the candidate.").

These precedents are supported by common sense. A candidate who is successful at raising many legal non-corrupting contributions from a broad range of contributors is less likely to be indebted to any single contributor; and in any event, having legally *raised* the money, there is no threat of corruption if the candidate *spends* it. Even less of a threat is the expenditure of a candidate's own resources. A candidate simply cannot corrupt himself. And the Court has repeatedly held that independent spending on political speech lacks the potential to corrupt the candidate. *See, e.g., NCPAC*, 470 U.S. at 498.

What more spending does imply, however, is more political speech, more debate, and more information for the voting public. According to the First Amendment, that is good. Such wide open, robust debate is exactly what the Speech Clause protects. *New York Times v. Sullivan* 376 U.S. 254, 270-71 (1963).

III. THE NINTH CIRCUIT ERRONEOUSLY FAILED TO APPLY STRICT SCRUTINY.

A. The Ninth Circuit Erred by Rejecting Strict Scrutiny in Favor of Intermediate Scrutiny.

The Ninth Circuit improperly chose to subject the Arizona statute to intermediate scrutiny. *McComish*, 611 F.3d at 525. It thus ignored *Buckley*'s ironclad rule mandating strict scrutiny for all significant governmental intrusions on the right of candidates and organizations to make spend money for political discussion. *See Buckley*, 424 U.S. 39-59.

Instead, the Ninth Circuit employed a two-part test that asked 1) whether the statute imposes limitations on fully protected speech; and 2) how severely the statute burdens those expenditures. *McComish*, 611 F.3d at 520. Under this test, only those statutes that impose the most extreme limitations on expenditures would be subject to strict scrutiny; all other restrictions would be subjected to more deferential intermediate scrutiny. *Id.*[6]

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[6] The Ninth Circuit purports to rely on *Lincoln Club v. Irvine*, 292 F.3d 934 (9th Cir. 2002) as support for its two-part test. But *Lincoln Club* adopts no such test. To the contrary, *Lincoln Club* recognized the unwavering line of cases that have construed *Buckley* to require strict scrutiny of limitations on independent expenditures and intermediate scrutiny of limitations on contributions. *Lincoln Club*, 292 F.3d at 938 (citing *Colorado Republican II*, 533 U.S. 431, 121 S.Ct. at 2358) (observing that ever since *Buckley* the Court has understood that limits on expenditures deserve closer scrutiny than

The first inquiry asked whether the challenged statute limits expenditures (fully protected speech) or only contributions. The Ninth Circuit expressly found that "[t]he matching funds provision of the Act affects both contributions and expenditures," and therefore, must be "interpreted as though it affects fully protected speech." *Id.* Indeed, the Ninth Circuit noted that the Act affected the right of non-participating candidates and independent expenditure organizations to make unfettered expenditures of money for political speech. *Id.* Those who wish to expend monies above a certain threshold are burdened by the pain of directly benefiting their opponent. Accordingly, they may choose—and some have so chosen—to self-censor by foregoing further expenditures.

The Ninth Circuit next asked whether the challenged limitations are severe enough to require strict scrutiny. The only types of expenditure regulation this Court has ever found minimal enough to justify intermediate scrutiny are informational disclaimer and disclosure requirements. *See Buckley*, 424 U.S. at 60-84; *Citizens United*, 130 S.Ct. at 913-16. Although disclosure/disclaimer requirements arguably burden speech, they affect only the

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restrictions on contributions); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387 (2000) (construing *Buckley* as providing that contribution limitations warrant less compelling justification than expenditure limitations); *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending").

speaker's initial decision to engage in a public debate, and do not impact the quantity, quality, or content of the speech. Thus, disclosure and disclaimer requirements are deemed minimal and require only intermediate scrutiny. All other limitations on expenditures have been deemed severe enough to require strict scrutiny.

The Ninth Circuit incorrectly analogized the Arizona matching fund penalty to disclosure/disclaimer requirements, rather than to expenditure limitations. *See McComish*, 611 F.3d at 525 (analogizing Arizona penalty to disclaimers and disclosures). As a result, the court said, "because the Act imposes only a minimal burden on fully protected speech, intermediate scrutiny applies." *Id.*

Of course, Arizona's matching funds penalty imposes a far more severe burden on expenditures than do disclaimer and disclosure requirements. In Arizona, both participating and nonparticipating candidates must comply with disclosure and disclaimer requirements. A.R.S. § 16-913 (requiring disclosures of receipts and disbursements). A speaker facing disclosure requirements must make the choice between staying mute or merely disclosing his or her identity and the amount spent. The requirement is neutral in all respects: all speakers on all covered subject matters in all amounts are subject to it.

By contrast, the Arizona matching funds provision imposes a direct and substantial burden on the speaker. It imposes almost a dollar-for-dollar penalty for any spending by a nonparticipating candi-

date above the statutory spending limit by providing an offsetting amount to each of the speaker's opposing candidates. It is not difficult to predict that many nonparticipating candidates will say "why bother?" and then muzzle themselves rather than trigger the additional funding against themselves.

It was precisely for this reason that *Davis* rejected the Millionaire's Amendment's increased contribution limits. *Davis*, 554 U.S. at 740-41. Under the Millionaire's Amendment, a self-funding candidate was forced into the choice of either self-censoring his or her speech, or speaking and thus bestowing on his or her opponent an asymmetrical increase in contribution limits. *Id.* at 739. The Court found that the prospect of conferring a benefit on the opponent created a severe burden on the self-funding candidate's speech.

The penalty in the Arizona statute is even more offensive than the penalty struck down in *Davis* because the Arizona penalty burdens not just nonparticipating candidate speech but also independent speech, and guarantees that the competing candidate will have additional resources without the need to do anything. *McComish*, 611 F.3d at 515-17. If both a nonparticipating candidate and independent groups trigger the matching funds provision, the participating candidate may have more funding than even the nonparticipating candidate.

B. The Ninth Circuit Ignored the Adverse Impact the Arizona Penalty Has on Nonparticipants.

The Ninth Circuit found the matching funds penalty justified as an incentive for candidates to participate in the public financing system. *McComish*, 611 F.3d at 526. Providing matching funds as insurance against being outspent, it reasoned, would encourage candidates to participate in the public financing system. Further, since participating candidates would be receiving "clean" taxpayer money rather than legally-raised contributions, it concluded, the provision had the effect of reducing actual or apparent corruption.

The Ninth Circuit's analysis simply misses the point. By focusing on the government's interest in providing *benefits to participants* in the system, the Court entirely ignored the lack of government justification for imposing *penalties on the nonparticipants*. *Id.* (focusing exclusively on participating candidates). In the campaign finance context, this Court has never upheld restrictions on one candidate's speech because the restriction provided a benefit to a competing candidate. If regulation of speech could be so justified, the First Amendment guarantee of free speech would be swallowed by the exception.

It is true that *Buckley* approved expenditure limitations *on willing participants in the public financing scheme*, who voluntarily accept the limitations in return for a disbursement of public funds. *Buckley*, 424 U.S. at 108. *Buckley* did not hold,

however, that the government may incentivize participation in the public financing scheme by providing incremental benefits to participants based on the actions of nonparticipants.

Supporters of the Arizona statute argue that if the original public financing system is justified, then any penalty imposed on those who choose not to participate in the system is similarly justified as a means of encouraging participation (or discouraging non-participation). *See McComish*, 611 F.3d at 525-27. This reasoning is nonsensical, and the Court has rejected such "prophylaxis upon prophylaxis" reasoning as leading to ever-expansive restrictions. *See WRTL*, 551 U.S. at 479 (plurality opinion). If the Ninth Circuit's reasoning were sound, the First Amendment would permit a tax on campaign contributions raised by nonparticipants for use in "equalizing" funding for participants. The focus of strict scrutiny must be on the burden placed on the nonparticipant: is that burden narrowly tailored to prevent *quid pro quo* corruption? The Ninth Circuit's approach of asking whether the beneficiary candidate is assisted misstates the standard and renders it largely meaningless in protecting both nonparticipating candidates and independent speakers.

When properly viewed from the perspective of a candidate who has chosen not to participate, the Arizona statute imposes a substantial burden on the right to engage in unfettered political speech. No legitimate, much less compelling, government interest justifies this burden. Certainly, the anticorruption interest is not served by penalizing the nonpar-

ticipant. To the contrary, the statute incentivizes nonparticipants either to abandon their right to join the political discussion at any level above the disbursement threshold, or to engage in even more aggressive fundraising and spending so as to exceed the maximum government grant. As the Ninth Circuit noted, the nonparticipant reaches a fundraising advantage only when spending exceeds three times the initial state disbursement. *McComish*, 611 F.3d at 516-17.

The fallacy of the Ninth Circuit's purported justification is even more clear with respect to independent expenditure organizations. Independent spending may trigger dollar-for-dollar matching funds beginning with the very first dollar spent. Moreover, the statute offers no alternative of public financing for those who desire to make independent expenditures on behalf of or opposed to political candidates.

The Arizona matching funds provision is subject to strict scrutiny, and the justification advanced in its behalf is neither legitimate nor compelling. Accordingly, the Ninth Circuit's decision is in error, and the permanent injunction against the matching funds provision must be reinstated.

CONCLUSION

For the reasons set forth above, *amicus* Senator Mitch McConnell urges the Court to reverse the decision of the Ninth Circuit Court of Appeals and to affirm the district court's permanent injunction.

Respectfully submitted,

Bobby R. Burchfield
Counsel of Record
Richard W. Smith
Matthew M. Leland
McDERMOTT WILL & EMERY LLP
600 Thirteenth St., NW
Washington, DC 20005
(202) 756-8000
bburchfield@mwe.com

Attorneys for Senate Republican Leader Mitch McConnell

January 20, 2011

AMICUS CURIAE BRIEF

10-238 and 10-239

In the

Supreme Court of the United States

JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,

Petitioners,

-against-

KEN BENNETT, in his official capacity as Secretary of the State of Arizona, and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, LOUIS HOFFMAN and LORI DANIELS, in their official capacities as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MUNICIPAL BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
100 Church Street,
New York, New York 10007,
(212) 799-1043 or 1010

LEONARD J. KOERNER,*
EDWARD F.X. HART,
JANE L. GORDON,
of Counsel

*Counsel of Record

(Additional counsel listed on inside page)

THERESE M. STEWART,
Chief Deputy City Attorney
JONATHAN GIVNER,
ANDREW SHEN,
CHRISTINE VAN AKEN,
City Attorney's Office
1 Dr. Carlton B. Goodlett Place
City Hall, Room 234
San Francisco, California 94102
(415) 554-4700
Counsel for the City and County of San Francisco

CHARLES W. THOMPSON, JR.
Executive Director, General Counsel
International Municipal Lawyers Association
7910 Woodmont Ave., Ste. 1440
Bethesda, Maryland 20814
(202) 742-1016
Counsel for International Municipal Lawyers Association

QUESTION PRESENTED

Given that long-term practical experience with tiered public funds in public campaign financing demonstrates they do not deter the exercise of free speech by non-participants, did the Ninth Circuit correctly apply an intermediate level of scrutiny to Arizona's Clean Elections Act, and under that analysis, find those payments are justified by the compelling and important state interest in reducing actual or perceived corruption, encouraging participation in public financing programs, and promoting robust and competitive elections?

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INTEREST OF THE *AMICUS CURIAE*

The New York City *Amicus*

In 1988, the New York City Council responded to widely reported local "pay to play" scandals by creating an innovative system of public financing for campaigns. In its legislative findings, the Council determined that "both the possibility of privilege and favoritism and the appearance of impropriety harm the effective functioning of government" and that corruption "has a deleterious effect upon government in that it creates the appearance of such abuses and thereby gives rise to citizen apathy and cynicism."[1]

The authors of the City's Campaign Finance Act ("CFA") resolved to address that public perception, as well as improve governmental ethics and popular understanding of local issues, increase participation in elections by voters and candidates, and enhance public confidence in government. They did this by creating a program built on the premise that competitive, corruption-free campaigns that actively engaged citizens could be financed with a combination of small private donations and public funds. When the Act was signed into law by then-Mayor Ed Koch, New York City became the largest municipality in the nation to adopt publicly financed elections. Today, New York City's public financing program is considered one of the most

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[1] Local Law of the City of New York No. 8 § 1 (1988).

No counsel for a party authored this brief and no counsel or party made a monetary contribution intended to fund this brief.

successful in the country and "a model for campaign reformers nationwide."[2]

An essential element of the City's program are "bonus" provisions, which come into play when a program participant faces a high-spending non-participant. In 1989, businessman Ronald Lauder spent $13 million (the vast majority of it his own money) in his failed bid for the Republican nomination for mayor. His spending in that race triggered the program's first bonus payment; his opponent in that race was a former federal prosecutor named Rudolph Giuliani. Since that time, bonus payments have been paid in 58 more City elections.

Perhaps no other public financing program, at any level of government, has had more practical experience with how bonus provisions actually work. And after more than two decades of experience, there is simply no empirical data to support the notion, on which petitioners rest their First Amendment claim, that bonus payments somehow inhibit a non-participant's speech.

The City's extensive experience with bonus provisions also confirms the critical role they play in advancing genuine and meaningful campaign finance reform and the important and compelling government interest in combating actual and perceived corruption.

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[2] Editorial, *A Hard Act to Follow*, N.Y. Times, June 4, 2006, §14, at 15.

In November 2000, San Francisco voters adopted a public financing program for candidates for the City's Board of Supervisors. In 2006, San Francisco expanded its public financing program to include candidates for Mayor. San Francisco's public financing scheme is a "partial" public financing program: it requires participants to raise contributions from private sources before receiving any matching public funds. Like Arizona's system, a central element of San Francisco's program is its "trigger" mechanism. After a participating candidate qualifies, the candidate is initially subject to a spending limit, but spending by other candidates and third-parties over a certain level "triggers" an incremental increase in the spending caps for participating candidates. When San Francisco raises a participating candidate's spending limit, the candidate becomes eligible for additional public funds, but only if the candidate first raises additional contributions from private sources.

Since the inception of its public financing program, San Francisco has balanced two competing concerns: encouraging viable candidates to participate in the program by offering sufficient funds to make them competitive against privately funded political opponents, and ensuring that public funds are not expended needlessly. The program's trigger mechanism, because it makes matching public funds available only when necessary, is the best – and perhaps the only – policy response that appropriately balances those competing concerns. Like many local and state governments, San Francisco is facing unprecedented budget shortfalls and will continue

to wrestle with fiscal challenges for the foreseeable future. And beyond its near-term fiscal difficulties, San Francisco must be a responsible steward of public funds and allocate its taxpayer dollars as efficiently as possible. Without the ability to use trigger mechanisms, local governments like San Francisco would be forced to choose between two equally unpalatable options: a public financing program that viable candidates would refuse to join or a program that unnecessarily consumes limited public funds. Either option could ultimately lead to the end of public financing in many jurisdictions, including San Francisco.

Moreover, ten years of experience in San Francisco indicate that trigger mechanisms do not deter fund-raising or political spending by candidates or third parties. In fact, the levels of spending in San Francisco elections have significantly increased since the voters adopted public financing in 2000.

The IMLA *Amicus*

The International Municipal Lawyers Association ("IMLA") is a non-profit, professional organization of over 3500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme

Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA believes that with the ever-increasing cost of political campaigns and the concomitant governmental interest in assuring free and open elections, state and local governments must create methods by which campaigns can be financed through public dollars, thereby allowing all candidates to express their political message. IMLA believes that because these programs depend on public finances, they must be carefully constructed to prevent limitless spending while making sufficient funds available to draw the participation of a wide-range of candidates. IMLA believes that the trigger mechanism used in Arizona provides one of the few method to reach these goals and that without this mechanism, state and local governments would lose a vital tool necessary to protect the democratic nature of the electoral process.

Thus, pursuant to Supreme Court Rule 37.4, the City of New York, Mayor Michael R. Bloomberg, the New York City Council, Public Advocate Bill de Blasio, the New York City Campaign Finance Board, the City and County of San Francisco, and the International Municipal Lawyers Association submit this brief *amicus curiae* in support of the respondents.

SUMMARY OF THE ARGUMENT

Public financing of campaigns serves well-recognized governmental interests. It reduces corruption and the appearance of corruption by eliminating the improper influence of large private contributions and relieving candidates from the

rigors of soliciting private contributions. As this Court recognized in *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976), public financing enhances the First Amendment because it is the use of public money "to facilitate and enlarge public discussion and participation in the electoral process . . ."

Buckley also recognizes that public financing programs may condition the receipt of public funds on a voluntary agreement to limit expenditures. 424 U.S. at 57, n.65. As a practical matter, however, few candidates would voluntarily participate in a public financing program involving voluntary spending limits if those limits effectively precluded their ability to mount a competitive campaign against a high-spending opponent who has no spending limit. Bonus payments make these races competitive in a fiscally prudent and targeted way. And more importantly, they encourage candidates to join a public financing program that does not penalize them when an opponent refuses to join. Without these mechanisms, public financing programs that advance a municipality's substantial and compelling interest in eliminating actual or perceived corruption in its political process will be unable to accomplish that goal, because no viable candidates will participate.

Bonus provisions also produce more speech that helps to build a robust representative democracy. They increase debate about issues of public concern, and they therefore necessarily promote exactly the kind of free and open debate the First Amendment fosters and protects. Indeed, because democracy demands that kind of informed debate, this Court has long recognized that the First Amendment embraces government funding of particular speakers, such as "aid to public

broadcasting and other forms of educational media, and preferential postal rates and antitrust exemptions for newspapers." *Buckley*, 424 U.S. at 93, n.127.

At the same time, there is no evidence that non-participants intentionally limit their own spending so as not to trigger additional payments to candidates they oppose. To the contrary, data from two decades of New York City elections, as well as the experience of San Francisco, establish exactly the opposite conclusion.

As this Court has also recognized, "the central purpose" of the First Amendment is "to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish." *Buckley*, 424 U.S. 93, n.127, *quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Our electoral system works best when two or more strong candidates compete for the support of their fellow citizens. That is what makes the exercise of the franchise meaningful.

STATEMENT OF FACTS

The New York City Experience

The New York City Campaign Finance Program ("the Program") is the voluntary government reform program established by the New York City Campaign Finance Act. The independent, non-partisan Campaign Finance Board administers the Program through which it provides public matching funds to participating candidates running for Mayor, Comptroller, Public

Advocate, Borough President, and City Council member. In return, participating candidates agree to abide by strictly-enforced spending limits and other limits on self-financing and contributions. The law also imposes certain requirements on non-participants regarding complete and timely disclosure of their financial transactions, and all campaigns are subject to rigorous auditing by the Campaign Finance Board.[3]

The overarching goals of the Program are to encourage grassroots support for candidates by average New Yorkers, require full disclosure of campaign fundraising practices, and combat the public perception of corruption in the political process by decreasing a candidate's dependence on large contributions. The Program helps credible candidates run competitive campaigns whether or not they have access to "big money," giving New Yorkers greater choices at the voting booth.

Public funds are only a portion of the money spent by candidates, and they are capped at 55 percent of the spending limit for the office the candidate is seeking. The Program encourages participants to seek small contributions, and reach out to a greater number of their prospective constituents. That, in turn, increases citizen interest and participation in elections. Only contributions from New York City residents are matched with public funds. Contributions from political action committees, unions, lobbyists, or persons doing business with the City are not

[3] These facts are taken from *A Citizen's Guide to the New York City Campaign Finance Board* (January 2011), http://www.nyccfb.info/PDF/press/agency_brochure.pdf?sm=press_21dthe 2006.

matchable. The match is limited to the first $175 of an eligible contribution. Because the basic matching funds rate is $6-to-$1, that $175 contribution can be matched with $1,050 in public dollars, resulting in a total of $1,225 for the campaign.[4]

In the last 22 years, the City's voluntary public financing program has disbursed more than $101.2 million in matching funds to 543 candidates. The distinguishing feature of the Program – its system of matching individual donations in a way that supercharges small donations – is in large measure the reason for the Program's success. Under the Program, a New York City candidate can finance a viable campaign based on small donations, and the City's experience shows that an increasing number of them now do just that. In 2009, 95 percent of all candidates who were elected were Program participants.

The Program has also had a profound effect in encouraging broader participation in the political process. *Small Donor Matching Funds: The NYC Election Experience*, a 2010 report by the Brennan Center for Justice, found that the Program has not just increased donor participation, it has also expanded the pool of donors to encompass what the

[4] Contributions to all city candidates are subject to the following limits: $4,950 for Mayor, Public Advocate and Comptroller, $3,850 for Borough President, and $2,750 for City Council. NYC Admin. Code § 3-703(1)(f). There are additional contributions limits imposed on persons doing business with the City. *Id.* at § 3-703(1-a).

report describes as "a more diverse and inclusive political culture."[5]

Competition also increased. Even with a limited number of open seats, five City Council incumbents were unseated by challengers. Other incumbents won by slimmer margins, and more faced primaries, and the average margins of victory were closer than in previous elections. More than half of all participants in 2009 – 101 candidates – were seeking city office for the first time.[6]

Additionally, candidates, motivated by the Program's matching formula, are now placing a greater emphasis on soliciting smaller contributions. In 2009, 68.9 percent of all individual contributors gave $175 or less to candidates, up from 56.5 percent in 2005. Most significantly, in 2009 more than half of all contributors – 30,000 New Yorkers – contributed to City elections for the first time. This proves how effective the matching of small donations is as a campaign financing model, and how dramatically candidates are expanding their fundraising base beyond a core of reliable large donors.

In short, more New Yorkers are investing in the political process for the first time – as contributors, as candidates, and as successful

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[5] Angela Migally & Susan Liss, *Small Donor Matching Funds: The NYC Election Experience* 13 (2010) http://brennan.3cdn.net/8116be236784cc923f_iam6benvw.pdf

[6] These facts are from *New Yorkers Make Their Voices Heard: Report on the 2009 Elections* (2010) http://www.nyccfb.info/PDF/per/2009_PER/2009PostElectionReport.pdf

elected officials. And the City's public financing program is giving a voice to many who otherwise would be unable to run a competitive campaign.

To assure candidates in competitive races that they will have sufficient funds to run a viable campaign, the Program has also provided for "bonus" payments (N.Y.C. Admin. Code §§3-706[3][a] and [b]). They come into play when an otherwise competitive candidate faces off against a high-spending candidate who is not a Program participant. Under a Tier 1 bonus situation (when the nonparticipating opponent raises or spends more than 50 percent of the spending limit for the participant), the $1,050 in funds for a $175 contribution rises to $1,250, and the spending limit is increased to 150 percent of the regular spending limit. Under Tier 2 (when the nonparticipating opponent raises or spends three times the spending limit), $1,500 in public funds is available for a $175 contribution, and the spending limit is removed. New York City participants must gather private support from New Yorkers to maximize their access to additional public funds.[7]

Funds attributable to bonus payments are a very small percentage of the total funds distributed through the Program. As of 2006, those public funds accounted for only four percent of the total

[7] The City's bonus provisions are being challenged in *Ognibene v. Parkes*, 08-cv-1335 (S.D.N.Y.)(Swain, J.).

public funds distributed since 1997.[8]

In the most recent City election (2009), almost all primary candidates – 93 percent – financed their elections through the City's program, while 66 percent of all general election candidates participated.[9] In 2009's contest, the Public Advocate, the Comptroller, all five Borough Presidents, and all but two of the 51 City Council candidates who were elected to office participated.

In the six elections that year pitting participating candidates against high-spending non-participants, a participant won in three of the races and finished as close runners-up in the remaining three races. All of those races were competitive, and no winner finished more than 10 percentage points ahead of the runner up.

An analysis of the Program's bonus provisions, performed in January 2011, is annexed as Appendix A. Certain important trends are evident from the years covered (1989 – 2009). Most relevantly, this experience shows that high-spending non-participants are simply not forgoing speech opportunities in order to curb a participating opponent's bonus payments. As with Arizona's public financing system, actual campaign

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[8] *The Impact of High-Spending Non-Participants on the Campaign Finance Program* (2006), 8 http://www.nyccfb.info/PDF/issue_reports/High-Spending_White-Paper.pdf

[9] That 66 percent figure reflects certain anomalies, including the fact that 26 of 51 non-participants are candidates who had little or no campaign activity and failed to register with the CFB. If that group is excluded from the equation, the participation rate in the general election rises to 80 percent.

behavior establishes that non-participating candidates do not make decisions about their spending based upon the possibility of triggering bonus payments. If they were refraining from speaking, the data would show candidates spending up to, but not in excess of, the trigger amounts. However, the data reveals no such pattern.

- There have been 56 high-spending non-participants who have triggered bonus payments. They spent, on average, 5.5 times the bonus amount. More than half of them (33 of 56) spent more than double the trigger amount; one-fourth (14 of 56) spent more than six times the trigger.

- Of the 59 non-participating candidates who never triggered a bonus payment, the average non-participating candidate spent only 17.8 percent of the bonus trigger amount. Practically all of them (54 of 59) spent less than half the trigger amount.

- Only two non-participating candidates reported expenditures that brought them within five percent of the trigger amount, and both were candidates in the same race for City Council in 1997.

- The Tier 2 bonus was established before the 2005 elections to provide additional bonus funds to candidates facing extremely high-spending candidates (the Tier 2 trigger is six times the original Tier 1 bonus trigger). Since then, seven candidates

have triggered a Tier 1 bonus; none of those candidates even approached spending enough to trigger the Tier 2 bonus.

- Only four candidates have triggered a Tier 2 bonus since 2005. One candidate triggered the bonus with contributions (rather than expenditures); the other three exceeded the bonus level by substantial amounts.

Thus, non-participating candidates tend to spend far above, or far below, the bonus trigger, which strongly indicates their speech is not affected by bonus payments at all. There is, therefore, no evidence that the City's bonus provisions are inhibiting speech or otherwise affecting the First Amendment rights of non-participants.

The San Francisco Experience

In November 2000, San Francisco voters adopted a public financing program for their elected officials via a ballot measure. The measure, Proposition O, was placed on the ballot by San Francisco's independent Ethics Commission (the "Commission") in June 2000 following several months of hearings and consideration of numerous policy proposals to address the appearance of corruption in local government.

The immediate catalyst for Proposition O was the City's 1999 mayoral election, which featured an unprecedented amount of political contributions and spending, raising concerns about the appearance of corruption. Before, during, and

after the 1999 election, the public was readily aware that the mayoral race drew unusually high levels of campaign spending. The top four candidates received and spent over $7 million in private contributions, and independent committees spent approximately $2.6 million.[10] Press reports painted a picture of apparent corruption, highlighting specific examples of perceived corruption arising out of campaign spending in the race, including contributions and independent spending by several entities that won major contracts or legislative victories shortly before or after the campaign.[11]

Shortly after the election, the Commission launched a series of public hearings on San Francisco's campaign finance laws and the laws of other municipalities. As the Commission's Executive Director testified before the Board in April 2000, these hearings indicated that "the campaign finance system in San Francisco [was] in a state of crisis," in large part because of "concern

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[10] *See* Testimony of Virginia Vida, S.F. Ethics Commission Executive Director, before S.F. Board of Supervisors Finance Committee, February 16, 2000, http://www.sfethics.org/files/vida_2.16.00.pdf.

[11] *See, e.g.*, Lance Williams and Chuck Finnie, *Brown Nets 'Soft Money' Windfall*, S.F. Examiner, Sept. 7, 1999; Bob Porterfield and A. Clay Thompson, *Zoning for Sale?*, S.F. Bay Guardian, January 5, 2000; Lance Williams and Chuck Finnie, *Gusher of 'Soft Money' a Bonanza for San Francisco Mayor*, S.F. Examiner, May 2, 2001; Lance Williams, Chuck Finnie, and Jenny Strasburg, *'Juice Politics' at City Hall*, S.F. Examiner, July 29, 2001. *Cf. Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 393, 395 (2000) (citing newspaper accounts to suggest that concerns about corruption and appearance of corruption supported state contribution limits).

about the appearance or perception of corruption in San Francisco politics" and "the perception that big money and big spending may influence the policymaking of those who are elected." As the hearings drew to a close, the Commission favored the establishment of a public financing program because the "public financing of campaigns actually enhances the democratic process" by encouraging more candidates to seek office, including their points of view in the public dialogue, and allowing candidates to spend their time and energy debating public policy instead of raising campaign donations. And the Commission concluded that public financing would "limit the influence, or the appearance of influence, of private contributions on policymaking."[12]

In crafting a public financing system, the Commission balanced the important goal of encouraging candidates to participate with the need to operate within San Francisco's financial constraints. From the outset, the Commission focused on whether using trigger mechanisms would accomplish that balance. After extensive debate, the Commission and its staff concluded that a trigger mechanism was critical to the success of the program because candidates were unlikely to participate unless the program allowed them to raise and spend money in response to opposition spending. Finally, on June 26, 2000, the Commission decided to submit the measure to the voters. Voters adopted the measure, and San

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[12] Testimony of Virginia Vida, S.F. Ethics Commission Executive Director, before S.F. Board of Supervisors (April 12, 2000), http://www.sfethics org/files/vida_4.12 00.pdf, and before S.F. Board of Supervisors' Finance Committee (April 5, 2000), http://www sfethics.org/files/vida_4.5.00.pdf.

Francisco implemented its public financing system for the first time in November 2002.

San Francisco's public financing program currently provides public funds to eligible candidates for Mayor and eleven-seat Board of Supervisors. To qualify for public financing, a candidate must raise a certain amount of money from a minimum number of San Francisco residents. S.F. Campaign & Gov'tal Conduct Code §§ 1.104(w), 1.140(b)-(c). Once they qualify, participating candidates receive an initial grant of public funds. *Id.* § 1.144(c)-(d).

Thereafter, to receive additional public funds, a participating candidate must first solicit campaign contributions from private sources. Once a participating candidate has raised private contributions, the City matches those contributions with public funds in predetermined ratios, initially on a four-to-one basis and then on a one-to-one basis. *Id.* § 1.144(c)(3), (d)(3). Thus, after the initial grant, for every additional dollar that participating candidates raise from private sources, the City matches those contributions with public funds.

As noted above, San Francisco's system also incorporates a "trigger" mechanism. Publicly financed candidates' fundraising efforts are initially subject to an upper limit, a spending cap referred to as an "individual expenditure ceiling." *Id.* § 1.140(b)(4),(c)(4). During the course of a campaign, a candidate's spending cap may increase based upon the level of spending in the race. The City must raise a candidate's spending limit when the sum of (1) third-party spending opposing the candidate, (2) contributions to one of the candidate's opponents, and (3) third-party spending

supporting the opponent exceed the publicly financed candidate's spending cap. *Id.* § 1.143(a)-(b). Once the City raises a candidate's spending cap, the candidate becomes eligible to collect additional private contributions and receive additional matching funds from the City on a dollar-for-dollar basis.

Since its adoption, San Francisco's public financing program has successfully attracted the participation of many credible candidates for local office. For example, in the November 2010 elections for members of the Board of Supervisors, 22 of the 46 candidates participated in the City's public financing program. And many of the participants won their races for open seats – three of the five were publicly financed. In the November 2008 Board of Supervisor elections, 19 of the 42 candidates for seven open seats qualified for public financing. Of the seven winning candidates, five had participated in the City's public financing program.

San Francisco's public financing system is supported entirely by taxpayer dollars. Both in the current climate of budget challenges and beyond, San Francisco must act as a responsible steward of public funds, using every available policy option that conserves money without compromising public programs. A trigger mechanism is a critical policy tool to achieve both goals. By providing publicly financed candidates with access to public funds in limited circumstances, i.e., only when they are in danger of being outspent by competing, non-participating candidates and third parties, and only when they are able to show continuing support from local donors, San Francisco provides only what is needed but no more. An alternative public

financing system that did not feature a trigger mechanism would risk either setting funding levels so low that no viable candidate would be interested in participating or spend public funds unnecessarily by over funding publicly financed candidates who face no challenge from credible opponents. In short, a challenge to trigger mechanisms is a challenge to the viability of public financing itself.

The City's first ten years of public financing indicate that trigger mechanisms neither chill political speech nor deter political spending in San Francisco. The relative levels of spending in San Francisco's Board of Supervisors elections have dramatically increased since the voters instituted public financing in 2000.[13] The growth in spending is demonstrated by a comparison of campaigns in November 2000 with recent campaigns in 2008 and 2010.[14] Over that decade, despite the public financing program's trigger mechanism, the aggregate amount of spending in Board elections has increased at a steady pace. In November 2000, when San Francisco held its last set of

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[13] Even though candidates for both the Board of Supervisors and Mayor may currently participate in the city's public financing system, the first election in which mayoral candidates could be eligible was held in 2007. In 2007, then-Mayor Gavin Newsom ran largely unopposed, and no candidate in the race qualified for public financing.

[14] Elections between 2002 and 2006 are not good comparators because during those election cycles, a local campaign provision unrelated to public financing limited contributions that could be made to third-party committees, thus lowering the amount of third-party spending generally. During the 2008 and 2009 elections, the Commission has not enforced that provision.

supervisorial elections prior to the advent of public financing, all eleven seats on the Board of Supervisors were up for election. Candidates in those eleven races raised approximately $4 million in campaign contributions and spent approximately $3.1 million of those funds. A variety of third-party groups spent approximately $1.5 million to support or oppose these candidates. On average, spending per open seat was approximately $420,000.

In 2008, with seven open Board seats, the candidates raised approximately $2.4 million in contributions and spent approximately $3.9 million, and third-parties spent $1.3 million. In that election, spending totaled an average of $740,000 per open seat.[15] And in 2010, with five open Board seats, candidates collected approximately $2.3 million in contributions and spent approximately $3.6 million, and third parties again spent $1.3 million. The average spending per open seat in that election was almost $1 million. In other words, the average spending per seat on the Board of Supervisors has risen dramatically in the years since San Francisco instituted public financing. The City's public financing system, and its trigger mechanism, has simply not deterred spending in local elections.

As these figures reflect, San Francisco's public financing system has not deterred non-participants from spending even though such activity results in a publicly financed candidate's eligibility for additional public funds. For example,

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[15] The expenditures in the 2008 and 2010 election cycles exceeded contributions because the City's public financing program increased the total amount of money available.

average per-race third-party expenditures leaped from approximately $136,000 in 2000 to $186,000 in 2008 to $260,000 in 2010. Every political committee spending money on these races understood that its spending could implicate the trigger mechanism and potentially increase the amount of public funds available to candidates whom the committee opposed. Indeed, the Ethics Commission regularly updates a public webpage with information about each publicly financed candidate's spending cap. Armed with that information, non-participants can determine whether their additional spending will result in an increased spending cap for their publicly financed political opponents. Yet there is no evidence that spending has been chilled at all. To the contrary, spending has increased significantly.

Apart from aggregate and average spending figures, discrete decisions in individual races further demonstrate that the City's public financing program and its trigger provisions do not deter political spending by non-participants. Candidates and third parties continue to spend freely despite the implications of their spending on their publicly financed opponents' spending caps. Two recent examples bear this out concretely.

In 2008, Supervisor David Chiu was a publicly financed candidate pursuing election to the Board of Supervisors. He was opposed by well-funded candidates who declined to participate in the City's public financing program. Applying the City's trigger mechanism, the Commission first raised his cap a month and a half before election day, making Chiu eligible for additional private fund-raising and matching public funds. Over the next six weeks, one competing candidate

nonetheless spent approximately $170,000 in favor of his candidacy even though it had the direct effect of further raising Chiu's ceiling. By election day, Supervisor Chiu's spending cap had been adjusted up from its initial level of $143,000 to $360,000 in response to this type of spending by his opponents. The City's trigger provision had no apparent effect on their campaign activity.

More recently, in 2010, Supervisor Scott Wiener, then a publicly financed candidate for the District 8 seat on the Board, faced a significant amount of independent spending opposing his candidacy. The Commission raised his spending cap from the initial $143,000 on September 28, 2010. Over the next month, third parties spent approximately $100,000 against him, even though it was evident that the spending would result in Wiener becoming eligible for additional matching public funds. Due to that spending, and other contributions and expenditures made opposing his candidacy, the Commission eventually raised Wiener's ceiling to $493,000.

Finally, San Francisco's public financing system has not faced any apparent "gaming" by its participants (Pet. Br., at 71-75). There have been no reported instances in which candidates seeking the same elective office were actively cooperating in order to trigger increases in the spending caps. Nor is there any evidence that third-parties have engaged in "reverse targeting" to benefit participating candidates.

Practical experience from both New York City and San Francisco therefore demonstrates that there is no empirical evidence to support the contention that non-participants restrain their

spending in order to avoid bonus payments to program participants they disagree with or seek to defeat.

ARGUMENT

NON-PARTICIPATING CANDIDATES AND THIRD PARTIES DO NOT CURTAIL THEIR SPEECH TO AVOID BONUS OR TRIGGER PAYMENTS TO PARTICIPATING CANDIDATES THEY OPPOSE, AND THOSE PAYMENTS THEREFORE POSE NO MORE THAN A MINIMAL BURDEN ON FIRST AMENDMENT RIGHTS. THE PROGRAMS ALSO ADVANCE THE IMPORTANT STATE INTERESTS IN COMBATING CORRUPTION, ENCOURAGING PARTICIPATION IN PUBLIC FINANCING PROGRAMS, AND FOSTERING ROBUST COMPETITION AND DEBATE IN THE POLITICAL PROCESS.

A. Based on the experience of San Francisco and New York City, there is no evidence that bonus payments deter campaign spending.

Petitioners ask this Court to accept, on faith alone, the premise that no "rational person" would want to raise and spend money if it means it would trigger additional public funds for his or her opponent, and that "anyone who takes ideas seriously" will be chilled by that prospect (Pet. Br., at 41). Many years of practical experience, however, demonstrate that trigger funds have no impact on the campaign spending of non-participants and third parties, as Arizona, New York City, San Francisco, and others can attest. That experience, moreover, confirms the propriety of applying an

intermediate level of scrutiny to Arizona's program, as the Ninth Circuit correctly determined.

In Arizona's experience, non-participating candidates either regularly spent beyond the matching-funds trigger, or spent so far below it that spending by non-participants was evidently unaffected by triggers and matching funds (Resp. Br., at 5, 15-16). Not surprisingly, the municipal experience further supports the conclusion that trigger mechanisms are unlikely, if ever, to deter protected First Amendment activity.

In the 59 New York City races where bonus payments were never reached, the non-participating candidates spent, on average, 17.8 percent of the bonus trigger amount. The vast majority fell more than 75 percent short of the trigger. There have been 56 high-spending non-participants who have triggered bonus payments. They spent, on average, 3.5 times the bonus amount. Four candidates have triggered a Tier 2 bonus since 2005.

San Francisco has also found that, in the first ten years of public financing, trigger mechanisms have neither chilled political speech nor deterred political spending. Indeed, the relative levels of spending in local races have significantly increased since the City's public financing program went into effect. Accounting for the number of open seats in each election cycle, political spending has sky-rocketed from $420,000 per race in 2000, the last election held prior to public financing, to $740,000 per race in 2008 and nearly $1 million per race in 2010. Moreover, an examination of spending decisions in the context of individual races demonstrates that non-participants continue to

spend freely, regardless of the effect that spending has on a publicly financed candidate's eligibility for additional public funds.

The Ninth Circuit's conclusion that Arizona's program poses, at most, a minimal burden on First Amendment rights, is thus supported not just by the facts in this Record, but, as explained above, by the experience of San Francisco and New York City as well. The many elections conducted under these independent municipal financing programs demonstrate that bonus payments do not influence a non-participant's spending or impact his First Amendment rights, because they have no apparent impact whatsoever on the quantity of a non-participant's speech. Non-participants are simply not reducing their speech in order to avoid triggering an opponent's opportunity to receive additional public funding.

B. Matching fund provisions also advance important and compelling government interests.

Public financing programs, and the bonus and trigger provisions found in New York City's and San Francisco's programs, advance several important and compelling interests.

The first is the government interest in combating actual corruption and the appearance of corruption created by campaign-related fundraising. A key component in all public financing programs is the requirement that participating candidates, in exchange for public financing, either relinquish or limit their right to raise campaign contributions from private donors, and also agree to spending limits. That alone

reduces opportunities and incentives "to trade legislative favors for financial favors," as the Ninth Circuit correctly found. *McComish v. Bennett*, 611 F.3d 510, 526 (9th Cir. 2010). And as this Court recognized in *Buckley*, that furthers a significant governmental interest. 424 U.S. at 96. Tellingly, since its public financing program began, New York City has not experienced the "pay to play" corruption scandals that led the City Council to enact the program in the first place. And in San Francisco, participants have confirmed that the City's public financing program has reduced the pressure to spend all of their time on fundraising activities.

In addition, as acknowledged by several appellate decisions, encouraging participation in public financing programs is itself an important and compelling government interest. *See, e.g.*, *McComish*, 611 F.3d at 526; *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39-40 (1st Cir. 1993). If municipal public financing programs did not incorporate a trigger mechanism that assured participants that they could mount a competitive campaign, no credible candidates would participate. In other words, without triggers, public financing programs would simply fail due to a lack of interest.

Lastly, public financing programs create more speech and a more robust civic dialogue by fostering competition. Enhancing involvement in the political process is an important government interest because it honors "a profound national commitment . . . that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

More speech and discussion among candidates on issues of public importance is a matter of utmost civic importance and those conversations make "a healthy representative democracy flourish." *Buckley*, 424 U.S. at 93, n.127. Citizens in New York City and San Francisco have gained more confidence in the integrity of their elections, as shown by their willingness to participate in the political process, either as small donors or as candidates.

C. Trigger mechanisms are substantially related to those important and compelling government interests.

There is, moreover, ample practical experience showing a "substantial relation" between a matching funds program and the sufficiently important and compelling governmental interests discussed above. To draw the participation of strong candidates, public financing programs must ensure that those candidates will be able to mount competitive campaigns. If additional matching funds were not available, no fiscally responsible public financing plan could attract participants, because it would pose an enormous risk to participate in such a system.

In times of fiscal austerity, trigger mechanisms are the most prudent, reasonable, and narrowly tailored approach to an increasingly expensive and vexing problem for municipalities. These programs are obligated to allocate limited public funds in a non-partisan and equitable, content-neutral way. Targeting matching funds for the most competitive races accomplishes that goal most efficiently.

Moreover, the Constitution "does not require Congress to treat all declared candidates the same for public financing purposes." *Buckley*, 424 U.S. at 97. That is because legislative initiatives that enhance core First Amendment values by financing particular speakers "is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, and preferential postal rates and antitrust exemptions for newspapers." *Id.* at 93, n.127.

In the concededly different yet nevertheless apt context of contribution limits, this Court has recognized that ensuring competitiveness is an important constitutional consideration. *See, e.g., Buckley*, 424 U.S. at 21 (noting the "severe impact on political dialogue" that occurs when candidates are prevented from "amassing the resources necessary for effective advocacy"); *Randall v. Sorrell*, 548 U.S. 230, 248-249 (2006)("contribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability"). That is because "enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process" contributes to freedom of expression. *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981). The "silencing of a candidate has consequences for political debate and competition overall." *Shrink Mo.*, 528 U.S. at 420 (Thomas, J., *dissenting).*

Arizona's program does not restrict anyone's speech. But even if this Court found that it

somehow was a restriction, the Constitution "often permits restrictions on the speech of some in order to prevent a few from drowning out the many -- in Congress, for example, where constitutionally protected debate, Art. I, § 6, is limited to provide every Member an equal opportunity to express his or her views." *Shrink Mo.*, 528 U.S. at 402 (Breyer and Ginsburg, JJ., concurring). Effective electoral competition is the critical civic value here, because political discourse and democracy suffer when only one candidate has the resources to mount a competitive campaign.

That does not mean that the trigger provisions of these campaign finance programs are impermissibly egalitarian or intended to "level the playing field." Rather, they are a necessary building block for public financing. They are effective in bringing more candidates into the program, and that advances the legitimate, compelling and long-accepted government interest in campaigns that are free of corruption.

That is the intent and effect of Arizona's matching fund programs, as the Ninth Circuit correctly understood. Its order should be affirmed.

CONCLUSION

THE NINTH CIRCUIT'S JUDGMENT SHOULD BE AFFIRMED.

Respectfully submitted,

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
100 Church Street,
New York, New York 10007.
(212) 788-1043 or 0835
jgordon@law.nyc.gov

LEONARD J. KOERNER,*
EDWARD F.X. HART,
JANE L. GORDON,
of Counsel.

*Counsel of Record

NON-PARTICIPATING CANDIDATES AND THE BONUS PROVISIONS IN NEW YORK CITY'S CAMPAIGN FINANCE PROGRAM

New York City Campaign Finance Board, February 2011

Spending by High-Spending Non-Participating Candidates Who Triggered Bonus

New York City Elections, 1989-2010

Year	Election	Candidate	Office	Boro/ Dist.	"Trigger" Amount	Net Expend.	Expend. as % of Trigger
2009	General	Bloomberg, Michael*	Mayor	-	$3,079,001	$108,371,688	3519.7%
2005	General	Bloomberg, Michael*	Mayor	-	$2,864,000	$84,567,319	2953.5%
2001	Prim/Gen	Bloomberg, Michael	Mayor	-	$2,615,500	$73,109,266	2795.2%
1997	General	Erstoff, Andrew*	City Council	4	$30,000	$805,803	2686.0%
1993	General	Erstoff, Andrew*	City Council	4	$30,000	$623,914	2079.7%
1997	Primary	Dear, Noach*	City Council	44	$30,000	$544,954	1816.5%
1991	Prim/Gen	Duane, Tom	City Council	3	$30,000	$279,629	932.1%
1989	Primary	Lauder, Ronald	Mayor	-	$1,500,000	$13,789,889	919.3%
2001	Primary	Posner, Elana	City Council	1	$68,500	$582,529	850.4%
2009	Prim/Gen	Kim, Kevin	City Council	19	$80,501	$648,603	805.7%
1993	Primary	Dear, Noach*	City Council	44	$30,000	$228,375	761.3%
1993	Primary	Lasher, Howard	City Council	47	$30,000	$212,022	706.7%
1997	Primary	DeMarco, Michael*	City Council	13	$30,000	$204,977	683.3%
1991	Primary	Howard, Philip	City Council	2	$30,000	$185,193	617.3%
1991	Primary	Garson, Michael	City Council	48	$30,000	$137,506	458.4%
2005	Primary	Katz, Melinda*	City Council	29	$75,000	$331,304	441.7%
1997	General	Hirschfeld, Abraham	Boro Pres	Mn	$532,500	$2,274,801	427.2%
2009	Primary	Chou, Yen	City Council	20	$80,501	$304,849	378.7%
1997	General	Eisland, June*	City Council	11	$30,000	$103,973	346.6%
1991	General	O'Donovan, Jerome*	City Council	49	$30,000	$101,258	337.5%
1991	Prim/Gen	Dear, Noach*	City Council	44	$30,000	$96,210	320.7%
2009	Primary	Chain, Heidi	City Council	29	$80,501	$246,136	305.8%
1997	Prim/Gen	White, Jr., Thomas*	City Council	28	$30,000	$90,302	301.0%
1997	General	Spigner, Archie*	City Council	27	$30,000	$80,378	267.9%
1997	Primary	Wooten, Priscilla*	City Council	42	$30,000	$79,284	264.3%
1993	Primary	Spigner, Archie*	City Council	27	$30,000	$73,961	246.5%
2009	Special	Tabacco, John	City Council	49	$80,500	$189,953	236.0%
2008	Special	Crowley, Elizabeth	City Council	30	$80,500	$179,912	223.5%
1997	General	Pevman, Morton*	City Council	24	$30,000	$63,514	211.7%
1991	General	Goldstein, David	City Council	4	$30,000	$62,137	207.1%
1997	Primary	Addabbo, Jr., Joseph	City Council	32	$30,000	$61,561	205.3%
1991	General	Dehna, Joseph	City Council	43	$30,000	$61,335	204.5%
1991	Primary	Colon, Rafael*	City Council	17	$30,000	$60,256	200.9%
2005	Primary	Sanders, Jr., James*	City Council	31	$75,000	$147,753	197.0%
2001	Primary	Diaz, Ruben	City Council	18	$68,500	$116,770	170.5%
2009	Primary	Kalatharia, Stanley	City Council	25	$80,501	$133,652	166.0%
1991	Primary	Gresser Jr., Lawrence	City Council	19	$30,000	$48,949	163.2%
1997	General	Fiala, Stephen	City Council	51	$30,000	$45,307	151.0%
1997	Prim/Gen	Harrison, Julia*	City Council	20	$30,000	$43,073	143.6%
1993	Primary	Williams, Enoch*	City Council	41	$30,000	$42,181	140.6%
1991	Primary	Valentino, Louis	City Council	38	$30,000	$42,153	140.5%
1991	Primary	McCaffrey, Walter*	City Council	26	$30,000	$42,020	140.1%
1991	Primary	Rivera, Jose*	City Council	15	$30,000	$41,896	139.7%
1991	Primary	Strauss, Sidney	City Council	29	$30,000	$40,837	136.1%
1993	General	Fisher, Kenneth*	City Council	33	$30,000	$39,146	130.5%

1991	Primary	Fiatta, John	City Council	1	$30,000	$38,936	129.7%
1991	Primary	Cruz, Lucy	City Council	18	$30,000	$38,149	127.2%
1997	Primary	Perez, Frederico*	City Council	17	$30,000	$34,885	116.3%
1991	Primary	Mason, Vernon	City Council	7	$30,000	$34,158	113.9%
1991	Primary	Siegner, Archie*	City Council	27	$30,000	$32,905	109.7%
1991	Primary	Coleman, Dennis	City Council	18	$30,000	$32,632	108.7%
2001	Primary	Provenzano, Madelyn*	City Council	13	$66,500	$71,834	134.9%
1997	General	Ryan, Chun Soo	City Council	20	$30,000	$31,136	103.8%
1993	General	McCaffrey, Walter*†	City Council	26	$30,000	$25,606	85.4%
1997	General	Golden, Howard*†	Boro Pres	BK	$532,500	$390,445	73.3%
1991	Primary	Williams, Enoch*†	City Council	41	$30,000	$21,209	70.7%

* - Incumbent

† - Bonus was triggered by non-participant's contributions only

Note: Includes high-spending non-participating candidates who faced participating candidates in races where the Board declared a bonus. High spending non-participants who were unopposed, faced only other non-participating candidates, or who faced participating candidates who did not qualify for public funds, are not included. Candidates who triggered a bonus payment for opponents in both a primary and general election are counted once for each election.

Spending by Non-Participating Candidates Who Triggered Tier 1 Bonus Payments
New York City Elections, 2005-2010

Year	Election	Candidate	Office	Boro Dist	"Trigger" Amount	Net Expend	Expend as a % of Tier 2 Trigger
2009	Primary	Koo, Kin	City Council	19	$483,001	$309,994	64.2%
2009	Primary	Chou, Yee	City Council	20	$483,001	$304,849	63.1%
2009	Primary	Chan, Hed	City Council	29	$483,001	$246,136	51.0%
2009	Special	Tabacco, John	City Council	49	$483,000	$189,853	39.3%
2008	Special	Crowley, Elizabeth	City Council	30	$483,000	$179,912	37.2%
2005	Primary	Sanders, Jr., James*	City Council	31	$460,000	$147,783	32.8%
2009	Primary	Kalathara, Stanley	City Council	25	$483,001	$133,652	27.7%

Spending by Non-Participating Candidates Who Triggered Tier 2 Bonus Payments, New York City Elections, 2005-2010[‡]

Year	Election	Candidate	Office	Boro Dist	"Trigger" Amount	Net Expend	Expend as a % of Tier 2 Trigger
2009	General	Bloomberg, Michael*	Mayor		$18,474,001	$108,371,888	586.6%
2005	General	Bloomberg, Michael*	Mayor		$11,184,000	$84,587,319	492.2%
2009	General	Ken, Kevin	City Council	19	$485,001	$648,603	134.3%
2005	Primary	Katz, Melinda*†	City Council	29	$450,000	$331,304	73.6%

* - Incumbent

† - Bonus was triggered by non-participant's contributions only

‡ - Tier 2 established by Local Law 58 of 2004

Spending by Non-Participating Candidates Failing to Trigger Bonus New York City Elections, 1989-2010

Year	Election	Candidate	Office	Boro Dist	"Trigger" Amount	Net Expend	Expend as % of Trigger
1997	Primary	Alvarez, Stanley	City Council	41	$30,000	$29,482	98.2%
1997	Primary	Boyland, Tracy	City Council	41	$30,000	$28,626	95.4%
1997	General	Solano, Reylando	City Council	13	$30,000	$22,241	74.1%
1993	General	Golden, Howard*	Boro Pres	BX	$450,000	$299,946	66.7%
1993	Prim/Gen	Rosado, David	City Council	17	$30,000	$19,569	65.2%
1993	General	Harrison, Julia*	City Council	20	$30,000	$14,401	48.0%
2005	Primary	Jennings, Jr., Alan*	City Council	28	$75,000	$32,191	42.9%
1997	Primary	Bonzellen, Frank	City Council	30	$30,000	$12,742	42.5%
1993	Prim/Gen	Kloberdanz, Barbara	City Council	5	$30,000	$11,569	38.5%
1991	Primary	Dorsa, Joseph	City Council	19	$30,000	$10,902	36.4%
1997	General	Scala, Frank	City Council	1	$30,000	$10,514	35.0%
1991	Primary	Mongiello, Mario	City Council	38	$30,000	$9,797	32.7%
2005	Primary	Ampry-Samuel, Alicia	City Council	41	$75,000	$22,970	30.6%
2001	General	Stoogo, Robert	City Council	5	$66,500	$20,864	30.5%
2010	Special	Caller, Carl	City Council	44	$84,000	$24,061	28.6%
2009	Primary	Facundo, Luis	City Council	10	$80,501	$18,267	22.7%
2001	General	Natale, Jill	City Council	4	$66,500	$14,453	21.1%
2010	Special	Jennings, Jr., Alan	City Council	28	$84,000	$17,335	20.6%
2007	Special	Eugene, Mathieu	City Council	40	$75,000	$15,170	20.2%
1993	General	Mangano, Rosemarie	City Council	51	$30,000	$6,060	20.2%
1991	Primary	Mazzarello, Fred	City Council	19	$30,000	$5,662	18.9%
2005	Prim/Gen	Flores, Rosario	City Council	25	$75,000	$11,672	15.6%
1993	General	Marin, George	Mayor		$2,000,000	$270,824	13.5%
1991	Primary	Eatmon Jr., Andrew	City Council	17	$30,000	$4,034	13.4%
2009	Primary	Jennings, Jr., Alan	City Council	28	$80,501	$10,003	12.4%
2001	General	Chwat, Norbert	City Council	29	$66,500	$7,649	11.2%
1997	General	Salaca, Rod	City Council	6	$30,000	$2,934	9.8%
1991	Primary	Dechter, Hyman	City Council	2	$30,000	$2,602	8.7%
2001	General	Mercado, Julio	City Council	34	$66,500	$4,927	7.4%
2001	General	Vazquez, Jorge	City Council	34	$66,500	$4,927	7.4%
2009	General	Goldberg, Joshua	City Council	6	$80,501	$5,646	7.0%
2002	Special	Martinez, George	City Council	38	$75,000	$5,000	6.7%

2001	General	Grupico Sal	City Council	45	$68,500	$3,793	5.5%
2001	General	Hirschfeld, Allen	City Council	48	$68,500	$3,611	5.3%
1997	General	Shanahan, Mary Lou	City Council	51	$30,000	$1,329	4.4%
1993	General	Brown, Marilyn	City Council	24	$30,000	$1,227	4.1%
2003	PrimGen	Park, Terence	City Council	22	$75,000	$2,977	4.0%
1993	General	Ross, Elaine	Boro Pres	Mn	$450,000	$17,345	3.9%
2001	Primary	Pope, Sandra	City Council	27	$68,500	$2,534	3.7%
1997	General	Paul, Joan	Boro Pres	Mn	$532,500	$18,350	3.4%
1997	Primary	Cerelli, Anthony	City Council	43	$30,000	$1,000	3.3%
2001	General	Jeresky, Robert	City Council	4	$68,500	$1,919	2.8%
1997	General	Mc Avoy, Annemarie	Comptroller		$1,479,000	$18,203	1.2%
1991	Primary	Cavacco Jr., Manuel	City Council	1	$30,000	$345	1.2%
2005	General	Gonzalez, Miguel	City Council	37	$75,000	$674	0.9%
1993	General	Richman, Martin	Boro Pres	Bx	$450,000	$3,559	0.8%
2001	General	Reyach, Nilda Luz	City Council	10	$68,500	$485	0.7%
2009	Primary	Gray, Lou	City Council	31	$80,501	$569	0.6%
2009	General	Vitale, Francisca	Mayor		$3,079,001	$10,527	0.3%
1997	Primary	Green, Roger	Pub. Advo		$1,479,000	$3,186	0.2%
1997	Primary	Rogers, Roland	Mayor		$2,386,000	$4,635	0.2%
1993	Primary	Braggs, Monica	Boro Pres	Bx	$450,000	$595	0.1%
2009	General	Horvath, Irene	City Council	1	$80,501	$56	0.1%
1993	General	Falk, Bob	Pub. Advo		$1,250,000	$568	0.0%
2009	Primary	Rogers, Roland	Mayor		$3,079,001	$205	0.0%
2001	General	Agosto, Jonathan	City Council	16	$68,500	$0	0.0%
1993	General	Augustin, Owen	City Council	40	$30,000	$0	0.0%
2001	General	McManus, Patrick	City Council	17	$68,500	$0	0.0%
2001	General	Perez, Aida	City Council	17	$68,500	$0	0.0%

* - Incumbent

Note: Includes only non-participating candidates who were opposed by participants and reported itemized financial activity to the city or state Board of Elections or the Campaign Finance Board. During the same period, there were an additional 267 non-participating candidates opposed by participants who reported no itemized contributions or expenditures.

Spending by Non-Participating Candidates as a Percentage of the Bonus Trigger, New York City Elections, 1989-2010

AMICUS CURIAE BRIEF

Nos. 10-238 and 10-239

IN THE

Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *et al.*,
Petitioners,

v.

KEN BENNETT, *et al.*,
Respondents.

JOHN MCCOMISH, *et al.*,
Petitioners,

v.

KEN BENNETT, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* PROFESSORS OF CONSTITUTIONAL AND ELECTION LAW IN SUPPORT OF RESPONDENTS

Of Counsel:
RICHARD BRIFFAULT
435 West 116th Street
New York, NY 10027

DANIEL F. KOLB
Counsel of Record
DOUGLAS K. YATTER
ANDREW DITCHFIELD
BENEDICT J. SCHWEIGERT
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, NY 10017
(212) 450-4000
daniel.kolb@davispolk.com
Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are law professors and scholars with expertise in constitutional and election law. Although they hold divergent views on many issues, *amici* have a common interest in the application of constitutional principles to campaign finance regulation. *Amici* have a shared belief that state regulation of campaign finance can promote important public interests in government integrity, competitive elections, and robust debate from different perspectives, and that, absent clear evidence of infringement on constitutional rights, states should be given space to experiment with and develop such regulations.

SUMMARY OF ARGUMENT

Public funding of campaigns serves states' compelling interests in combating corruption and the appearance of corruption, as well as other speech-enhancing goals that have been recognized by the Court as important interests. Arizona's supplemental funding trigger is a helpful and appropriate tool for ensuring the viability and cost-effectiveness of its public funding system. Available data indicate that supplemental funding triggers in Arizona and other states provide more funding for campaign speech, increase electoral competition, reduce dependence on private contributions, and ameliorate the rigors of

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

fundraising, without burdening political participation by other campaign actors. Supplemental funding triggers play important roles in providing appropriate levels of funding to the most competitive elections, without wasting scarce state resources in elections where additional public funds are not needed. In the absence of evidence of any actual burden on constitutional rights, the Court should continue to allow states and local governments to regulate campaign finance and experiment with innovative means to further their legitimate governmental interests, much as it has allowed states to experiment with a variety of other election laws.

Amici believe that there is no one clearly correct method of financing elections, nor that there is one clearly correct form of public funding. Supplemental funding triggers, however, are a significant feature in the development of public funding systems at the state and local level. Their ability to advance core goals of campaign finance regulation – to ameliorate the potentially corrupting effects of campaign contributions and promote vigorous election competition, without curbing campaign speech – make them worthy of close examination and possible emulation by other states and, potentially, the federal government. Such state and local innovation is a valuable source of learning in our federal system. *Amici* therefore respectfully submit that the Court should allow Arizona and other states to continue using supplemental funding triggers in their ongoing efforts to improve their campaign finance laws.

ARGUMENT

THE COURT SHOULD PERMIT STATES TO CONTINUE DEVELOPING PUBLIC CAMPAIGN FINANCE SYSTEMS USING SUPPLEMENTAL FUNDING TRIGGERS

In November 1998, in response to a widespread series of campaign corruption scandals, the voters of Arizona approved an initiative adopting a public campaign funding system to regulate their state's elections. In doing so, they added Arizona to the growing group of state and local jurisdictions, now numbering thirty-nine, *see* Br. of *Amicus Curiae* Center for Governmental Studies at 1-3 & n.4, which have adopted some form of public campaign financing.

The supplemental funding trigger in Arizona's Citizens Clean Elections Act is part of the ongoing effort by states to design and implement cost-effective campaign regulations that serve their important and compelling interests. Many states and local governments that have implemented public funding programs have included some form of trigger mechanism in their systems. Some of those measures – including Arizona's Citizens Clean Elections Act – were adopted by voter initiative, reflecting strong grassroots support for this reform. *See, e.g.*, "An Act to Reform Campaign Finance," L.D. 1823, Initiated Bill 5, 1996 117th Leg., Sec. Reg. Sess. (Me. 1996); *Daggett v. Commission on Governmental Ethics & Election Practices*, 205 F.3d 445, 450, 458 (1st Cir. 2000). Although the design of trigger mechanisms varies considerably from

jurisdiction to jurisdiction, each seeks to provide a cost-effective means of ensuring that more funding is available in the most competitive elections, without wasting public funds in elections where additional funds are not needed.

In its prior election law cases, this Court has frequently indicated its respect for the value of state experimentation and the importance of states having discretion to determine which laws, in varying ways, advance their interest in self-government. The Court should not curtail such experimentation in an area of core local concern absent clear evidence of constitutional harm. Given the lack of any showing that supplemental funding triggers have curtailed speech, discriminated against particular political views, or interfered with electoral competition, the Court should allow Arizona and other states to continue employing public campaign financing with supplemental funding triggers in their election laws.

A. States Have Recognized that Supplemental Funding Triggers in Public Financing Systems Serve Important and Compelling Interests

Arizona, like other jurisdictions, adopted its system of public campaign funding for the express purpose of combating real and apparent corruption. *See* Ariz. Rev. Stat. Ann. § 16-940(A); *see also, e.g.*, Neb. Rev. Stat. § 32-1602(2); 1997-64 Vt. Adv. Legis. Serv. 1 (LexisNexis). States have found that public funding systems also serve several important speech-enhancing purposes, such as increasing political discussion and debate, encouraging potential

candidacies, improving voter participation, and improving access to information. *See, e.g.*, Ariz. Rev. Stat. Ann. § 16-940(A); Fla. Stat. § 106.31; Neb. Rev. Stat. § 32-1602(1)-(2); R.I. Gen. Laws § 17-25-18; 1997-64 Vt. Adv. Legis. Serv. 1 (LexisNexis). As the Court observed in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), in addition to reducing "the deleterious influence of large contributions on our political process," public funding "facilitate[s] communication by candidates with the electorate" and helps "to free candidates from the rigors of fundraising." *Id.* at 91. Public funding is a laudable "effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93 (concluding that public funding therefore "furthers, not abridges, pertinent First Amendment values"). Public funding programs provide funds so that all candidates may speak, "entrusting the people to judge what is true and what is false." *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 907 (2010).

As explained in Respondents' briefs, Arizona's supplemental funding trigger serves a critical role in ensuring that the Citizens Clean Elections Act meets the vital goals that Arizona voters intend it to achieve. *See* Br. of Resp. Clean Elections Inst., at 40-58; Br. of State Resps., at 46-47. By providing additional funds to a participating candidate only after his or her opposition has exceeded certain levels of contributions or expenditures, the supplemental funding trigger allows Arizona to allocate appropriate levels of public funds to the most competitive races. In this way, it balances the state's

need to conserve limited public resources with its goal of enabling robust public debate and competition in state election campaigns. *See Buckley*, 424 U.S. at 96-98 (upholding certain provisions in the federal presidential public financing system on the ground that they conserve federal resources and prevent "raid[s on] the United States Treasury") (internal quotation marks omitted).

B. States and Local Governments Have Adopted a Variety of Supplemental Funding Triggers as Part of Their Efforts to Create Viable and Cost-Effective Public Financing Systems

Over the past twenty years, most states and local governments that have adopted public campaign financing have included trigger mechanisms in their systems. Although the specific mechanisms vary from jurisdiction to jurisdiction, each seeks to ensure that candidates in the most competitive elections will be adequately funded, without wasting scarce public resources in elections where additional funds are not needed. This makes public funding more attractive to more candidates and promotes a core public funding goal of reducing candidates' dependence on private donations that may give rise to corruption or the appearance of corruption.

Supplemental funding triggers make additional funds available only in those elections where high levels of spending by other campaign participants indicate that those elections are particularly competitive. It would be impossible in advance to determine which specific elections in a particular

election year will be more competitive than others, and it would be wasteful to pump more public funds into all elections just to ensure that more money is available in those elections where it is most needed. Triggers address this difficulty with appropriate flexibility by allowing the level of public funding, or the mix of public and private funds, to respond to specific electoral conditions.

The variety of trigger mechanisms testifies to the vibrancy of our federal system, demonstrating the differences in political preferences, resources, or circumstances across states and localities as they grapple with this common problem. A significant number of jurisdictions, like Arizona, employ supplemental funding triggers to provide additional funds to candidates who participate in the public funding system if statutory criteria are met. The events that trigger supplemental funding vary by jurisdiction, with some looking to spending of both non-participating candidates and opposing independent entities, and some just to spending of non-participating candidates. *See, e.g.*, Ariz. Rev. Stat. Ann. § 16-952(A)-(B); L.A., Cal., Mun. Code § 49.7.22(C)-(D); New Haven, Conn., Code of Gen. Ordinances § 2-825; Fla. Stat. § 106.355; Me. Rev. Stat. tit. 21-A, § 1125(9); N.M. Stat. Ann. § 1-19A-14; Albuquerque, N.M., Charter of the City of Albuquerque, art. XVI, § 16; N.C. Gen. Stat. § 163-278.67; Chapel Hill, N.C., Gen. Code of Ordinances § 2-95(a)-(b); Wis. Stat. § 11.512.

Other jurisdictions have implemented triggers that increase or remove voluntary contribution or expenditure limits, which initially apply to

candidates who receive public funding, if a non-participating opponent receives or spends funds above a designated limit. These measures also vary in their specifics from one jurisdiction to another. *See, e.g.*, L.A., Cal., Mun. Code § 49.7.14; Oakland, Cal., Mun. Code § 3.12.220; Sacramento, Cal., City Code § 2.14.060; S.F., Cal., Campaign & Governmental Conduct Code § 1.143; Fla. Stat. § 106.355; Mich. Comp. Laws § 169.269(8); Minn. Stat. § 10A.25(10); N.Y.C., N.Y., Admin. Code § 3-706(3); R.I. Gen. Laws § 17-25-24; Austin, Tex., Code of the City of Austin § 2-2-17.

States have been experimenting with such trigger mechanisms in public funding systems for more than twenty years. *See, e.g.*, Minn. Stat. § 10A.25(10) (1988) (lifting expenditure limits of participating candidates); R.I. Gen. Laws § 17-25-24 (1988) (lifting contribution and expenditure limits for participating candidates); *see also* 1991 Fla. Sess. Laws Serv. 2281 (West) (amending law to allow lifting of expenditure limits for participating candidates). The public funding program enacted by Arizona voters in 1998 was among the first to adopt its particular form of supplemental funding trigger, and other states have adopted similar measures in the years since then. *See, e.g.*, 2003 N.M. Legis. Serv. 1763 (West); 2002 N.C. Legis. Serv. 1768 (West). States have also revised their approaches as they have gained experience with their trigger mechanisms. Arizona's law, for example, has been refined both by the state commission responsible for administering it, *see* Br. of Resp. Clean Elections Inst., at 62 n.19 (noting amendment of commission rules to prevent distribution of supplemental funds when candidates engage

in coordinated conduct), and by state courts interpreting the law, *see Citizens Clean Elections Comm'n v. Myers*, 1 P.3d 706, 712-15 (Ariz. 2000) (excising portions of the law that impermissibly expanded the authority of the judicial branch by involving it in nominating candidates for, and appointing members to, the commission); *see also May v. McNally*, 55 P.3d 768, 774 (Ariz. 2002) (upholding surcharge funding provision of Arizona's law against First Amendment challenge because the act expands rather than burdens speech and the allocation of funds is viewpoint neutral).

In these ways, states are engaged in an ongoing effort to develop the most cost-effective means of using public campaign funding to combat corruption, promote competition, and enhance speech in their elections. It is worth noting that, although the presidential public funding system pioneered public funding in the United States, in recent elections fewer major candidates have chosen to participate in that system. Presidential public funding does not use a trigger; if one major candidate opts out and raises more money in private funds, the other candidates who take public funding still receive the same limited funds and remain subject to the same spending limit as before. This has increasingly led the candidates who believe they are most able to finance their campaigns with private funds to opt out, so that the program has begun to turn into one that funds only the more marginal candidates. The spread of trigger mechanisms at the state and local levels reflects an awareness of the shortcomings of public campaign financing systems that lack a means

of enabling publicly funded candidates in the most competitive races to raise and spend more money.

Amici do not believe there is one ideal trigger mechanism or, indeed, one best campaign finance system. We do, however, believe that it is very valuable to take advantage of the genius of the federal system by letting states and local governments, in some instances acting by grassroots voter initiatives, implement and thereby learn from these laws.

C. Absent Clear Evidence of Constitutional Harm, the Court Should Allow States Space to Continue Using Supplemental Funding Triggers as They Develop Their Public Financing Systems

As the Court has repeatedly recognized, states have broad power to regulate their own elections. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Indeed, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest." *Storer v. Brown*, 415 U.S. 724, 730 (1974). This Court's precedents have recognized that regulation of elections is an area of core local interest and expertise, entitling states to exercise their own judgment where there is no clear evidence of constitutional harm.

The Court recently recognized the importance of allowing states latitude in administering their own elections. In *Doe v. Reed*, 130 S. Ct. 2811 (2010), the Court rejected a First Amendment challenge to Washington State's law permitting private parties to

obtain the names of referendum signatories. *Id.* at 2821. The Court explained that, although "[p]etition signing remains expressive even when it has legal effect in the electoral process[,] . . . that is not to say that the electoral context is irrelevant to the nature of our First Amendment review. We allow States significant flexibility in implementing their own voting systems." *Id.* at 2818.

Numerous other cases have upheld state election regulations and state experimentation with new means of achieving legitimate state purposes, even when those regulations have had potential implications for constitutional rights, where no clear evidence existed that the regulations actually burdened protected rights. Thus, in *Crawford v. Marion County Election Board*, 553 U. S. 181 (2008), the Court recognized that a state voter identification requirement could potentially affect the ability of eligible voters to cast ballots, but upheld the measure because it had been adopted to advance the important state interest in preventing voter fraud, and the evidence of a burden on voting was inadequate to displace the state's choice. *Id.* at 191, 197-203.

Similarly, in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), the Court upheld the provision of Washington's "top-two" primary law allowing a candidate to list a party preference below his or her name on the ballot, against the assertion that this provision burdened the parties' freedom of association. *Id.* at 457. Under the "top-two" law, the two candidates receiving the most votes in the

primary would advance to the general election, regardless of their party affiliations. *Id.* at 447-48. The law was a novel measure intended to broaden participation in the process of nominating candidates, while focusing the general election decision on the "top two" candidates. The party-preference designation was an innovative compromise provision intended to enable a candidate to inform voters about the candidate's party preference without imposing that candidate as the nominee of that party absent the party's consent. The Court held that Washington could try this new system, finding that enabling a candidate to list a party preference advanced the state's "interest in providing voters with relevant information about the candidates on the ballot." *Id.* at 458. By the same token, there was no evidence that voters would be confused into thinking that the party-preference designation constituted a party's endorsement. *Id.* at 454-55. The Court emphasized that granting such a facial challenge, in the absence of a showing of actual harm, "threaten[s] to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* at 451.

In other areas of election law, the Court has likewise upheld regulations potentially implicating constitutional rights, so long as they are reasonable measures advancing legitimate state interests. The Court has recognized the interest of voters in being able to put forward and have a range of choices among candidates by striking down laws that require new parties to obtain so many signatures to get on the ballot that it is virtually impossible for any party

other than the Democrats and Republicans to do so. *See Williams v. Rhodes*, 393 U.S. 23, 32-34 (1968). At the same time, the Court has permitted states to adopt more modest restrictions that advance legitimate state interests in ballot integrity, political stability, and focusing electoral choice on more serious candidates. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 353-54, 369-70 (1997) (upholding Minnesota law that prohibited a candidate from appearing on the ballot for two different parties, because the burdens on party associational rights were "justified by 'correspondingly weighty' valid state interests in ballot integrity and political stability"); *Jenness v. Fortson*, 403 U.S. 431, 432, 438-39, 442 (1971) (upholding Georgia statutory scheme that imposed significant ballot access requirements on candidates who did not win a party primary, because even though requirements were in some respects more onerous than provisions in other states, they were less burdensome in other ways, such that "Georgia in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life").

Similarly, the Court has invalidated lengthy durational residency requirements that seriously burden the right to vote, while upholding more limited measures to advance what it has considered to be legitimate state goals. *See Rosario v. Rockefeller*, 410 U.S. 752, 753, 761 (1973) (upholding New York party enrollment rule that allowed voters to participate in primaries only if they enrolled in a party at least 30 days before previous general election, because requirement was "an integral part"

of a scheme that preserved the integrity of the electoral process by preventing party raiding); *Marston v. Lewis*, 410 U.S. 679, 679-81 (1973) (per curiam) (upholding Arizona's 50-day voter residency and registration requirements for state elections because it represented "an amply justifiable legislative judgment that 50 days rather than 30 is necessary to promote the State's important interest in accurate voter lists," and "[t]he Constitution is not so rigid that that determination and others like it may not stand").

Embedded in the Court's approach to examining states' regulation of elections is an appreciation for the value of experimentation within and across jurisdictions. In *Burson v. Freeman*, 504 U.S. 191 (1992), the Court considered First and Fourteenth Amendment challenges to Tennessee's law prohibiting solicitation of votes and display of campaign materials within 100 feet of the entrance to a polling place. *Id.* at 193. Acknowledging the long history behind such restrictions, the Court explained that states (and other countries) had experimented with several different ways to eliminate election fraud and voter intimidation at the polls, before settling on geographic limitations on vote solicitation and campaigning. *Id.* at 199-206. The Court noted that a handful of jurisdictions' early measures to restrict electioneering within a certain distance of polling places served as a springboard for other jurisdictions to adopt similar laws. *Id.* at 203-06. Upholding Tennessee's restriction, the Court noted that while some rules could be so restrictive as to create an impermissible burden, it would not employ a "litmus-paper test" in "reviewing challenges

to specific provisions of a State's election laws." *Id.* at 210-11.

The Court's approach in these cases accords with its longstanding recognition of the vital function states serve as laboratories for developing solutions to difficult legal and policy issues. *See, e.g.*, *Oregon v. Ice*, 129 S. Ct. 711, 718-19 (2009) (invoking states' role "as laboratories for devising solutions to difficult legal problems" as one reason for upholding state policy granting judges authority to determine whether criminal sentences run concurrently or consecutively); *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (noting that "the theory and utility of our federalism are revealed [when] the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear"); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (observing that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory" seeking new solutions on issues of public concern).

The Court has recognized that allowing state experimentation is particularly appropriate when there is no evidence of constitutional harm. For example, in *Chandler v. Florida*, 449 U.S. 560 (1981), the Court upheld a Florida policy allowing cameras in criminal trials, noting that because "no one has been able to present empirical data sufficient to establish" constitutional harm, "the admonition of Justice Brandeis . . . is relevant" and the "concept of

federalism, echoed by the states favoring Florida's experiment, must guide our decision." *Id.* at 578-80.

The value of state experimentation in regulating elections – and the need for clear evidence of unconstitutionality before foreclosing such experimentation – also found expression in *Storer v. Brown*, 415 U.S. 724 (1974). In *Storer*, the Court first upheld a California law requiring a candidate wishing to run as an independent to disaffiliate from his or her party at least twelve months prior to its primary election. *Id.* at 733. The Court explained that this rule protected the direct primary process that California had come to employ after years of unfortunate experience with a prior nominating system that allowed candidates to run in multiple parties' primaries. *Id.* at 735-36.

At the same time, the Court in *Storer* remanded a challenge to a second California law, which required that independent candidates seeking ballot access file a petition with signatures constituting at least five percent of total votes cast in the last general election. *Id.* at 738. Although the Court speculated that this rule could require an impermissibly high percentage of signatures from the available pool of eligible signatories, it concluded that it did not have enough evidence to determine if the rule actually placed an unconstitutional burden on ballot access. *Id.*; *cf. Clingman v. Beaver*, 544 U.S. 581, 586-88 (2005) (upholding Oklahoma's "semiclosed primary" law, which existed in similar form in 23 other states, because any burdens imposed on associational rights were minimal when voters could elect to change party affiliation in order to vote in a primary).

D. There Is No Clear Evidence that Supplemental Funding Triggers Burden Speech

In this case, there is no evidence of constitutional injury to warrant shutting down Arizona's and others states' development of public funding systems using supplemental funding triggers. Instead, the existing data support the conclusion that Arizona's measure enhances overall speech without burdening the speech of any campaign participants. The Court should, therefore, permit Arizona and other states to continue experimenting with campaign finance regulations, including public funding systems that utilize the kind of trigger mechanism that Arizona employs.

As Respondents' briefs show, Arizona's law has been accompanied by an increase in overall speech in state elections. *See* Br. of Resp. Clean Elections Inst., at 58; Br. of State Resps., at 40. Rather than chilling speech, the evidence presented to the District Court demonstrated an increase in both candidate and independent expenditures since the enactment of the Citizens Clean Elections Act. Candidate expenditures increased between twenty-nine and sixty-seven percent, and independent expenditures increased by over 250 percent. The most robust published analysis of Arizona's system, conducted by the U.S. Government Accountability Office in 2010, found that candidate expenditures in state legislative elections have generally increased since passage of the Citizens Clean Elections Act. *See* U.S. Gov't Accountability Office, GAO-10-390, Campaign Finance Reform: Experiences of Two States that

Offered Full Public Funding for Political Candidates (2010), at 52-53, 59-60. Independent expenditures in Arizona have also increased since 2000. *Id.* at 63-64.

Moreover, expert evidence before the District Court showed that contested state Senate elections increased by twenty percent, and that the number of competitive state Senate elections involving incumbents increased by 300 percent. Br. of Resp. Clean Elections Inst., at 6. The District Court also received evidence that the public funding offered under Arizona law allowed candidates to seek election who otherwise would not have been able to do so. J.A. 541-42, 591.

The additional campaign funds that Arizona's supplemental funding trigger provides further First Amendment values by enabling participating candidates to speak, and voters to hear, more campaign communications. There is no evidence that non-participating candidates or independent committees have reduced their campaign speech in response. Quite the contrary – since Arizona adopted public funding with its supplemental funding trigger, electoral debate in the state has been more robust than ever.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals. Supplemental funding triggers are an important means by which states ensure the effectiveness and viability of the public funding systems that they have adopted to prevent corruption, promote competition, and enhance speech in their elections. There being no clear evidence that such measures infringe on constitutional rights, the Court should allow states to continue to develop their regulations in this traditional area of local control.

Respectfully submitted,

Of Counsel:
RICHARD BRIFFAULT
435 West 116th Street
New York, NY 10027

DANIEL F. KOLB
Counsel of Record
DOUGLAS K. YATTER
ANDREW DITCHFIELD
BENEDICT J. SCHWEIGERT
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, NY 10017
(212) 450-4000
daniel.kolb@davispolk.com
Counsel for Amici Curiae

February 2011

APPENDIX

APPENDIX
LIST OF *AMICI CURIAE* PROFESSORS OF CONSTITUTIONAL AND ELECTION LAW*

Mark C. Alexander
Professor of Law
Seton Hall University Law School
One Newark Center
Newark, New Jersey 07102

Richard Briffault
Joseph P. Chamberlain Professor of Legislation
Columbia Law School
435 West 116th Street
New York, New York 10027

Guy-Uriel Charles
Professor of Law and Co-Director of the Duke Law Center on Law, Race and Politics
Duke University School of Law
210 Science Drive
Durham, North Carolina 27708

James A. Gardner
Vice Dean for Academic Affairs; Joseph W. Belluck & Laura L. Aswad Professor of Civil Justice; Director of the Edwin F. Jaeckle Center for Law and Democracy
State University of New York
University at Buffalo Law School
514 O'Brian Hall
Buffalo, New York 14260

---

* Affiliations of *amici* are listed for identification purposes only.

Heather K. Gerken
J. Skelly Wright Professor of Law
Yale Law School
127 Wall Street
New Haven, Connecticut 06511

Frances R. Hill
Professor of Law
University of Miami School of Law
1311 Miller Drive
Coral Gables, Florida 33146

Michael S. Kang
Associate Professor of Law
Emory University School of Law
1301 Clifton Road
Atlanta, Georgia 30322

Ellen D. Katz
Professor of Law
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109

Lloyd Hitoshi Mayer
Associate Professor of Law
University of Notre Dame Law School
P.O. Box 780
Notre Dame, Indiana 46556

William McGeveran
Associate Professor of Law
University of Minnesota Law School
229 19th Avenue South
Minneapolis, Minnesota 55455

Gene R. Nichol
Professor of Law and Director of the Center on
Poverty, Work & Opportunity
University of North Carolina School of Law
160 Ridge Road
Chapel Hill, North Carolina 27599

Daniel R. Ortiz
John Allan Love Professor of Law
Edward F. Howrey Professor of Law
University of Virginia School of Law
580 Massie Road
Charlottesville, Virginia 22903

Spencer A. Overton
Professor of Law
The George Washington University Law School
2000 H Street, NW
Washington, DC 20052

Richard H. Pildes
Sudler Family Professor of Constitutional Law
New York University School of Law
40 Washington Square South
New York, New York 10012

Daniel P. Tokaji
Professor of Law
The Ohio State University Moritz College of Law
55 West 12th Avenue
Columbus, Ohio 43210

AMICUS CURIAE BRIEF

Nos. 10-238 and 10-239

In The Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, et al.,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

JOHN McCOMISH, et al.,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF SELF-FINANCING CANDIDATES CONGRESSMAN BILL FOSTER (RET.), CONGRESSMAN ALAN GRAYSON (RET.), CONGRESSMAN STEVE KAGEN (RET.), GOVERNOR ANGUS KING (RET.), NED LAMONT, CONGRESSMAN WALT MINNICK (RET.), CONGRESSMAN JARED POLIS, AND CONGRESSMAN JOHN YARMUTH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

THOMAS BENNIGSON
Counsel of Record
SETH E. MERMIN
PUBLIC GOOD LAW CENTER
3130 Shattuck Avenue
Berkeley, CA 94705
(510) 548-4064
tbennigson@publicgoodlaw.org

Counsel for Amici Curiae

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INTEREST OF *AMICI*

Amici are current and former Members of the United States Congress, a former Governor, and a former candidate for Senator and Governor, all of whom have at some time funded their own campaigns in significant part. *Amici* believe that a robust public financing system is vital for democracy, so that candidates' dependence on private funders does not render government beholden to those with the deepest pockets, so that a variety of voices may be heard by the public, and so that public service and participation in public debate do not become inaccessible for all but a privileged few. *Amici* range from individuals able to spend millions in a campaign to others able to self-fund only at relatively moderate levels. One *amicus* oversaw as Governor the implementation of a public financing system similar to the one challenged in Arizona. Another *amicus* triggered matching funds to opponents through his spending under a system like Arizona's; five *amici* triggered the asymmetrical contribution limits of the Millionaire's Amendment, before it was struck down. None was ever deterred in any measure from broadcasting his own speech by concern that his spending would increase the resources of his opponents.[1]

Congressman Bill Foster, a prize-winning research physicist and entrepreneur, represented

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[1] No counsel for a party authored this brief in whole or in part, and no person, other than amici and their counsel, made a monetary contribution to the preparation or submission of this brief. All parties have granted blanket consents to the filing of *amicus* briefs

Illinois' 14th District in the U.S. House of Representatives from 2008 to 2011. He won office in a special election in March 2008, following a narrow primary victory in February, and was handily re-elected in November in a race attracting almost $2 million in outside expenditures. Congressman Foster contributed significantly to both his 2008 campaigns. His spending in the special election triggered the "Millionaire's Amendment," then still in effect, allowing his opponent to accept contributions up to triple the ordinary limit. His political spending was not deterred to any extent.

Congressman Alan Grayson represented Florida's 8th District in the House of Representatives from 2009 to 2011. He ran for the Democratic nomination for the same seat in 2006, contributing over $600,000 to his own campaign, triggering the Millionaire's Amendment, then in effect, without being deterred. After financing 80% of his own 2008 campaign, in 2010 he raised more funds from individual contributors than any other Democratic House candidate. Congressman Grayson is a distinguished attorney, and was the first president of a telecommunications company now among the Fortune 1000.

Congressman Steve Kagen, a prominent physician specializing in allergies, represented Wisconsin's 8th District in the House of Representatives from 2007 to 2011, championing transparency in government and in health care costs. Dr. Kagen contributed over $2 million to his 2006 election campaign. He was not deterred by the "Millionaire's Amendment" then in effect, which was

triggered by self-funding of over $350,000. Approximately $1.5 million was spent by outside groups in each of his races.

Governor Angus King, an attorney, alternative energy entrepreneur, and former television host, was elected as an Independent to two terms as Governor of Maine, one of only two governors in the nation at that time not affiliated with either major party. First elected in 1994 in a hotly contested four-way election, he won re-election in a landslide in 1998. Governor King contributed significantly to both his campaigns, funding slightly over 50% of the first. Maine's Clean Elections Act, which is very similar to Arizona's, including a matching provision similar to the one challenged here, was passed by referendum during his first term, going into effect during his second. Governor King initially had some concerns about taxpayer-funded public financing. However, having had a close-up view of its effectiveness, and having seen no chilling effect on political speech, he has come to believe that it is one of the most important ways to protect democracy from the power of special interests.

Ned Lamont, a successful telecommunications entrepreneur and executive, was the Democratic nominee for Senator from Connecticut in 2006, after upsetting the incumbent in a nationally watched primary election. Mr. Lamont ran for Governor of Connecticut in 2010, losing in a hotly contested primary to the eventual general election winner. Mr. Lamont's contributions to his 2010 gubernatorial campaign triggered the maximum available

matching public funds to his opponent (doubling the base grant) under the matching provision of Connecticut's Citizens Election Program, which works similarly to Arizona's. In 2006 his contributions to his Senate campaign triggered higher contribution limits for opponents under the Millionaire's Amendment. His principal opponent consequently raised over $20 million. In neither race was Mr. Lamont's spending deterred by the prospect of triggering increased funding for his opponent.

Congressman Walt Minnick represented Idaho's First District in the House of Representatives from 2009 to 2011. His voting record was labeled the most independent in Congress by the Washington Post. He served in the Nixon White House in the early 1970s, and later became a prominent leader of forestry and nursery businesses in Idaho. In 2008 Congressman Minnick contributed about $900,000 to his campaign, and raised twice that from other sources. He ran for Senate in 1996, and contributed a similar sum.

Congressman Jared Polis represents Colorado's Second District in the House of Representatives. A successful entrepreneur and philanthropist, Congressman Polis was first elected to Congress in 2008, after a closely contested three-way primary election. He previously served on the Colorado State Board of Education, defeating an incumbent in one of the closest elections in Colorado history. He has long been active in working to ensure integrity in government, having served as Co-Chair of Coloradans for Clean Government and

championed a state measure to ban gifts from lobbyists to government officials.

Congressman John Yarmuth is a third-term Member of Congress, representing Kentucky's Third District. A respected businessman and publisher, Congressman Yarmuth was first elected to Congress in 2006, after winning a three-way primary election and then defeating a five-term incumbent. In the 2006 primary and general elections, he contributed more than $700,000 to his campaign, undeterred by triggering the Millionaire's Amendment, and raised more than $1.5 million in private contributions. His general election opponent spent nearly $3.5 million. Since his election, Congressman Yarmuth has donated his post-tax congressional salary to various charities every year.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long recognized that the increasing centrality of fundraising to an ever more expensive campaign system creates expanded opportunities for political corruption. *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976). The real or apparent indebtedness of elected leaders to those who have funded their campaigns fosters mistrust of government and the political process. *Id.* at 27. The Arizona Citizens Clean Elections Act, Ariz. Rev. Stat. §§ 16-940 *et seq.* [CCEA] serves to lessen the incentives for – and public perceptions of – political corruption, by offering candidates a viable alternative to dependence on private funding. *See Buckley*, 424 U.S. at 96 ("public financing as a means

of eliminating the improper influence of large private contributions furthers a significant governmental interest").

The provision challenged in this case, Ariz. Rev. Stat. § 16-952, which offers additional matching funding to publicly financed candidates when their opponents exceed designated spending or funding thresholds, is simply a further refinement of the public financing approach to addressing corruption. The fund-matching provision strikes a balance between, on the one hand, the political and fiscal reality that the funds available for public financing are not limitless and, on the other, the importance of minimizing the possibility that the speech of a publicly financed candidate will effectively be drowned out by that of an opponent with far greater resources. That possibility would otherwise be likely to deter many candidates from participating in the public financing system, thereby thwarting its purpose of lessening corruption and the appearance of corruption.

The fund-matching provision achieves this balance in a manner that promotes the First Amendment values of vigorous debate, without infringing the First Amendment rights of any individual or of the public. The increasing expense of the traditional campaign system, besides increasing opportunities for corruption, makes it harder for multiple perspectives to be heard. The fund-matching provision makes it possible for a variety of voices to be heard, thereby contributing to that robust exchange of ideas about issues of public

concern which the First Amendment was intended to protect.

The matching provision helps to promote wide-ranging public debate without violating the stricture that the government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." *Buckley v. Valeo*, 424 U.S. at 48-49. Rather than restricting any speech, the provision hews to the guidance of this Court that in cases where one-sided speech may be problematic, the constitutionally preferred remedy is "more speech, not less." *Citizens United v. Fed'l Elections Comm'n*, 130 S.Ct. 876, 911 (2010). It enables more speech without compelling any speech, and without favoring any content, viewpoint, or speaker.

Above all, the CCEA accomplishes its salutary purposes without chilling any speech. *Amici* can attest from their own experience to the robustness of political speech. Candidates are principally focused on getting their message out, to the exclusion of other concerns. And because it is critical for them to do so *before* their opponents can define the issues or the candidates, it would not make sense for them to refrain from or postpone broadcasting their message in order to make it harder for their opponents to respond later.

In any event, a candidate's decision to abstain from or postpone some campaign spending for tactical advantage does not resemble anything recognized by this Court as a "chill" on speech. An examination of this Court's decisions makes clear

that it is the threat of coercive non-speech retaliation that gives rise to a "chilling effect." The Arizona statute, by contrast, presents no danger of government or private reprisals, of legal or financial repercussions, or of any other sort of consequence that would remove the electoral contest from the sphere of debating ideas to the sphere of non-speech retaliation. The threat of rebuttal by another speaker (that is, of provoking more speech) is not the sort of consequence that chills speech in the Constitutional sense. While a candidate in a contested election may prefer that opposing views not be heard, that is not an interest protected by the First Amendment.

Finally, Arizona's matching provision is materially different from the so-called "Millionaire's Amendment" to the federal Bipartisan Campaign Reform Act of 2002, struck down by this Court in *Davis v. Fed'l Election Comm'n*, 554 U.S. 724 (2008). The Arizona statute is not subject to the strict scrutiny triggered by the Millionaire's Amendment, because it does not discriminate among similarly situated candidates or among members of the public who might wish to contribute to political campaigns. The Arizona statute is better situated to withstand the appropriate level of scrutiny, because it acts to lessen the danger of political corruption and the perception of corruption, interests repeatedly recognized by this Court as important, indeed compelling. And it does so in full concordance with the First Amendment.

ARGUMENT

I. THE ARIZONA STATUTE EMPLOYS CONSTITUTIONALLY PERMISSIBLE MEANS TO ENHANCE THE FREE EXCHANGE OF IDEAS.

By enhancing the public's ability to be informed by debate among a variety of speakers representing a variety of viewpoints, the CCEA in general, and the matching provision in particular, serve the purposes of the First Amendment. Unlike measures found unconstitutional by this Court, they do so without restricting any speech and without compelling any speakers to disseminate speech to which they are opposed.

A. The Exposure Of The Public To Various Points Of View Is A Primary First Amendment Value.

The premise of the First Amendment is that genuine democratic self-governance depends on an informed public exposed to various perspectives. By providing public financing to candidates who might otherwise have difficulty raising sufficient funds to mount a campaign, the CCEA makes it possible for a variety of voices to be heard. The matching provision makes an important contribution to the goal of wide-ranging debate, not only because the CCEA would promote debate less effectively if candidates did not participate for fear of being drastically outspent by their opponents, but also because debate is impeded when a few voices are able to drown out others.

The democratic promise of government by the people depends on vigorous debate. In a system of "political self-government," voters "must know what they are voting about. And this, in turn, requires that so far as time allows, all facts and interests relevant ... shall be fully and fairly presented.... That is why freedom of discussion ... may not be abridged." Alexander Meiklejohn, *Free Speech and Its Relation to Self Government*, *in* Political Freedom 26 (1965). The First Amendment reflects this understanding. Because "[d]emocracy depends on a well-informed electorate," *Buckley*, 424 U.S. at 49, "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Id.* at 14. *See also Rosenbloom v. Metromedia*, 403 U.S. 29, 41 (1971) (self-governance presupposes knowledge and debate). The First Amendment protects "such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). The CCEA promotes just such "free and general discussion of public matters."

Underlying the foregoing understanding of the relation between democracy and free debate is the premise, championed famously by John Stuart Mill, that truth is most likely to emerge from vigorous debate. Mill, *On Liberty*, 86-120 (David Bromwich *et al.* eds. 2003). The First Amendment is based on this understanding. The "theory of our Constitution" is "that the best test of truth is the power of the thought to get itself accepted in the competition of

the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919). "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Red Lion Broad. Co. v. Fed'l Communications Comm'n*, 395 U.S. 367, 390 (1969). The First Amendment serves "to insure the ascertainment and publication of the truth about public affairs." *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (in context of political campaign publications). Freedom of discussion is "indispensable to the discovery and spread of political truth." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

But for truth to emerge from debate it is important that a wide variety of voices be heard. "[O]nly through diversity of opinion is there ... a chance of fair play to all sides of the truth." Mill, *supra*, at 90. This tenet too informs the First Amendment. "The First Amendment ... presupposes that right conclusions are more likely to be gathered out of a multitude of tongues." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). *See also Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 151 (1967) (First Amendment protects "the stimulating benefit of varied ideas"); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"). For this reason, "A primary First Amendment policy has been to foster the widest possible debate ... on matters of public importance." *Banzhaf v. Fed'l Communications Comm'n*, 405 F.2d 1082, 1102 (D.C. Cir. 1968) (Bazelon, J.). By providing funds for any

qualifying candidate to disseminate his views, the CCEA allows wider ranging political debate among a greater variety of voices than if effective political participation were limited to those who could afford to broadcast their views with private funds alone.

Most crucially, the public funding provided by the CCEA and the matching provision allow a variety of voices not only to speak, but also to be heard. For self-government, "the point of ultimate interest is ... the minds of the hearers." Meiklejohn, *supra*, at 26. "It is the right of the public to receive suitable access to ... political ... and other ideas ... which is crucial." *Red Lion*, 395 U.S. at 390 (discussing broadcast media). The "right to receive information and ideas ... is fundamental to our free society." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Speech is protected for "its capacity for informing the public." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978).

The CCEA's matching provision not only makes Arizona's public financing system more inviting to candidates who might otherwise be deterred by the prospect of being drastically outspent, the matching provision itself makes a contribution to the goals undergirding the First Amendment. Vigorous debate among various viewpoints may actually be impeded when one voice is able to drown out others. This point has been recognized with respect to speech by the government itself. *See Warner Cable Communications v. Niceville*, 911 F.2d 634, 638 (11th Cir. 1990) ("the government may not speak so loudly as to make it impossible for other speakers to be heard by their

audience"); *accord R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 923 (9th Cir. 2005); *AMSAT Cable v. Cablevision Ltd. P'ship*, 6 F.3d 867, 872 (2d Cir. 1993).

In an age in which citizens get most of their information from expensive broadcast media, "a debate in which only one party has the financial resources ... to purchase sustained access to the mass communications media is not a fair test of either an argument's truth or its innate popular appeal." *Banzhaf*, 405 F.2d at 1102. "[T]he public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system ... heavily weighted in favor of ...those with access to wealth." *Columbia Broad Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 123 (1973). *See also id.* at 196 (Brennan, J., dissenting) ("in light of the current dominance of the electronic media as the most effective means of reaching the public," if only a few individuals can afford to broadcast their messages, this "renders even the concept of 'full and free discussion' practically meaningless").

The CCEA's matching provision makes "a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process." *CBS, Inc. v. Fed'l Communications Comm'n*, 453 U.S. 367, 396 (1981). By furthering the public's interest in being exposed to all sides of public debate, it helps to "ensure that competition among actors in the political arena is truly competition among ideas." *Fed'l Elections Comm'n v. Mass. Citizens for Life*,

479 U.S. 238, 259 (1986), rather than a melee in which "success ... may go to the advocate who can shout loudest or most often." *Banzhaf*, 405 F.2d at 1102.

Petitioners view "the context of competitive electoral politics" as a zero-sum game, "in which one candidate's gain is another's loss." (McComish Petitioners' Merits Brief [McComish Br.] 57.) That description betrays a blinkered perspective that fails to consider "a primary First Amendment policy," *Banzhaf*, 405 F.2d at 1102: the public interest in a debate in which a variety of views may be heard.

B. The Arizona Statute Promotes The Public's Interest In Debate Among Multiple Viewpoints Through the Constitutionally Preferred Means Of "More Speech, Not Less."

Unlike constitutionally problematic efforts to foster increased public exposure to varied viewpoints, Arizona's approach recognizes that, even in service of that essential goal, government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." *Buckley*, 424 U.S. at 48-49.[2] Far from restricting or constraining any speech, the Arizona statute is crafted with an eye to the principle that "it is our law

[2] *But see* Meiklejohn, *supra*, at 24-26 (comparing free speech in democratic society to discussion at town meeting, whose rules regulate speech to make possible effective discussion, by allowing different views to be heard).

and our tradition that more speech, not less, is the governing rule." *Citizens United*, 130 S. Ct. at 911.

For many decades, when speech of some sort has been deemed problematic, this Court has counseled that "the remedy to be applied is more speech, not enforced silence." *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring). Since Justice Brandeis first proposed this principle in the context of advocacy of violent revolution, it has been applied in striking down restrictions seeking to avert a variety of anticipated harms. *See Brown v. Hartlage*, 456 U.S. 45, 61 (1982) ("In a political campaign, a candidate's factual blunder is unlikely to escape ... notice ... and correction.... The preferred First Amendment remedy of 'more speech, not enforced silence' thus has special force"); *Rosenbloom v. Metromedia*, 403 U.S. 29, 47 (1971) (plurality opinion) (when liability for defamation might impede vigorous discussion, "the solution lies in the direction of ensuring [citizens'] ability to respond, rather than in stifling public discussion of matters of public concern"). *See also Texas v. Johnson*, 491 U.S. 397, 419 (1989) ("the way to preserve the flag's special role" is not to prohibit flag burning, but "to persuade [flag burners] that they are wrong"). The CCEA promotes wide-ranging debate precisely by funding "more speech," rather than by legislating "enforced silence."

When this Court has struck down limitations on speech as more extensive than necessary, it has often suggested more speech, representing a different point of view, as a less speech-restrictive remedy to the perceived problem. *See 44 Liquormart*

v. Rhode Island, 517 U.S. 484, 507 (1996) (plurality opinion) (instead of banning price advertising for alcohol, state could achieve "goal of promoting temperance" through "educational campaigns focused on the problems of ... drinking"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 586 (2001) (Thomas, J., concurring) (instead of limiting tobacco advertising unduly, state "could seek to counteract that message with 'more speech'"). *See also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 571 (1980) (instead of banning promotional advertising by electric utility, state could "further its policy of conservation" by "for example, requir[ing] that the advertisements include information about the relative efficiency and expense of the offered service"). More speech, rather than enforced silence, has likewise often been held to be the constitutionally preferred remedy for potentially misleading speech. *See Meese v. Keene*, 481 U.S. 465, 481 (1987) ("the best remedy for misleading or inaccurate speech contained within materials [labeled 'political propaganda'] is fair, truthful, and accurate speech"); *Bates v. State Bar*, 433 U.S. 350, 375 (1977) ("the preferred remedy [for potentially misleading speech] is more disclosure, rather than less").

The challenged provision of Arizona's Clean Elections Act accords with this directive. The state faced serious concerns about the potential for political corruption if candidates were deterred from participating in the public financing system for fear of being drowned out by their opponents' spending. It addressed those concerns without restricting any speech, but through the constitutionally preferred

remedy of "more speech." The state does not advocate any particular position on any issue, and does not weight the scales for or against the speech of any candidate. Thus, Arizona's remedy is an appropriate application of foundational First Amendment doctrine.

Thirty-five years ago this Court found that a federal public financing system was "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Buckley*, 424 U.S. at 92-93. Neither the matching funds trigger nor the passage of time has called that conclusion into question.

C. The Statute Enhances Debate Without Compelling Speech.

The matching provision of Arizona's public financing system does not compel speech any more than it suppresses it. To the contrary, in every way it respects the "individual freedom of mind" protected by the First Amendment. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).[3]

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[3] Besides violating the rights of the compelled individual, compelled speech does not further society's interest in open debate. It tends, rather, to inhibit it, both by preventing the speaker from presenting his actual views, and because viewpoints are fairly represented only when presented by "persons who actually believe in them, who defend them in earnest." Mill, *supra*, at 104.

Relying on the principle that compelled dissemination of speech one disfavors amounts to compelled speech, *Pacific Gas & Elect. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986); *Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241 (1974), Petitioners argue that being required to report spending and fund-raising data, which will trigger matching funds to publicly financed opponents if certain thresholds are surpassed, is comparable to compelled dissemination of opponents' speech. (*E.g.* McComish Br. 54.) "[T]he financial reporting requirements of Arizona's system literally force [candidates] to press a button on their computer that will trigger the payment of subsidies to the very participating candidates they oppose," thereby compelling them "to help disseminate private political speech, which they abhor." (*Id.* at 24.)

The matching provision cannot plausibly be viewed as compelling dissemination of opponents' speech, even accepting Petitioners' questionable assertions that *Pacific Gas* and *Tornillo* govern scenarios not involving the conscription of private property, and that *Tornillo* applies to scenarios not implicating freedom of the press.[4] Essentially, Petitioners' complaint amounts to no more than that a candidate is required to perform an act (financial reporting) that may, if other conditions obtain (he has spent above the threshold, he has a publicly

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[4] The Court explained that *Tornillo* was more specifically about "the principle that the State cannot tell a newspaper what it must print," for fear of "dampen[ing] the vigor and limit[ing] the variety of public debate." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980).

financed opponent), constitute one link in a causal chain leading to matching funds being disbursed to his opponent.

A causal link of this sort cannot be sufficient to constitute dissemination. If it were, any candidate who agrees to participate in a debate in which his opponent gets equal time is voluntarily disseminating his opponent's speech. By Petitioners' reasoning, California's "civil Gideon" statute, providing publicly funded attorneys to low-income defendants in certain civil suits, Cal. Gov. Code § 68651 (operative July 1, 2011), compels plaintiffs in such cases to disseminate speech they oppose, in that it is plaintiffs' action that causes defense counsel's speech to be funded. Or if the Department of Health shuts down – or gives an unfavorable health rating to – a restaurant on the basis of reports the owner is required to file, and the Department publicizes that fact, then, on Petitioners' analysis, the restaurant owner was compelled to disseminate speech he disfavored. Indeed, there is no end to what could be considered compelled dissemination on Petitioners' reasoning. If a socialist worker in Indonesia taps the rubber that is used to manufacture the tires on trucks used to deliver the Wall Street Journal, the worker could complain that as a condition of employment he is compelled to help disseminate speech he abhors. Petitioners' contention that the Clean Elections Act compels high-spending privately funded candidates to disseminate their opponents' speech is no more plausible.

II. THE ARIZONA LAW DOES NOT CHILL SPEECH.

Petitioners' speculation that debate might somehow be chilled by a funding mechanism that makes it possible for more than one candidate to be heard has no support in observable fact, common sense, or the law.

A. Petitioners' First Amendment Concerns Are Based On An Unrealistic View Of Actual Campaign Behavior.

Petitioners' claims that speech is deterred or postponed by fear of triggering matching funds to an opponent, or that Arizona's public financing scheme discriminates against privately funded candidates, reflect a view divorced from the realities of actual campaign behavior.

1. Candidates Do Not Refrain From Speech to Avoid Triggering Matching Funds.

Petitioners' central complaint that candidates' speech is deterred by the prospect of triggering the release of matching funds is unsupported by evidence, and defies basic principles of campaigning for office. As made clear by the Court of Appeals, 611 F.3d 510, 523-24 (9th Cir. 2010), the record does not support any such claims, even with respect to Petitioners themselves. To the contrary, there is ample evidence that concerns about triggering matching funds played no part in Petitioners' strategizing. *Id.* (*See also* Clean Elections Institute Respondents' Merits Brief [Institute Br.] 6-7).

That evidence accords with what a modicum of familiarity with political campaigning would suggest. A candidate's top priority is almost invariably to get his message out. *See* Joseph Napolitan, *Napolitan's Rules: 112 Lessons Learned From a Career in Politics*, *in* Winning Elections 29 (Ronald Faucheux, ed. 2003). Particularly for candidates who are not already well known to voters, spending heavily is not a choice, but a necessity. Ruth Ann Weaver-Lariscy & Spencer Tinkham, *The Influence of Media Expenditure and Allocation Strategies in Congressional Advertising Campaigns*, 16 J. of Advertising No. 3, at 13 (1987). Moreover, according to generally accepted political campaign strategy, it is crucial for a candidate to get his message out first, so that he, and not his opponents, can frame the issues in the race, and define who the candidates are and what they stand for. *See* Denise Baer, *Contemporary Strategy and Agenda Setting*, *in* Congress and Elections American Style 55 (James Thurber ed. 1995); Joe Garecht, *5 More Secrets for Winning a Political Campaign*, *at* http://www.localvictory.com/strategy/secrets-for-winning-a-political-campaign.html. Consequently, it would be unusual – and likely self-defeating – for a candidate to refrain from spending to get his message out in order to prevent an opponent from getting her message out later.

Privately financed candidates cannot know in advance how much money they will raise. This fact makes it all the more implausible that they might somehow plan to raise the maximum amount possible while remaining just below the fundraising threshold that would trigger matching funding.

Presumably they opted for private financing because they thought doing so would be to their advantage, because they believed either (1) they could raise more funds than the maximum level matched under the CCEA, *see* Ariz. Rev. Stat. § 16-952(E), (2) they would be advantaged by having funds in hand earlier, or (3) they would benefit from a race in which both they and their opponents were able to spend more. It would defeat any of these strategies for privately financed candidates not to maximize their fundraising. And once the funds are in hand, there would be no incentive not to spend them, for raising the money is already enough to trigger the matching funds. § 16-952(B).

In general a candidate would not run for office if she did not believe that her message was superior to that of her opponents, and hence likely more appealing to voters. A candidate who believes this would have no reason to refrain from broadcasting her message in order to prevent her opponent from acquiring the means to broadcast his message to an equal extent.[5]

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[5] Ironically, Petitioners argue that "[a]nyone who takes ideas seriously will be chilled by the prospect of being instrumental in funding the dissemination of ideas one opposes." (McComish Br. 41.) But a candidate who takes ideas seriously is precisely one who would not shrink from presenting his ideas simply because the cost was that his opponent could do the same. He would welcome the opportunity to debate.

2. Delayed Spending Is Neither Factually Nor Legally Likely to Constitute Evidence of a Chilling Effect on Speech.

Even less plausible is Petitioners' argument that the speech of privately financed candidates is chilled because the trigger provision allegedly provides an incentive for candidates to *delay* spending. (McComish Br. 36, 42, 56; Arizona Free Enterprise Club's Freedom Club PAC Petitioners' Merits Brief [AFEC Br.] 16-17, 34.) The only incentive for delay alleged by Petitioners is an attempt to thwart the law. Moreover, it is implausible that the law in fact causes candidates to defer spending, and it would not constitute a chilling effect if it did so.

Petitioners assert that the trigger provision causes candidates to delay political activity until close to the election "so that matching funds arrive too late to be used by the publicly financed candidate." (AFEC Br. 16.) This is a remarkable argument. The only incentive alleged for a privately financed candidate to postpone spending is as an effort to circumvent the public financing system, so that opponents will not receive the funds to which they are entitled under law. It is peculiar to regard such efforts to cheat the system as a burden imposed by the system. Even more remarkably, as Petitioners admit, (McComish Br. 36), such manipulations are illegal under the Clean Elections Act. Ariz. Rev. Stat. § 16-958(C) (prohibiting conspiracies to postpone campaign donations in order to postpone reporting that will trigger matching funds to opponents). Petitioners'

argument therefore amounts to a claim that the Clean Elections Act burdens candidates' speech by providing an incentive to defer spending in ways that the Act itself explicitly prohibits. That is not a coherent objection.

In any event, deferring spending to deprive opponents of matching funds would be self-defeating. First, as noted *supra*, *see* sec. II.A.1, it is critical to speak early, in order to define the issues and candidates in a campaign. Second, late spending is unproductive, because many voters will already have voted. In Arizona voting begins 33 days before Election Day,[6] Long Distance Voter, *Early Voting Rules*, *at* http://www.longdistancevoter.org/early_voting_rules#arizona, and many voters avail themselves. For example, of 315,879 total votes cast in Pima County in the 2010 gubernatorial general election, 200,158 ballots were submitted before Election Day. Election Summary Report, Pima County, *at* http://www.pima.gov/elections/results.htm. Consequently, "media needs to be up, and running heavy, when the ballots go out." Gary Nordlinger, *Early Voting: Impact on Campaign Strategies, Training, Budgets*, *in* Winning Elections, *supra*, at 124. Third, late spending is ineffective, because most voters choose their candidates well before Election Day. *Id.* at 122; *see also* Stuart Rothenberg, *Final Stretch Not as Important as You Think*, *available at* http://rothenbergpoliticalreport.com/news/article/final-stretch-not-as-important-as

[6] Most states now offer early voting. Nat'l Conf. of State Legislatures, *Absentee and Early Voting*, *at* http://www.ncsl.org/default.aspx?tabid=16604

you-think (2010). In reality, candidates try to spread their media advertising – their greatest expense, Judith Trent & Robert Friedenberg, *Political Campaign Communication* 372 (2008) – over as many weeks as they can afford while achieving a heavy enough media presence to make an impact. Tobe Berkovitz, *Political Media Buying* (1996), *at* http://www.hks.harvard.edu/case/3pt/berkovitz.html.

Even if the matching provision did on occasion affect the timing of a candidate's spending, it would be incorrect to conclude that the state is thereby chilling speech. After all, many decisions concerning when to spend campaign funds are influenced in some way by state action. For example, federal candidates regularly make a big fundraising push shortly before the end of an F.E.C. reporting period, in order to demonstrate momentum. *See* David Læventhal, *January Fund-Raising Mania* , *at* http://www.opensecrets.org/news/2011/01/eco-1-31-11.html (Jan. 31, 2011). Candidates may avoid advertising on holiday weekends, when voters' attention is likely to be elsewhere; most holidays are scheduled by state action. The state action of allowing early voting influences the scheduling of campaign spending. In fact, Election Day itself is scheduled by the government. By Petitioners' reasoning, the fact that candidates are unlikely to spend heavily too far before Election Day – or for that matter, *after* Election Day – is equally an example of state action chilling political speech. It would be far-fetched to maintain that the scheduling of Election Day (or holidays or a deadline for disclosing funding) exerts a chilling effect on speech. It is equally far-fetched to maintain that the alleged

incentive to delay campaign spending provided by the matching provision exerts a chilling effect.

3. Neither Arizona's Public Financing System as a Whole Nor the Triggered Matching Funds Provision Discriminates Against Privately Financed Candidates.

There is equally little merit to Petitioners' complaints that the matching provision discriminates against privately financed candidates.

There is nothing discriminatory in the application of the Arizona statute to multi-candidate races. Petitioners object to the possibility that one candidate's high spending could trigger additional funds to more than one rival candidate, thereby allegedly weighting the scales unfairly against the high spending candidate. But it is plain that additional funding at an equal level all around does not in itself worsen the odds of any given candidate. In fact, candidates often benefit when voters opposed to them are split between more than one candidate. *See, e.g.*, Jon Walker, *NY-23: Dem Owens Catches a Lucky Break – Another Three-Way Race*, *at* http://elections.firedoglake.com/2010/09/23/ny-23-dem-owens-catches-a-lucky-break-another-three-way-race (Sept. 23, 2010). To avert just such a scenario, the national Republican Party refrained from funding the campaign of the Republican nominee in *amicus curiae* Ned Lamont's 2006 Senate race in Connecticut, for fear of splitting the anti-Democratic vote, after Mr. Lamont defeated incumbent Senator Joseph Lieberman in the

primary, and Sen. Lieberman sought re-election as an Independent. Anne Kornblut, *G.O.P. Deserts One of Its Own for Lieberman*, N.Y. Times, Aug. 19, 2006, http://www.nytimes.com/2006/08/19/nyregion/19conn.html.

Nor does the Clean Elections regime discriminate against privately financed candidates when it counts independent expenditures against a publicly financed candidate, as well as opponents' spending, for purposes of calculating matching funds. From the perspective of a candidate, as *amici* can attest, independent advertising against the candidate has the same impact as advertising by an opposing candidate. Given the proportion of election expenditures made by entities other than candidates, *see* GAO, *Campaign Finance Reform: Additional Information*, GAO-10-391SP 45 tbl.42, 47 tbl.44 (2010), *at* http://www.gao.gov/new.items/d10391sp.pdf ($2.2 million in independent expenditures reported in 2008 Arizona legislative elections compared to $2.1 million spent by privately financed candidates), candidates would be less likely to participate in a public financing system that did not provide funds to respond to adverse independent expenditures. The difficulty of verifying that nominally independent expenditures are truly independent only strengthens the case for counting them in the matching funds calculation.[7]

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[7] That difficulty is exacerbated by the lack of transparency surrounding the sources of funding for independent expenditures. *See* Lisa Rosenberg, *Impotent FEC Fails to Act on Disclosure Rules*, *at* http://sunlightfoundation.com/blog/taxonomy/term/

Finally, the obvious rejoinder to all of Petitioners' allegations of disadvantages to privately financed candidates is that many candidates continue to opt for private funding. *See id.* at 5 tbl.2 (51.2 % of Arizona legislative candidates chose private funding in 2000-2008). Candidates would not choose private funding unless they expected to benefit from doing so.

In sum, there is no evidence that the matching provision of the CCEA deters speech, discriminates against privately financed candidates, or in any other way infringes expressive rights.

B. The Fear Of Opposing Speech Does Not Constitute A "Chill" On Speech As That Term Is Understood Under The Constitution.

Even in an imaginary world in which the matching funds trigger provision deterred many privately financed candidates from broadcasting their messages as widely as they otherwise would, this would not constitute a "chilling effect" in the constitutional meaning of that phrase. An examination of the contexts in which this Court has found debate to be chilled reveals that it is non-speech retaliation (or threats or the possibility thereof) which give rise to a "chilling effect."

The crucial distinction is between two qualitatively different ways in which one may seek

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Transparency (Jan. 21, 2011) (only 41% of groups making independent expenditures in 2010 federal elections reported funding sources).

to "defeat" speech with which one disagrees: through persuasion or through coercion. One may seek to persuade by countering the speaker's ideas with other ideas, i.e., through the classic remedy of "more speech." Alternatively, one may take the disagreement out of the realm of words and ideas altogether and into the realm of coercion, through crude violence or, for example, through the possibility of "economic reprisal, loss of employment, threat of physical coercion." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). It is the latter sort of response that chills debate, directly or incidentally. By contrast, the threat that speech will be responded to with speech in favor of another viewpoint – the only threat posed by the matching provision – does *not* chill debate. To the contrary, such a response *is* debate.

A survey of recognized chilling effects reveals that they all involve some degree of coercion, through the threat of some sort harm in the material world. The following situations have repeatedly been found to chill speech:[8]

[8] Other factors may chill speech insofar as they lead to the listed sorts of outcomes. Requirements to identify the author of a leaflet or to disclose membership lists, for example, may chill speech, or association for speech, when they could plausibly expose the author or member to government or community reprisals. *Talley v. California*, 362 U.S. 60, 64-65 (1960); *Patterson*, 357 U.S. at 462.

- Criminal penalties, or threats or the possibility of prosecution.[9] *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality opinion); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002).

- Government or private threats, harassment, or reprisals. *Doe v. Reed*, 130 S. Ct. 2811, 2821 (2010) (citing *Buckley*, 424 U.S. at 74); *Hynes v. Oradell*, 425 U.S. 610, 626 (1976) (Brennan, J., concurring).

- Public hostility and threats of violence. *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963); *Patterson*, 357 U.S. at 462.

- Loss of employment or professional status or threats thereof. *Sheet Metal Workers' Int'l Ass'n v. Lynn*, 488 U.S. 347, 355 (1989) (regarding statutory free speech rights); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

- Loss of money or forgone earnings. *United States v. Treasury Employees*, 513 U.S. 454, 468-69 (1995); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983).

- State withholding of benefits. *Baird v. State Bar*, 401 U.S. 1, 7 (1971).

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[9] The doctrine that speech is chilled by laws that are vague, ambiguous, or difficult to understand, *Citizens United*, 130 S.Ct. at 889, 894-96; *NAACP v. Button*, 371 U.S. 415, 432-33, 437-38 (1963), or overbroad, *Virginia v. Hicks*, 539 U.S. 113, 119 (2003), is based on the attendant possibility of prosecution.

- Risk of civil litigation (including risk of liability and the costs and burdens of litigation itself). *Fed'l Elections Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007); *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 794 (1988).

- Harm to reputation or community standing. *Denver Area Educ. Telecoms. Consortium v. Fed'l Communications Comm'n*, 518 U.S. 727, 754 (1996); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965).

Unlike the foregoing examples, the "threat" alleged in this case – that opposing viewpoints will be aired in response to one's own – involves no coercion. It is wholly different in kind from anything that has ever been found to chill speech, and is not a threat of any legally cognizable harm.[10] A candidate has the right to shrink from such debate. But his speech is not being *chilled* in the constitutional sense when he does so. His interest in having his speech unanswered is not an interest protected by the First Amendment. *Cf. Red Lion*, 395 U.S. at 387 ("[t]he right of free speech ... does not embrace a right to snuff out the free speech of others").

In sum, Petitioners' argument that § 16-952 chills speech is empirically unsupported – candidate

[10] Indeed, given that the possibility of opposing speech does not threaten any legally cognizable harm to Petioners, there is some doubt whether they even have standing to bring this case. *See Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm").

speech is highly unlikely to be deterred. And it is incorrect as a matter of law – if the speech of some candidates were deterred by the prospect of opposing speech, that would not be a constitutionally cognizable chilling effect.

III. BECAUSE THE CCEA EMPLOYS NON-DISCRIMINATORY MEANS TO ACHIEVE IMPORTANT ENDS, *DAVIS* DOES NOT CONTROL THE OUTCOME OF THIS CASE.

The Arizona trigger provision fundamentally differs from the "Millionaire's Amendment," 2 U.S.C. § 441a-1(a), struck down in *Davis*, 554 U.S. 724, in both its ends and means, making Petitioners' reliance on *Davis* unavailing.

A. The Arizona Statute Calls For A Lower Level Of Scrutiny.

The strict scrutiny applied in *Davis* is inapplicable to this case, because the Arizona statute does not discriminate in any of the ways that made the Millionaire's Amendment constitutionally suspect. This Court applied strict scrutiny in *Davis*, because "the activation of a scheme of discriminatory contribution limits ... impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech." 128 S.Ct. at 2772. Arizona's law imposes no comparable burden.

The scheme struck down in *Davis* was discriminatory in several significant ways. First, it imposed unequal contribution limits on different privately funded candidates seeking the same office. In this way it was unlike systems, such as Arizona's,

in which candidates may voluntarily agree to accept lower contribution limits – or to refrain from accepting contributions at all after qualifying – in exchange for other advantages. *See id.* at 2772 (citing *Buckley*, 424 U.S. at 57 n.65). Second, it discriminated even among high spending candidates in a way that served no legitimate government purpose: one candidate could spend any amount without triggering higher contribution limits for his opponent, as long as he spent funds raised from other contributors, while a self-funding candidate could trigger triple contribution limits for his opponent by spending that same amount. Such discrimination violated the precept that "speech cannot be limited based on a speaker's wealth." *Citizens United*, 130 S.Ct. at 905. Third, it discriminated among members of the public, allowing some to make political contributions three times as great as other were allowed to make, based solely on their political preferences. Such discrimination violated the constitutional demand that "each citizen have an equally effective voice in the election" of office holders. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

By contrast, the public financing system at issue in this case is not discriminatory in this or any other way. As explained by Respondents, (Institute Br. 32-37), the CCEA does not discriminate according to speaker, content, or viewpoint.[11] Nor,

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[11] To Respondents' discussion of the statute's viewpoint neutrality, *amici* wish only to add that just as Arizona will provide matching funds equally to "pro-life" and "pro-choice" candidates, (Institute Br. 34), so too will it provide funds equally to candidates who favor public financing

does the CCEA burden speech in any significant way, as explained in section II, *supra*. Therefore, it is not subject to strict scrutiny any more than was the public campaign financing system this Court upheld in *Buckley*, 424 U.S. at 90-108; *see also Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983) ("We rejected First Amendment ... challenges to [the public financing provision in *Buckley*] without applying strict scrutiny").

Indeed, given that the Arizona statute does not impose *any* constitutionally recognized burden on speech whatsoever, *see supra*, at IIB, it is not clear that it should be subject even to intermediate scrutiny. The only point at which the *Buckley* Court indicated that any degree of heightened scrutiny of public financing might be in order was when considering an equal protection challenge to the denial of public financing to minor party candidates. 424 U.S. at 93-96. No such equal protection issues arise in the current case.

The CCEA does not impose even incidental burdens on speech like the ones potentially imposed by regulations to which the Court has applied intermediate scrutiny in the context of campaign finance regulation. Those regulations have been of two kinds: contribution limits, *Randall v. Sorrell*, 548 U.S. 230, 246-48 (2006); *Buckley*, 424 U.S. at 25, and disclosure requirements. *Citizens United*, 130 S. Ct. at 914; *Buckley*, 424 U.S. at 64-66. Contribution limits entail a "restriction upon the contributor's

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and those who don't. Candidates opposed to public financing may accept – and have accepted – public campaign funds. (*See* AFEC Br. 13-14.)

ability to engage in free communication," even if "only a marginal" one, *Buckley*, 424 U.S. at 20, and they constrain "one aspect of the contributor's freedom of political association." *Id.* at 21. The Arizona statute imposes no such restriction or constraint. Disclosure requirements "may burden the ability to speak" in some circumstances, such as when disclosing the identity of a speaker may lead to "threats, harassment, or reprisals" against the speaker. *Citizens United*, 130 S. Ct. at 914. The Arizona statute imposes no such potential burden.

It is not clear, therefore, that the Clean Elections Act implicates rights protected by the First Amendment in a way serious enough to warrant *any* form of heightened scrutiny. But two things at least are certain: first, the strict scrutiny exercised in *Davis* is inapplicable; and second, the Act readily withstands intermediate review.

B. The CCEA Serves Important State Interests.

1. The Statute Reduces Corruption and the Appearance of Corruption.

This Court has repeatedly recognized preventing corruption and the appearance thereof as not just important, but *compelling*, state interests in campaign finance regulation. *E.g., Fed'l Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985) ("preventing corruption or the appearance of corruption are the only ... compelling government interests thus far identified for restricting campaign finances"); *accord Davis*, 128 S.Ct. at 2773. The Millionaire's

Amendment was found to *disserve* that interest, both because it discouraged use of personal funds, thereby increasing reliance on outside contributors, and because in some cases it raised contribution limits, thereby increasing contributors' potential influence. *Davis*, 128 S.Ct. at 2773. By contrast, the Arizona statute provides candidates an alternative to relying on private contributions. *Cf. Buckley*, 424 U.S. at 96 ("public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest"). The challenged matching provision makes it more attractive for candidates to take advantage of this alternative,[12] by assuring that they will be able to remain competitive even against highly funded opponents.

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[12] Petitioners back-handedly concede this point in objecting that the provision provides *too much* incentive to participate, alleging that one Petitioner "was coerced into running as a publicly financed candidate." (McComish Br. 45.) The claim of coerciveness is far-fetched. In reality, as was found regarding Maine's nearly identical public financing system, the CCEA "provides incentives to candidates to make the public financing route attractive, but the incentives hardly are overwhelming or of an order that can be said to create profound disparities." *Daggett v. Webster*, 74 F. Supp. 2d 53, 57 (D. Me. 1999), *aff'd sub nom. Daggett v. Stearns*, 205 F.3d 445 (1st Cir. 2000).

2. That the Act May Also Serve the Purpose of Enhancing the Variety of Public Debate Does Not Render It Constitutionally Suspect.

Petitioners' argument that the *real* interest served by the Clean Elections Act is to "equalize electoral opportunities, resources, and influences" or "level[] the playing field," (*e.g.* McComish Br. 64), is a misleading distraction.

As the decision below makes clear, it can hardly be denied that the Arizona statute serves the anti-corruption purpose. 611 F.3d at 525-27. If it also serves another interest, that does not detract from the Act's principal purpose or somehow render it constitutionally suspect. When more than one interest is proffered by the state, it is sufficient that one of those interests is weighty enough to meet the requirements of heightened scrutiny, whether intermediate or strict scrutiny is applicable. *See Doe*, 130 S. Ct. at 2819 (because the State's interest in preserving the integrity of the electoral process was "undoubtedly important," there was no need "to address the State's 'informational' interest" in the Public Records Act) (intermediate scrutiny); *Washington State Grange v. Wash. State Republican Party*, 552 U.S. 442, 446 (2008) (after "reject[ing] as illegitimate three of the [state's] asserted interests" for California's blanket primary, proceeding to consider whether "the remaining interests ... were ... compelling") (strict scrutiny).

Moreover, notwithstanding Petitioners' objections to an "illegitimate" government interest at

play, (AFEC Br. 60), this Court has never indicated that the public's exposure to more wide-ranging political discourse – or expanded opportunities for political participation – are not worthy purposes. Rather, the Court has held that certain *means* of achieving those goals are illegitimate, in particular the means of "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others." *Buckley*, 424 U.S. at 48-49.

What Petitioners describe as an interest in equalizing electoral influences could more accurately be described as interest in assuring that a variety of voices is heard, a government interest recognized as important by this Court. *See supra*, at sec. I.A. *See also Turner Broad. Sys. v. Fed. Communications Comm'n*, 512 U.S. 622, 663 (1997) ("assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment").[13]

That interest underlies the First Amendment itself, and could be sufficient on its own to justify § 16-952. But it does not need to be, as the statute serves the important interest of lessening opportunities for – and perceptions of – corruption. If the statute is also motivated in part by an interest

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[13] *Turner Broadcasting* concerned regulation of broadcast media, a context in which more government regulation may be appropriate than elsewhere. *Buckley*, 424 U.S. at 49. But assuring that a variety of voices is heard about issues of public concern remains an important interest, even if it does not, in non-broadcast contexts, justify measures that limit freedom of expression.

in promoting more wide-ranging debate, that in no way undermines its legitimacy.

CONCLUSION

Because the Arizona statute addresses the compelling problems of government corruption and the appearance thereof in a way that promotes the values of the First Amendment, without infringing any protected liberties, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

THOMAS BENNIGSON
Counsel of Record
SETH E. MERMIN
PUBLIC GOOD LAW CENTER
3130 Shattuck Avenue
Berkeley, CA 94705
(510) 548-4064
tbennigson@publicgoodlaw.org
Counsel for Amici Curiae

February 21, 2011

AMICUS CURIAE BRIEF

22

Nos. 10-238 and 10-239

IN THE

Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S
FREEDOM CLUB PAC, *et al.*,
Petitioners,
v.
KEN BENNETT, *et al.*,
Respondents.

JOHN MCCOMISH, *et al.*,
Petitioners,
v.
KEN BENNETT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* SERVICE EMPLOYEES INTERNATIONAL UNION IN SUPPORT OF RESPONDENTS

JUDITH A. SCOTT
MARK D. SCHNEIDER*
ARI WEISBARD
Service Employees International Union
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 350-6571
Mark.Schneider@seiu.org
Counsel for Service Employees International Union

**Counsel of Record*

February 22, 2011

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INTEREST OF THE AMICUS CURIAE[1]

Amicus Service Employees International Union ("SEIU") is one of the largest unions in North America. It represents 2.2 million workers in service industries throughout the United States and Canada. SEIU's members' voluntary contributions make SEIU's political action committee, the SEIU Committee on Political Education, one of the nation's largest PACs. Directly and through its affiliated local unions, SEIU actively participates in elections at all levels of federal, state, and local government, including in the state of Arizona. Because SEIU's members want to participate in fair and transparent electoral processes, SEIU has a substantial interest in the outcome of this litigation.

SUMMARY OF ARGUMENT

The Court should affirm the decision of the Ninth Circuit. This case involves a challenge to an Arizona law that subsidizes campaign speech for the purpose of reducing the risk of corruption in its electoral process. Petitioners claim that Arizona's manner of calculating this subsidy burdens the speech of those who choose not to accept the subsidy. There is a well-developed First Amendment jurisprudence that makes clear that such subsidies raise different and less substantial First Amendment concerns than government restrictions of speech and should be subject to intermediate judicial scrutiny. Petitioners' failure to acknowledge this difference infects virtually every aspect of their argument.

Specifically, Petitioners make two First Amendment claims that constitute direct assaults on this Court's hold-

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, and no counsel or party funded its preparation or submission.

ing in *Buckley v. Valeo*, 424 U.S. 1 (1976), upholding the federal public financing regime for Presidential elections. In their first Question Presented, they argue that Arizona's public financing law violates a non-participating candidate's free speech rights because it assertedly penalizes candidates who choose to speak with their own funds and effectively forces them to subsidize the speech of their opponents. A substantially similar claim was considered and rejected by the Court in *Buckley*, which held that laws that subsidize speech advance — rather than deter — First Amendment values, and do not force non-participants to subsidize participants.

Petitioners' second Question Presented similarly makes a claim that is inconsistent with the holding of *Buckley*. Petitioners argue that because Arizona's public financing regime is relatively more helpful to candidates with relatively less access to the large sums of money it sometimes takes to run a successful political campaign, it runs afoul of the Court's holdings that "equalization" is not a legitimate goal of campaign finance law.

But this claim could be made against any public financing scheme, because it can always be argued that public financing benefits candidates with relatively less access to money and so in that way "equalizes" political campaigns. Notwithstanding this same equalizing effect, the Court in *Buckley* approved Congress' Presidential public financing scheme, while at the same time making clear in contrast that laws whose sole purpose is to "equalize" all candidate's opportunities by restricting speech are unlawful. Nothing about the particular way Arizona's public financing law operates distinguishes it in relevant respects from the public financing law upheld in *Buckley*.

This Court's decision in *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008), does not support either of Petitioners' claims. There the Court struck down a law

which directly and asymmetrically *restricted* self-financing candidates' speech more than others, for the *sole* purpose of leveling the playing field as between rich and poor candidates. Arizona's law shares neither of those characteristics.

Regulations aimed at reducing the risk of corruption of the political process, and the appearance of such risk, advance compelling government interests, and the most comprehensive solution to the problem of quid pro quo corruption is a system of public financing that makes it possible to compete for political office without having to raise contributions at all, acting "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Buckley*, 424 U.S. at 91.

Arizona's law directly advances these compelling interests and fits comfortably among the laws this Court has upheld against First Amendment challenge. The Court should decline Petitioners' invitation to overrule these precedents and radically reconfigure both campaign finance and First Amendment jurisprudence.

ARGUMENT

SEIU often contributes to candidates up to the maximum amount allowed by law, and it operates a substantial independent expenditure program of behalf of candidates it supports. On Petitioners' way of thinking, SEIU therefore is an entity that is "burdened" and "punished" as a result of Arizona's public financing scheme. We do not share this view. Arizona's law allows us – and everyone else – to spend freely to provide independent support to candidates we endorse. We make such expenditures notwithstanding the Arizona "trigger" mechanism for many reasons, including a belief that our spending will be

effective in reaching particular voters, and that our speech will be more persuasive than any additional speech triggered by our activity.

In any event, our experience is that whatever burden we suffer as a result of this and other public financing regimes is greatly outweighed by the fact that public financing enhances our members' and the public's sense that elections are honest and fairly conducted. We would much rather participate in an election that is fair and free of any taint of corruption than in a purely privately-financed election, even though our resources might allow us to play a more prominent role in the absence of public financing.

But Petitioners' and amici's policy preferences regarding public financing are of little legal significance. Whether public financing "appear[s] 'bad,' 'unwise,' or 'unworkable' is [to the Court] irrelevant." *Buckley*, 424 U.S. at 91. The legally significant point is that the voters of Arizona, acting though referendum, choose to subsidize candidates' speech and encourage participation in Arizona's public financing program because they thought it would help address the problem of corruption in their electoral process. As we show in what follows, the First Amendment does not prevent them from implementing this policy judgment.

1. A.R.S. § 16-952 Should Be Subject to Intermediate, Not Strict, Judicial Scrutiny

Both of Petitioners' claims are predicated on their view that Arizona's law restricts their speech and should be scrutinized accordingly. But Arizona's law neither compels Petitioners to speak nor restricts their right to speak. Instead, Arizona provides content neutral subsidies for speech by candidates who voluntarily agree to abide by expenditure limits. These subsidies directly promote First Amendment values and only indirectly implicate Petitioners'

First Amendment interests. As the Court held in *Buckley*, because public funding laws are a state effort "not to abridge, restrict or censor speech but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people," a public financing law "furthers, not abridges, pertinent First Amendment values." 424 U.S. at 93.

While the First Amendment "certainly has application in the subsidy context," governments "may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-588 (1998). "So long as legislation does not infringe on other constitutionally protected rights, [the legislature] has wide latitude to set spending priorities." *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983). Congress or a state government may "selectively fund a program to encourage certain activities it believes to be in the public interest" and doing so does not constitute discrimination "on the basis of viewpoint." *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). In addition, a government entity may provide funds to "facilitate a wide range of speech" by private individuals or organizations, *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 231, 233 (2000), provided that the government complies with the "requirement of viewpoint neutrality in the allocation of funding support." *Id.* at 233. In sum, "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity." *Maher v. Roe*, 432 U.S. 464, 475 (1977).

For these reasons, this Court has repeatedly rejected the argument that "strict scrutiny applies whenever Congress subsidizes some speech, but not all speech" as "not the law." *Regan*, 461 U.S. at 548. As long as "govern-

mental provision of subsidies is not aimed at the suppression of dangerous ideas," *id.* at 550 (internal citations omitted), the government has broad powers to encourage actions deemed to be in the public interest.

Thus, strict scrutiny applies only to "laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed," and laws that "compel speakers to utter or distribute speech bearing a particular message." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642, 643 (1994) (citations omitted). "In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Id.* Because Petitioners challenge a speech subsidy, this Court should subject the challenged provision to intermediate, rather than strict scrutiny and determine only whether the challenged provision bears a "substantial relation" to a "sufficiently important" governmental interest. *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010) (quoting *Buckley*, 424 U.S. at 64, 66).

2. Arizona Law Does Not Compel Petitioners to Subsidize Hostile Speech

Petitioners' contrary claim is that the law should be subject to strict scrutiny and struck down because it "penalizes and deters free speech by forcing privately-funded candidates and their supporters to finance the dissemination of hostile political speech whenever they raise or spend private money ... above a spending limit." First Question Presented. They assert that Arizona's program forces non-participating candidates to "subsidize hostile speech," Pets. Br. 41, and its establishment is "the functional equivalent of the compelled speech regime struck down in *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986)." Pets. Br. 42.

In *Buckley v. Valeo*, this Court rejected a substantially similar challenge to the federal law providing public financing of Presidential elections, which was claimed to violate the First Amendment because it effectively required people "to finance the dissemination of ideas with which they disagree." 424 U.S. at 91 n.124. The Court observed that

> [l]egislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, and preferential postal rates and anti-trust exemptions for newspapers. *Id.* at n.127.

On that reasoning, the Court rejected any presumption that the law was unconstitutional and dismissed First Amendment challenge to the public financing law. That holding controls here.

The distinguishing "facts" that support Petitioners' "compelled speech" claim are a creation of their own rhetoric, and bear no relation to the actual operation of Arizona's law. Petitioners claim that Arizona "conscript[s] [the] labor" of candidates who choose not to participate in public funding, Pets. Br. 55, and that politicians in Arizona are "being required to assist in the rebuttal of their own speech." *Id.* at. 51. Less colorfully, they claim that they are being required to pay for their political opponents' speech. *Id.* at 55.

These factual assertions are false. Petitioners are not having their labor conscripted or their funds used by their opponents. Instead, Arizona is subsidizing the speech of candidates who opt in to its public funding campaign finance regime. Petitioners disapprove of the manner of adjusting the public subsidies that participating candidates

receive. But petitioners and other candidates and independent groups do not pay for that increase in their opponents' spending any more than they pay for the initial public spending subsidy. Just like the Presidential public financing at issue in *Buckley*, "the scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree." 424 U.S. at 91 n. 124.

Buckley v. Valeo is one of an unbroken line of cases in which the Court has drawn a distinction between laws that require a person to pay for or associate with speech with which he disagrees, *see e.g. Pacific Gas & Elec. Co.*, 475 U.S. 1, and laws in which the government has chosen to subsidize one speaker and another unsubsidized speaker asserts that choice has burdened his speech rights, *see, e.g., Finley*, 524 U.S. 569; *Rust*, 500 U.S. 173.

Pacific Gas & Elec. Co., on which Petitioners' compelled speech argument principally relies, Pets. Br. 42, itself explicitly distinguishes on two separate grounds PG&E's compelled speech claim from the challenges to the public campaign financing system sustained in *Buckley*. *Id.* at 15. First, the requirement that PG&E disseminate the views of its opponents identified "a favored speaker" and "force[d] the speaker's opponent – not the taxpaying public – to assist in disseminating the speaker's message." *Id.* The Court held that "[t]his kind of favoritism goes well beyond the fundamentally content-neutral subsidies that we sustained in *Buckley* and in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983)," and therefore "burdens the expression of the disfavored speaker." *Id.* at 14-15.

Second, the Court held that PG&E impermissibly was required "to associate with speech with which [it] may

disagree," *id.* at 15, because the speech would have been disseminated in envelopes that PG&E owned and that bore its return address, *id.* at 18. The danger that PG&E would "be required to alter its own message as a consequence of the government's coercive action . . . [arose] from a content-based grant of access to *private* property." *Id.* at 16-17 (emphasis added).

In this case, by contrast, the public financing system is content-neutral and does not require any speaker to finance the speech of his or her opponents: both the initial public campaign funding and any subsequent adjustments are provided by "the taxpaying public." In addition, Arizona's law presents no risk that candidates or groups that make independent expenditures will be forced to associate with speech with which they disagree. Rather, all disbursements of these public funds will be paid to the campaign accounts of the candidates who will use them, and any speech enabled by these funds will bear those candidates' names pursuant to disclosure requirements. No one could possibly think that a publicly-funded candidate's advertisements were being endorsed by his privately-funded opponent.

We are aware of no case in which this Court has applied the compelled speech strict scrutiny standard in circumstances involving the speech effects of government subsidies that neither restrict nor compel private parties' speech. The fact that a non-participating candidate's spending might affect the amount of subsidy provided to a participating candidate raises none of the constitutional infirmities present in compelled speech cases like *PG&E*.

3. Strict Scrutiny Does Not Apply Because Arizona's Public Financing System Does Not Restrict Speech

Just as this is not a "compelled speech" case, neither is it a case challenging a law that directly restricts speech.

No candidate is compelled to participate in Arizona's campaign public financing regime. A candidate who chooses not to participate is free to spend unlimited funds on his campaign, and his independent supporters likewise are not limited in what they may spend on his behalf. The only rules that restrict nonparticipating candidates' activities are the background (and unchallenged) contribution limits and disclosure rules that were in place before Arizona implemented public financing and apply equally to participating candidates.

This case is thus unlike *Davis*. The federal "Millionaires Amendment" struck down in *Davis* penalized candidates who exercised their constitutional right to fund their campaigns with their own money by imposing on such candidates direct and asymmetrical restrictions on their speech rights — self-funded candidates operated under lower contribution limits than candidates who were not able to contribute substantial amounts to their own campaigns. *Davis*, 554 U.S. at 751.

The Court in that case did not strike down that law merely because it imposed "negative consequences on individuals and groups for choosing to exercise their First Amendment rights." Pets. Br. 42. It struck down the law because the "negative consequences" were a direct violation of self-financing candidate's constitutional rights.

Contribution limits are restrictions on speech. Government subsidies are not. While the "millionaire" candidate in *Davis* has a First Amendment right not to have his speech discriminatorily restricted when he exercises his First Amendment right to spend his money, the candidate who chooses to decline public funding has no analogous First Amendment right to stop someone else from receiving a public subsidy that is tailored so that the public funding remains a viable option even in a relatively more expensive political campaign. *Davis* does not control this case.

4. The Arizona Law Furthers Legitimate Governmental Interests

Petitioners' second claim is that Arizona's law is unconstitutional because it furthers an illegitimate purpose – assertedly "to equalize 'influence' and financial resources among competing candidates and interest groups." Second Question Presented. Once again Petitioners' argument is painted with too broad a brush.

Any public financing law could be said to have the effect of benefitting the less well financed candidate relative to the better financed candidate. If that were enough to invalidate a campaign finance law, no public financing law would survive – including the Presidential public funding law affirmed by the Court in *Buckley*. But that is not enough.

It is undisputed that Arizona's law, like all public financing laws, is intended to reduce the risk of corruption of the political process, and the appearance of such risk. It is equally undisputed that these are legitimate — indeed compelling — government interests. *McConnell v. FEC*, 540 U.S. 93, 136 (2003); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985); *Buckley*, 424 U.S. at 25-30, 38.

Petitioners claim that the law is nevertheless invalid because it *also* has an allegedly illegal "equalizing" effect. In support of their view that speech subsidies that could be said to favor the poor over the rich for that reason violate the First Amendment, Petitioners rely on *Davis*. But that reliance is once again misplaced, for two reasons.

First, as discussed above, *supra* p. 10, *Davis* is a case about a law that restricted speech, with all that implies. This is not.

Second, in *Davis* the asymmetrical contribution limits

restricted self-financing candidates' speech *without* serving anticorruption interests. *Davis* took as its starting point the holding in *Buckley* that contribution restrictions were constitutional because they were justified by the compelling state interest in eliminating corruption or its appearance. Distinguishing *Buckley*, the Court in *Davis* then explained that the Millionaire's Amendment could not be justified by that same compelling state interest, since "discouraging use of personal funds disserves the anticorruption interest," and so the state could not rationally further that interest by providing non-self-funded candidates a higher contribution limit than self-funded candidates. 554 U.S. at 741. Instead, in *Davis*, the *sole* asserted government interest was to "level electoral opportunities for candidates of different personal wealth." *Id.* It was one of the principal holdings of *Davis* that this was not a legitimate governmental interest. *Id.*

But Arizona's law, in contrast, addresses corruption and the appearance of corruption. The assertion that, like any public financing law, it *also* could be said to have effect of improving the electoral opportunities of those with more limited access to private funds does not invalidate the law, or distinguish it from the law upheld in *Buckley*.

Petitioners and their *amici* make much of the assertion that the ballot initiative's drafters *intended* that the law have a "leveling" effect in addition to its anti-corruption purpose. But "leveling" by enhancing speech to make campaigns competitive is not unlawful, and even if it were "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). *See also, e.g., City of Erie v. Pap's A.M.*, 529 U.S.

277, 291 (2000) (rejecting the argument that a ban on public nudity was "'aimed' at suppressing expression" because "one purpose of the ordinance [was] to combat harmful secondary effects").

The question is not the alleged mixed motive of the legislature, but rather whether "the inevitable effect of a statute on its face . . . abridged constitutional rights." *O'Brien*, 391 U.S. at 384, 385 (citing *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)). A.R.S. § 16-952 does not on its face have the "inevitable effect" of restricting speech. Indeed, as explained in Respondent's brief, p. 16, it has not appeared to deter political expenditures in Arizona even incidentally, and it has not deterred *amicus* SEIU's speech. To the contrary, the fact that roughly two thirds of candidates choose to participate in the system and one third do not suggests that this level of funding and method of adjustment is well-calibrated to ensure that public funding is attractive to candidates without making it irrational for some candidates to opt out, should they so choose.

The voters evidently concluded that such a regime best balanced the State's interest in reigning in campaign fundraising (and its attendant harms) with the interest in establishing a public funding regime that would continue to attract candidates even in races in which spending would be over the amount of the statutory thresholds. If Arizona can implement a public financing law, it can also implement reasonable measures to encourage candidates to participate in public financing, and to make public financing a reasonable choice even when candidates expect a campaign may generate a more-than-normal amount of political spending. These are legitimate state interests that are wholly unrelated to the suppression of speech.

5. The Challenged Trigger Provision Bears a Substantial Relation to The Law's Anti-Corruption Interests

The "trigger" of A.R.S. §16-952 bears a "substantial relation" to the accomplishment of Arizona's interest in reducing corruption and its appearance. *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64). The trigger tailors the level of funding to the financial competitiveness of the race.

Arizona could have chosen to fund each campaign at the level of the cap, eliminating the feature of the law to which Petitioners object. But such a uniformly high funding rate would have resulted in a substantial drain on the state's budget, and would have led to a level of spending the state could reasonably determine was not generally necessary to inform the public and accomplish the law's other important purposes. So instead it determined to set funding at a level that it judged will be adequate in the normal case, and then to provide funding at the higher level (up to the statutory cap) when other spending in the campaign makes the lower amount insufficient to fund a competitive campaign.

The trigger thus furthers the same general anti-corruption purpose as the law of which it is a part. It makes the public financing system effective and efficient, supporting the law's anti-corruption purposes. Indeed, A.R.S. §16-952(C)(3) requires that independent expenditures *in favor* of participating candidates also be counted when determining how much funding other participating candidates will receive. The law in this way ensures that participating candidates have an appropriate funding level even when facing other participating candidates.

This system of tailoring the public subsidy to the financial competitiveness of the relevant races does not under-

mine its constitutionality; if anything, it strengthens it. If Arizona had instead simply funded all races at the maximum level, its system would have been closely parallel to the federal Presidential funding law the Court upheld in *Buckley*, but participating candidates in some less competitive races would have received substantially more funding than their non-participating opponents, wasting state resources and placing those non-participating candidates at a greater competitive disadvantage.

Calibrating the level of funding to reflect the other financial expenditures in the race also protects candidates' ability to opt out of the public financing system. It does so by limiting the risk that nonparticipants will be substantially outspent by a participating opponent. If Arizona had simply decided to disburse the maximum amount of funds to all participants rather than reserving most of the funds for competitive races, there would be many more cases in which participating candidates substantially outspent nonparticipating candidates.

Candidates are often uncertain regarding their private fundraising abilities. Had they been faced with the prospect of such generously funded participating opponents, many likely would have felt the safer course would be to participate and receive the same subsidy. By instead adopting a more carefully calibrated method for calculating subsidy levels, Arizona voters ensured that viable nonparticipating candidates can safely opt out of the system without fearing they might be massively outspent by participating opponents. Because participants are guaranteed only a modest subsidy initially and receive more only if their opponents have raised substantial additional sums, viable nonparticipating candidates can feel safe in the knowledge that they will rarely be outspent.

Petitioners nevertheless argue that they suffer disadvantages if they opt out of the system because their oppo-

nents will have access to public funding at the statutory threshold level and, if they and their independent supporters spend above that amount, their opponents will receive increased public funding up to the maximum set by statute. They complain that knowledge of these aspects of the law will affect their spending decisions, and in particular will influence candidates to spend less than they otherwise might. The public finance law might even persuade a candidate to forgo private financing and to opt into the public financing system. This regulation, Petitioners complain, thus places them "on the horns of a dilemma" as they adjust their speech conduct to the regulatory regime. Pets. Br. 42.

A similar dilemma faces all candidates who are considering whether to accept the benefits and burdens of participating in any public financing system, including the federal Presidential public financing system upheld in *Buckley*. The existence of the public funding option, and the fact that opponents may choose to accept public funds, will influence the choices candidates make. The availability of public funds up to a certain limit discourages candidates from choosing to spend above that limit by forcing them to reject public funds in order to do so.

But *most* regulations put regulated parties "on the horns of a dilemma": They must choose whether to suffer whatever burden the regulation creates or to forgo the behavior that is being regulated. A person wishing to make a political independent expenditure, for example, must evaluate the benefits of making that expenditure against the burdens of complying with substantial disclosure and disclaimer rules. A person wishing to make a political contribution must weigh the benefit he hopes to gain against the cost of having his name made public, and the need to maintain records so that he does not inadvertently violate contribution limits if he makes additional

contributions. If the mere fact that regulation of First Amendment conduct puts choices to the regulated party gave rise to strict scrutiny, every campaign finance regulation would be constitutionally suspect. That is not the law and that should not be the law.

The choice to reject public financing in Arizona evidently is a viable one. Many candidates – including some Petitioners – have chosen to opt out of the public system and continue to raise and spend unlimited public funds and to win elections after doing so. Candidates who opt out have to work to raise more funds privately, but they obtain several other advantages. Many candidates expect or hope that they will raise more the maximum funding their participating opponents can receive under A.R.S. § 16-952 and that being able to outspend their participating opponents will help them win. It is not only candidates who expect to raise such large amounts who might decide to opt out, however. Other candidates might predict that a higher level of campaign spending, even if done equally by both campaigns, will redound to their benefit because they believe the strength of their arguments is superior or that their staff will design more effective ads. In addition, even when candidates do not initially predict that a higher level of spending will aid their campaigns, they may opt out because of the value of retaining the ability to initiate a change in the level of the spending in the race if, and only if, they think it will help them capture or retain the lead. Because only nonparticipants may choose whether to exceed the initial spending caps, many might rationally opt out of the system in order to obtain this strategic advantage over nonparticipating opponents. These are not choices that on their face abridge the constitutional rights of non participating candidates.

For all of these reasons, the Arizona "trigger" provi-

sions advance the statute's important anti-corruption purposes and pass constitutional muster.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

JUDITH A. SCOTT
MARK D. SCHNEIDER*
ARI WEISBARD
SERVICE EMPLOYEES INTERNATIONAL UNION
1800 MASSACHUSETTS AVE., N.W.
WASHINGTON, D.C. 20036
(202) 350-6571
MARK.SCHNEIDER@SEIU.ORG

Counsel for Amicus Service Employees International Union

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* *Counsel of Record*

AMICUS CURIAE BRIEF

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In The Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

JOHN MCCOMMISH, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE YANKEE INSTITUTE FOR PUBLIC POLICY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

PETER J. MARTIN*
HINCKLEY, ALLEN & SNYDER LLP
20 Church Street
Hartford, CT 06107
Tel. 860-331-2726
Fax. 860-331-2727
pmartin@haslaw.com
*Counsel of Record

JUSTIN R. CLARK
BLACKWELL, DAVIS, & SPADACCINI LLC
158 East Center Street
Manchester, CT 06040
Tel. 860-432-0676
Fax. 860-432-2926
JClark@BDS-Law.com

Counsel for Amicus Curiae, The Yankee Institute for Public Policy

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1.

Whether *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010), and *Davis v. Federal Election Comm'n*, 128 S. Ct. 2759 (2008), require this Court to strike down Arizona's matching funds trigger under the First and Fourteenth Amendments because it penalizes and deters free speech by forcing privately-financed candidates and their supporters to finance the dissemination of hostile political speech whenever they raise or spend private money, or when independent expenditures are made, above a "spending limit."

2.

Whether *Citizens United* and *Davis* require this Court to strike down Arizona's matching funds trigger under the First and Fourteenth Amendments because it regulates campaign financing in order to equalize "influence" and financial resources among competing candidates and interest groups, rather than to advance directly a compelling state interest in the least restrictive manner.

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AMICUS CURIAE BRIEF OF THE YANKEE INSTITUTE FOR PUBLIC POLICY

The Yankee Institute for Public Policy ("Yankee Institute"), on behalf of itself and its members, submits this *amicus curiae* brief in support of the Petitioners. Pursuant to Supreme Court Rule 37.3(a), this *amicus curiae* brief is filed with the consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Yankee Institute is a nonpartisan educational and research group organized in the 1980s under the laws of the State of Connecticut. The Yankee Institute's core mission is to promote economic opportunity in Connecticut.

The Yankee Institute has over 800 members – most of whom reside in and are taxpayers of the State of Connecticut. If the Ninth Circuit's decision is affirmed and Arizona's triggered matching funds provisions are upheld as constitutional, it is likely that such a decision will pave the way for the Connecticut

[1] All parties have issued blanket consents to the filing of *amicus curiae* briefs in support of either party or neither party. The Yankee Institute affirms that no counsel for a party authored this brief in whole or in part and that no party, person or entity made a monetary contribution specifically for the preparation or submission of this brief.

legislature to reenact similar triggered matching funds provisions in Connecticut's campaign finance law, thereby increasing the scope of government involvement in elections and the amount of taxpayer dollars that are used to fund political campaigns and hostile political speech. The Yankee Institute and its members fundamentally oppose such a law and have an interest in the outcome of this case. Therefore, the Yankee Institute respectfully submits this *amicus curiae* brief in support of the Petitioners.

SUMMARY OF ARGUMENT

The Arizona triggered matching funds provisions at issue in this appeal impose an unconstitutional burden on the exercise of free speech rights protected by the First and Fourteenth Amendments of the Constitution and, therefore, should be struck down. By upholding Arizona's trigger provisions, the United States Court of Appeals for the Ninth Circuit defied this Court's holding in *Davis v. Federal Election Comm'n*, 128 S. Ct. 2759 (2008), and the holdings of other Circuits that have followed *Davis*, including the Second Circuit which recently held that Connecticut's supplemental matching funds provisions, like Arizona's, unconstitutionally chilled political speech by forcing privately-financed candidates and their supporters to finance the dissemination of hostile political speech whenever they raise or spend private money above certain threshold limits. The 2010 gubernatorial primary elections in Connecticut

demonstrated how these provisions, in practice, chill and deter constitutionally protected speech and reduce political discourse by causing candidates to reduce the amount that they would otherwise raise or spend on their campaigns. The Connecticut triggered matching funds provisions are similar to the Arizona provisions at issue in this appeal. Therefore, and in accordance with *Davis*, this Court should strike down Arizona's triggered matching funds provisions as unconstitutionally burdening First Amendment political speech.

ARGUMENT

I. THIS COURT SHOULD STRIKE DOWN THE ARIZONA TRIGGERED MATCHING FUNDS PROVISIONS BECAUSE THEY VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION BY UNCONSTITUTIONALLY CHILLING PROTECTED FREE SPEECH.

The United States Court of Appeals for the Ninth Circuit defied *Davis* when it upheld Arizona's triggered matching funds provisions as imposing only an insubstantial burden on the exercise of First Amendment rights. The Ninth Circuit's decision is inconsistent with other Circuits that have followed *Davis*, including the Second Circuit, which struck down Connecticut's triggered matching funds provisions as unconstitutionally infringing on candidates' protected campaign speech. More importantly, if

the Ninth Circuit's decision is allowed to stand, then constitutionally protected speech will be deterred in Arizona and elsewhere under a trigger matching funds regime.

A. The Connecticut's Triggered Matching Funds Provisions and Their Chilling Effect on the 2010 Primary Elections.

One needs not look any further than Connecticut to see the chilling impact these types of laws have on speech. Having gone through the 2008 and 2010 election cycles with a program similar to Arizona's – including triggered matching funds provisions – the constitutional rubber met reality's road in Connecticut.[2] What the 2010 primary elections in Connecticut

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[2] Although in force for the 2008 legislative elections, the first statewide races, including for Governor, under the CEP occurred in 2010. In 2010, $27.3 million was spent from the Citizens Election Fund on elections. Statewide, 445 candidates stood for election on the general election ballot and 296 of those candidates, or 67%, participated in the CEP. Of the 129 candidates that were in competitive races with spreads of less than 15%, only six non-participating candidates (5%) won their races. These statistics are available on the State Elections Enforcement Commission, List of Participating and Nonparticipating Candidates at http://www.ct.gov/seec and the Secretary of State's Statement of the Vote available at: http://www.statementofvote-sots.ct.gov/StatementOfVote/WebModules/ReportsLink/OfficeTitle.aspx.

Other statistics of note from the 2010 elections include: 8 statewide candidates participated in the CEP during the primary elections; 7 statewide candidates participated in the CEP during the general election; 34 General Assembly primary

(Continued on following page)

demonstrated, and what is most troubling to the Yankee Institute, is that triggered matching funds provisions, while purporting to increase political discourse, actually chill political speech in elections by forcing privately-financed candidates and their supporters to finance the dissemination of hostile political speech whenever they raise or spend private money above certain threshold limits.

The chilling impact that Connecticut's supplemental matching funds provisions had on the speech of candidates for Governor in Connecticut's 2010 primary elections and their supporters is recalled below.

1. The Citizens' Election Program

In 2005, Connecticut enacted the "Citizens' Election Program" ("CEP") in order to reduce the need for candidates to fundraise; infuse "clean" money into the election process; eliminate the perception that big donors buy influence; level the playing field; and open

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candidates participated in the CEP; 249 participating candidates ran for the General Assembly in the general election (this represents 67% of the general election General Assembly candidates); 84 general election candidates chose not to participate in the CEP; 6 statewide candidates opted out of the CEP during the primary elections; 8 statewide candidates opted out for the general election; 84 candidates for the General Assembly opted out of the CEP during the general election. *See id.*

the process to a greater number of candidates.[3] *See Green Party of Conn. v. Garfield*, Nos. 09-3760-cv(L), 09-3941(CON), 2010 U.S. App. LEXIS 14286, at **4-6 (2nd Cir. Jul. 13, 2010); CONN. GEN. STAT. §§ 9-700 *et seq.* The CEP was inspired, in part, by the Arizona Citizens Clean Elections Act, A.R.S. §§ 16-940 *et seq.*, and provides public financing for candidates for legislative and executive state offices, including Governor. CONN. GEN. STAT. §§ 9-702 and 9-703.

To be entitled to public financing under the CEP, participating candidates must limit their fundraising and campaign spending to amounts specified in the CEP and are required to obtain a specified amount of "qualifying contributions" based on the office for which he or she is running.[4] *See id.* at §§ 9-702(b) and 9-704. For example, a candidate for Governor must receive an aggregate of $250,000 of which $225,000 or more must be contributed by individuals residing in the state. *Id.* at § 9-704(a)(1). Upon reaching this threshold, a participating candidate for Governor would then be eligible for a public grant of $1.25 million in a primary. *Id.* at § 9-705. A participating candidate for Governor who won a primary would then be eligible to receive an additional $3 million

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[3] *See* the State Elections Enforcement Commission webpage at: http://www.ct.gov/seec/cwp/view.asp?a=3556&q=432196.

[4] "Qualifying contributions" are monetary contributions of, at most, one hundred dollars from qualified electors. *Id.* at § 9-704.

public grant for the general election campaign, under the law at the time of the 2010 primaries.[5]

Like the Arizona Citizens Clean Elections Act, A.R.S. §§ 16-940 *et seq.*, when the CEP was enacted it contained triggered matching funds provisions known as (1) the Excess Expenditure Trigger Provision, CONN. GEN. STAT. § 9-713; and (2) the Independent Expenditure Trigger Provision, CONN. GEN. STAT. § 9-714 (herein referred to, together and separately, as "the triggered matching funds provisions").[6] Candidates who participated in the program ("participating candidates") received additional public subsidies in response to funds received or spent by their opponents who did not participate in the program ("non-participating candidates"). *Id.* at § 9-713. The law also treated any independent expenditures made by a third party on behalf of a non-participating candidate as expenditures by the non-participating candidate for purposes of triggering additional funding for participating candidates who did not benefit from the third party independent expenditure.

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[5] The grant amount was subsequently increased from $3 million to $6 million after the legislature repealed the CEP's triggered matching funds provisions in an effort to circumvent the Second Circuit's decision in *Green Party*. *See* 2010 Conn. Acts 10-2 (Reg. Sess.).

[6] Funds spent under the CEP – including the triggered matching funds provisions – are public monies distributed from a state fund known as the Citizens Election Fund. CONN. GEN. STAT. § 9-701.

When a non-participating candidate received contributions or spent more than an amount equal to the participating candidate's initial grant amount, then the participating candidate would be eligible to receive up to four additional grants, each worth 25% of the initial grant amount. CONN. GEN. STAT. § 9-705. The triggered matching funds grants would be distributed whenever the non-participating candidate received contributions or made expenditures exceeding 100%, 125%, 150% and 175% of the initial grant amount. *Id.* In this way, a participating candidate could receive as much as $2.5 million in public funds for the primary elections, and as much as $6 million in public funds for the general election, if opposed by a non-participating candidate who spent more than 175% of the participating candidate's initial grant amount.

For example, assume that a primary election for a major party nomination for Governor in Connecticut pitted one participating candidate against one non-participating candidate. Once the participating candidate qualified under the CEP by raising $250,000 as described above, he would receive a $1.25 million grant to run his campaign. Assume that the non-participating candidate then spent or received $1,250,001 – one dollar over the $1.25 million grant amount, the participating candidate would then receive a supplemental grant of $312,500. The participating candidate would then receive an additional $312,500 once the non-participating candidate spent or received over $1,562,500. This would continue in

increments of $312,500 until the end of the election or the participating candidate received a total of $1.25 million in supplemental grants – a total grant to the participating candidate of $2.5 million. Although these provisions were eventually struck down,[7] they played a large role in the 2010 primary elections and chilled political speech and participation in ways that were inapposite to the stated purpose of the CEP.[8]

2. The *Green Party* Litigation

In 2006, well before the 2010 primary elections and the related litigation that ensued, several plaintiffs challenged the CEP on the grounds that the law was unconstitutional because, *inter alia*, the triggered matching funds provisions unconstitutionally burdened the plaintiffs' First Amendment rights. *Green Party*, 2010 U.S. App. LEXIS 14286, at **16-17. The District Court agreed with the plaintiffs and struck down the CEP's triggered matching funds provisions. *Green Party of Conn. v. Garfield*, 648 F. Supp. 2d 298 (D. Conn. 2009).

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[7] *See Green Party*, 2010 U.S. App. LEXIS 14286. A discussion of this case is below in Sections A.2 and B, *supra*.

[8] The State Elections Enforcement Commission's website states that "by eliminating their reliance on perpetual fundraising, it allows candidates to focus more on voters during the run-up to election day, listening to their needs and concerns, instead of 'dialing for dollars' to keep the their campaigns running, a tradition of many prior election campaigns." *See* http://www.ct.gov/seec/cwp/view.asp?a=3556&q=432196.

The state appealed, and on July 13, 2010 – just weeks before Connecticut's hotly-contested gubernatorial primary elections – the United States Court of Appeals for the Second Circuit affirmed the judgment declaring unconstitutional the triggered matching funds provisions and reversed other portions of the judgment not relevant to the appeal before this Court. The Second Circuit held that the triggered matching funds provisions "impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech" and that "the state had not asserted a compelling state interest in burdening such speech." *Green Party*, 2010 U.S. App. LEXIS 14286, at *74. The Second Circuit agreed "with the District Court that the triggered matching funds provisions violate the First Amendment because they operate in a manner similar to the law that the Supreme Court struck down in *Davis v. Federal Election Commission*, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008)." *Id.* at *77.

These were precisely the burdens faced by non-participating candidates in the 2010 Connecticut primary elections for Governor.

3. The 2010 Primary Elections

In late 2009, Connecticut's sitting governor, M. Jodi Rell, announced her intention that she would not seek re-election. After the nominating conventions

in May 2010, five candidates among the two major parties qualified for their respective primaries.[9] Each would be affected by the CEP and its triggered matching funds in different ways.[10] The candidates were: Dannel Malloy, a Democrat, who participated in the CEP; Ned Lamont, a Democrat, who largely self-financed his campaign and did not participate in the CEP; Lieutenant Governor Mike Fedele, a Republican, who participated in the CEP; Tom Foley, a Republican, who did not participate in the CEP; R. Nelson "Oz" Griebel, a Republican, who also did not participate in the CEP. The three Republican candidates took very different paths to financing.[11]

On July 8, 2010, after qualifying for and obtaining an initial grant of $1.25 million under the CEP,

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[9] There were several other candidates for nomination for Governor from both the Republican and Democratic parties who failed to qualify for the primary ballot. Of those candidates, several participated in the CEP but were unable to reach the minimum qualifying amounts.

[10] Although at least two state legislative races implicated the triggered matching funds provisions, for purposes of this brief the Yankee Institute will focus primarily on the two gubernatorial races that implicated these provisions.

[11] The Connecticut Republican Party held its convention for the purpose of endorsing candidates for numerous statewide offices, including Governor, on May 21-22, 2010. At the Convention, the Republican Party endorsed Mr. Foley as its candidate for Governor. Lieutenant Governor Fedele and Mr. Griebel also each garnered enough support at the Convention to qualify for the Republican primary for Governor. *See* CONN. GEN. STAT. §§ 9-372 *et seq.*

Lieutenant Governor Fedele applied for $937,500 in supplemental matching funds (an amount equal to 175% of the initial grant amount) pursuant to the triggered matching funds provisions. *Foley v. State Elections Enforcement Commission*, No. 3:10cv1091, 2010 U.S. Dist. LEXIS 71744, at *7 (D. Conn. Jul. 16, 2010). This was based on Mr. Foley's purported expenditures above $1.25 million. This application – along with his application for the initial grant – led to extensive litigation involving the propriety of the grants by the State Elections Enforcement Commission ("SEEC") and their interpretation of the CEP statutory scheme.[12]

On July 14, 2010 – shortly after the Second Circuit's ruling in the *Green Party* litigation and some four weeks before the primary elections scheduled for August 10, 2010 – Lieutenant Governor Fedele applied for the remaining supplemental matching funds in the amount of $312,500. This was triggered by Mr. Foley expending more than 175% of the initial grant amount.[13] *Id.* In response, Mr. Foley filed an

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[12] *See Foley v. State Elections Enforcement Commission*, No. 3:10cv1091, 2010 U.S. Dist. LEXIS 71744, at *7 (D. Conn. Jul. 16, 2010); *Foley v. State Elections Enforcement Comm'n*, 297 Conn. 764 (2010).

[13] Although the SEEC had determined that the Foley campaign exceeded the threshold limits of the triggered matching funds provisions entitling his participating opponent to supplemental funds, this issue was decided by the courts in the litigation surrounding the primary election grants under the CEP. When making decisions about expenditures, the Foley campaign had a different reading of the triggered matching funds provisions

(Continued on following page)

application for a temporary restraining order and permanent injunction seeking to prevent the SEEC from issuing the remaining matching funds because the United States Court of Appeals for the Second Circuit had found the triggered matching funds provisions unconstitutional just days earlier.[14] *Id.* at **7-8. The District Court denied the temporary restraining order notwithstanding that it found Mr. Foley would be irreparably harmed by the triggered matching funds provisions because "the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics." *Id.* at **14-15 (citing *Davis*, 128 S. Ct. at 2772).

Although the triggered matching funds provisions had previously been declared unconstitutional, Lieutenant Governor Fedele's final supplemental grant in the amount of $312,500 was nonetheless approved by the SEEC on July 21, 2010 and he received the

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than the SEEC and therefore did not think it had exceeded those thresholds contrary to the SEEC's interpretation of the law. *See Foley v. State Elections Enforcement Commission*, 297 Conn. at 784 (2010). This good faith dispute was not settled until July 20, 2010, less than 25 days before the primary elections. *See id.* at 764.

[14] The District Court lacked jurisdiction to simply enjoin the SEEC from approving matching funds in accordance with the Second Circuit's decision in *Green Party* because the Second Circuit had yet to issue a mandate. *Id.* at **8-9.

money.[15] Ultimately, the non-participating Mr. Foley edged the participating Lieutenant Governor Fedele and the non-participating Mr. Griebel in a close primary.

At the same time, the Democratic primary featured one participating candidate – Mr. Malloy – and one non-participating candidate – Mr. Lamont. Mr. Malloy qualified for the initial public grant of $1.25 million and later received triggered matching funds totaling $1.25 million in response to spending in excess of the cap by Mr. Lamont.[16] Mr. Malloy, the participating candidate having received $2.5 million in public funds, won the primary.

4. The Harm

The outcomes of both primaries were significantly influenced – and perhaps determined – by the triggered matching funds provisions.

Leading up to the award of the CEP grants, Mr. Foley was mindful that any money he spent over $1.25 million in the primary would trigger public

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[15] *See* minutes of the SEEC regular meeting on July 21, 2010 which are available at http://www.ct.gov/seec/lib/seec/2010commissionmeetings/minutes_07212010.pdf.

[16] *See* minutes of the SEEC regular meetings on June 3, 2010 and June 23, 2010 which are available at http://www.ct.gov/seec/lib/seec/2010commissionmeetings/minutes_06032010.pdf; http://www.ct.gov/seec/lib/seec/2010commissionmeetings/minutes_06232010.pdf.

funds supporting hostile speech for his participating opponent. Accordingly, he made different decisions than he would have otherwise made in terms of whether, when and how much he would spend. This placed a substantial burden on his First Amendment right to freedom of speech. Specifically, each and every expenditure related to direct and indirect voter contacts – protected political speech – were reduced as a result of the triggered matching funds provisions. Clark Aff. ¶ 6. This reduction in expenditures resulted in less voter contact and, thus, less constitutionally protected political speech.[17]

Additionally, as a result of these provisions, careful attention was given to the timing of expenditures. Clark Aff. ¶ 8. The Foley campaign was forced to make expenditures on television advertising before the primary period began in order to avoid those expenditures being counted toward any trigger.[18]

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[17] Further, 2010 saw a national political environment with many competitive races. This led to increased competition for political talent and, thus, increased salary costs. Clark Aff. ¶ 7. As a result of the triggered matching funds provisions, the Foley campaign was forced to spend less on employee salaries and was thus less competitive in recruiting talent to work on the race and thus engage in political speech.

[18] It is important to note that the timing of expenditures was a large part of the litigation surrounding the CEP. One of the central issues raised was "whether a candidate participating in the [CEP] was entitled to supplemental grants for a primary campaign pursuant to § 9-713(a), [based upon] contributions received by or expenditures made by the opposing nonparticipating candidate before the primary period has started may be considered." *Foley*, 297 Conn. at 764 (2010).

Clark Aff. ¶ 8. The campaign's message was therefore diluted as it was delivered further from the primary than it otherwise would have been without the triggered matching funds provisions. Clark Aff. ¶ 9. This resulted in a more difficult – and closer – primary than might otherwise have been necessary had Mr. Foley not been deterred from making expenditures – exercising political speech – at the time he viewed as optimal. Clark Aff. ¶ 9. Not only did the triggered matching funds provisions alter the course of the Republican primary, they also affected the general election because the extra public funds were used for a barrage of negative advertizing, the impact of which carried over long after the primary. Clark Aff. ¶ 10.

The non-participating, self-financed Democrat, Mr. Lamont, faced a similar dilemma in his primary campaign. Ultimately Mr. Lamont's spending triggered $1.25 million of triggered matching funds which in turn were used to fund hostile speech by his opponent, Mr. Malloy. The participating, publicly-funded Mr. Malloy would ultimately defeat the non-participating, self-financed Mr. Lamont in the Democratic primary.

Similar harms befell the other non-participating candidate in the Republican primary, Mr. Griebel. This was particularly so because Mr. Griebel did not raise or spend more than the CEP threshold amounts, unlike Mr. Foley. Moreover, when Mr. Foley exceeded the CEP threshold limits, it triggered public funds to go to Lieutenant Governor Fedele leaving Mr. Griebel further behind both candidates in terms of financial

resources. Mr. Griebel was not able to significantly supplement his campaign with personal money. Griebel Aff. ¶ 6. Additionally, Mr. Griebel's campaign was hamstrung by campaign contribution limits imposed by the CEP. Griebel Aff. ¶ 7. These restrictions prevented candidates from raising money from state contractors and lobbyists.[19] CONN. GEN. STAT. §§ 9-610 and 9-612. As a non-participating candidate, Mr. Griebel did not and could not have raised the money necessary to compete because of these restrictions and, more importantly, because of the supplemental matching funds provisions. Griebel Aff. ¶ 9.

In this way, the CEP has created a coercive system whereby only participating candidates and those willing to self-fund or raise substantial sums of private dollars can run for public office with any reasonable likelihood of winning. Any other candidate would face the "double-whammy" of restrictive contribution limits and increased public funding in the campaign which drives non-participating, non-wealthy and non-financed candidates from the race and further deters speech.

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[19] These restrictions were, in large part, struck down by the United States Court of Appeals for the Second Circuit. *See Green Party*, 2010 U.S. App. LEXIS 14286, at *74.

B. Arizona's and Connecticut's Triggered Matching Funds Provisions Are Unconstitutional Under *Davis*.

In striking down Connecticut's triggered matching funds provisions, the Second Circuit compared those provisions to the "Millionaire Amendment" that this Court struck down in *Davis*. The Second Circuit concluded that the triggered matching funds provisions, like *Davis*' "Millionaire Amendment," caused a non-participating candidate to "shoulder a special and significant burden" if the candidate chose to exercise her First Amendment speech rights because the more money the non-participating candidate spent above the initial grant amount, the more money her participating opponent would receive. *Green Party*, 2010 U.S. App. LEXIS 14286, at **80-81. In fact, the Second Circuit held that the "penalty" imposed by the triggered matching funds provisions is "harsher" and, therefore, more constitutionally objectionable than *Davis*' "Millionaire Amendment." *Id.* at **82-83.

Beyond the theoretical analysis espoused in *Green Party*, triggered matching funds provisions like Arizona's have proven unconstitutional in practice as well as in theory. The 2010 gubernatorial primary elections in Connecticut demonstrated how these provisions deter constitutionally protected speech and reduce political discourse by causing non-participating candidates to reduce the amount that they would otherwise raise or spend on campaigns because raising or spending above certain threshold limits would result in their participating opponents receiving

additional financing to fund the dissemination of hostile political speech. These provisions run directly afoul of *Davis* and are the same type of provisions before the Court in the titled appeal. Accordingly, and in harmony with *Davis*, the Court should find that Arizona's triggered matching funds provisions, like Connecticut's, impose an unconstitutional penalty on First Amendment political speech.[20]

CONCLUSION

The Yankee Institute, as *amicus curiae*, respectfully urges this Court to strike down Arizona's triggered matching funds provisions.

Respectfully submitted by Counsel for
The Yankee Institute for Public Policy,

PETER J. MARTIN*
HINCKLEY, ALLEN & SNYDER LLP
20 Church Street
Hartford, CT 06107
Tel. 860-331-2726
Fax. 860-331-2727
pmartin@haslaw.com
*Counsel of Record

JUSTIN R. CLARK
BLACKWELL, DAVIS, & SPADACCINI LLC
158 East Center Street
Manchester, CT 06040
Tel. 860-432-0676
Fax. 860-432-2926
JClark@BDS-Law.com

Counsel for Amicus Curiae

[20] The Second Circuit found the Ninth Circuit's decision in *McComish v. Bennett*, 605 F.3d 720 (9th Cir. 2010), unpersuasive. *Green Party*, 2010 U.S. App. LEXIS 14286, at *83 fn. 19.

App. 1

NOS. 10-238, 10-239

IN THE SUPREME COURT
OF THE UNITED STATES

ARIZONA FREE ENTERPRISE CLUB'S
FREEDOM CLUB PAC, et al.,
Petitioners,

v.

KEN BENNETT, et al.,
Respondents.

JOHN MCCOMMISH, et al.
Petitioners,

v.

KEN BENNETT, et al.,
Respondents.

AFFIDAVIT OF JUSTIN CLARK

PETER J. MARTIN*
Hinckley, Allen &
Snyder LLP
20 Church Street
Hartford, CT 06107
Tel. 860-331-2726
Fax. 860-331-2727
pmartin@haslaw.com
*COUNSEL OF RECORD

JUSTIN R. CLARK
Blackwell, Davis, &
Spadaccini LLC
158 East Center Street
Manchester, CT 06040
Tel. 860-432-0676
Fax. 860-432-2926
JClark@BDS-Law.com

Counsel for Amicus Curiae, the Yankee Institute for Public Policy

I, Justin Clark, do on oath depose and state as follows:

1. I am over eighteen (18) years of age and I believe in the duty and obligations of an oath.

2. I reside in West Hartford, Connecticut and am registered to vote in the State of Connecticut.

3. I was the campaign manager for Foley for Governor, the gubernatorial campaign for Thomas C. Foley. Mr. Foley won the Republican Party primary election for governor in 2010 and became the nominee for that party on August 10, 2010. As campaign manager I took part in all strategic and tactical decisions during the campaign, including all decisions related to spending and strategy regarding campaign finance.

4. Mr. Foley did not participate in Connecticut's public financing system known as the Citizens' Election Program ("CEP").

5. As a non-participating candidate, and with a participating opponent in the Republican Party primary election, the campaign was keenly aware of the triggered matching funds provisions of the CEP, particularly the Excess Expenditure Trigger Provision, Conn. Gen. Stat. § 9-713 ("the triggered matching funds provisions").

6. As a result of the triggered matching funds provisions, each and every expense related to direct and indirect voter contacts during the primary election campaign were reduced during different time periods of the campaign.

7. One particular campaign expense was higher than normal in 2010. As a result of the national environment, there was an increased competition for political talent and thus, increased salary costs.

8. Additionally, as a result of these provisions, careful attention was given to the timing of expenditures. Due to the trigger dates in the statute, the campaign was forced to make expenditures on television advertising before the primary period began, and thus avoid those expenditures being counted toward any trigger.

9. The campaign's message was therefore diluted as it was delivered further from the primary election than it otherwise would have been without the triggered matching funds provisions. This resulted in a more difficult primary than might otherwise have been necessary had Mr. Foley and the campaign not been deterred from participating in political speech at the time he and it viewed as optimal.

10. The triggered matching funds provisions altered the course of the primary election, and changed the outcome of the general election because the extra public funds were used for a barrage of largely negative advertizing, the impact of which carried over long after the primary..

The foregoing is true, accurate and correct to the best of my knowledge, information and belief, under the penalty of perjury.

Dated at West Hartford, Connecticut, this 16th day of January, 2011.

/s/ Justin Clark

Subscribed and sworn to before me this 16th day of January, 2011.

/s/ Peter J. Martin
Commissioner of the Superior Court

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AFFIDAVIT OF R. NELSON "OZ" GRIEBEL

PETER J. MARTIN*
Hinckley, Allen &
Snyder LLP
20 Church Street
Hartford, CT 06107
Tel. 860-331-2726
Fax. 860-331-2727
pmartin@haslaw.com
*COUNSEL OF RECORD

JUSTIN R. CLARK*
Blackwell, Davis, &
Spadaccini LLC
158 East Center Street
Manchester, CT 06040
Tel. 860-432-0676
Fax. 860-432-2926
JClark@BDS-Law.com
*COUNSEL OF RECORD

Counsel for Amicus Curiae, the Yankee Institute for Public Policy

I, R. Nelson "Oz" Griebel, do on oath depose and state as follows:

1. I am over eighteen (18) years of age, and I believe in the duty and obligations of an oath.

2. I reside in Weatogue, Connecticut and am registered to vote in the State of Connecticut.

3. I participated in the Republican Party primary election for governor in 2010.

4. I did not participate in Connecticut's public financing system known as the Citizens' Election Program ("CEP").

5. As a non-participating candidate with a Republican primary opponent who was participating in the CEP, I was keenly aware of the triggered matching funds provisions of the CEP, particularly the Excess Expenditure Trigger Provision, Conn. Gen. Stat. § 9-713 ("the triggered matching funds provisions").

6. I was not able to significantly supplement my campaign with personal money.

7. Additionally, my campaign was hamstrung by campaign contribution limits imposed by the CEP along with harsh consequences for noncompliance.

8. These restrictions and the noncompliance penalties prevented me from raising money from certain types of state contractors and lobbyists, many of whom said that they were prepared to provide financial support but for the prohibition and penalties.

9. As a nonparticipant in the CEP and due to the aforementioned restrictions, I could not and did not raise the money necessary to compete effectively, thereby infringing my rights of political speech as well as those of individuals prohibited from contributing.

The foregoing is true, accurate and correct to the best of my knowledge, information, and belief, under the penalty of perjury.

Dated at Hartford, Connecticut, this 14th day of January, 2011.

/s/ R. Nelson "Oz" Griebel

Subscribed and sworn to before
me this 14th day of January, 2011.

/s/ Nancy L. Marzano
1/14/11

NANCY L. MARZANO
NOTARY PUBLIC
MY COMMISSION EXPIRES NOV. 30, 2013